

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR MOORE

Appellant,

vs.

THE STATE OF NEVADA

Respondent

Electronically Filed
Oct 28 2021 11:22 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Docket No. 82747

District Appeal From A Judgment of Conviction After

A Guilty Plea

Eighth Judicial District Court

The Honorable Valerie Adair District Judge

District Court No. C316287

APPELLANT'S OPENING BRIEF

DAN M. WINDER, ESQ.
Nevada Bar No. 001569
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
(702) 878-6000

STEVEN B. WOLFSON, ESQ.
Clark County District Attorney
200 Lewis Ave.
Las Vegas, Nevada 89101
(702) 671-2500

AARON D. FORD, ESQ.
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 486-3420

Counsel for Appellant

Counsel for Respondent

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | STATEMENT OF JURISDICTION | 1 |
| II. | ROUTING STATEMENT..... | 1 |
| III. | STATEMENT OF THE CASE | 1 |
| IV. | STATEMENT OF FACTS | 2 |
| V. | STATEMENT OF ISSUES | 7 |
| VI. | LEGAL ARGUMENTS | 7 |
| | A. The District Court Erred When it Denied Appellant’s Motion to Withdraw His Plea | |
| VII. | CONCLUSION..... | 25 |
| | CERTIFICATE OF COMPLIANCE | 27 |
| | CERTIFICATE OF MAILING | 29 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------------------|
| <u>Bergen v. United States</u> , 145 F.2d 181 (8th Cir.1944). | 13 |
| <u>Crawford v. State</u> , 117 Nev. 718, 721 (2001). | 18, 19 |
| <u>Gearhart v. United States</u> ,106 U.S.App.D.C. 270, 272 F.2d 499 (1959). | 13 |
| <u>Johnson v. State</u> , 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007). | 24 |
| <u>Mitchell v. State</u> , 109 Nev. 137, 141 (1993). | 14, 15, 17, 19, 23 |
| <u>Molina v. State</u> , 120 Nev. 185, 191 (2004) | 14, 24, 25 |
| <u>Robert E. v. Justice Court</u> , 99 Nev. 443, 445 (1983) | 20 |
| <u>State v. Freese</u> , 116 Nev. 1097, 13 P.3d 442, 448 (2000). | 19, 25 |
| <u>State v. Lucero</u> , 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011). | 20 |
| <u>State v. Second Judicial Dist. Court</u> , 85 Nev.381, 455 P.2d 923(1969). | 12, 14, 22, 23 |
| <u>Stevenson v. State</u> , 131 Nev. 598, 354 P. 3d 1277 (2015). | 23, 24 |
| <u>Taylor v. Warden</u> , 96 Nev. 272, 274 (1980). | 17 |
| <u>United States v. Gaitan</u> , 954 F.2d 1005, 1008 (5th Cir. 1992). | 22 |
| <u>United States v. Paglia</u> , 190 F.2d 445 (2d Cir.1951). | 13 |
| <u>United States v. Puckett</u> , 505 F.3d 377, 382-83 (5th Cir. 2007). | 23 |
| <u>United States v. Rosen</u> , 409 F.3d 535, 538 (2d Cir. 2005). | 22 |
| <u>United States v. Wilson</u> , 81 F.3d 1300, 1303 (4th Cir. 1996). | 22, 23 |
| <u>Woodring v. United States</u> , 248 F.2d 166 (8th Cir.1957). | 13 |

Woods v. State, 114 Nev. 468, 475 (1998). 8, 14, 18, 19, 22, 23, 25

Statutes

NRAP Rule 4(b) 1

NRS 177.015(3) 1

NRAP 17(b). 1

NRS 176.165. 9, 10, 11, 12, 14, 20, 21

Fed. R. Crim. P. 11(d). 11, 12, 13

Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. 13

I. STATEMENT OF JURISDICTION

The district court denied Appellant's Motion to Withdraw his plea on February 19, 2021. (AA 000049). Appellant was sentenced on March 25, 2021 and a Judgement of Conviction was filed on April 1, 2021 (AA 000022). Appellant, Arthur Moore, filed a Notice of Appeal from that order on April 6, 2021.

(AA000025) This court's jurisdiction lies in NRAP Rule 4(b) and NRS 177.015(3) (which provides that a defendant may appeal from a final judgment in a criminal case.)

II. ROUTING STATEMENT

NRAP 17(b) provides that the Court of Appeals "shall hear and decide only that matters assigned to it by the Supreme Court." NRAP 17(b)(1) further provides that the Court of Appeals shall hear "...all post-conviction appeals except those ... that involve convictions for any offenses that are a category A felony..."

The forging Appellant's Opening Brief should be assigned to the Supreme Court, because the Appellant is challenging his conviction pursuant to a guilty plea which involves convictions for category B felonies.

III. STATEMENT OF THE CASE

Arthur Moore was charged by way of a Indictment. (AA 000001) A Guilty Plea Agreement was entered into by the parties on March 3, 2020 (AA000011) in

which Appellant pled guilty to Second Degree Murder, Robbery and Conspiracy to Commit Robbery. Both parties stipulated to a sentence of 10 to 25 years on the charge of second degree murder. The State retained the right to argue as to counts 2 and 3 and the parties stipulated that count 2 would run consecutive to count 1 and count 3 would run concurrent to count 2. (AA 000011).

IV. STATEMENT OF FACTS

After leaving a house party, Terrell Moore (“Terrell”) along with his friends Joseph Bentley (“Joseph”), Shannon Williams-Sutton (“Shannon”), Aric Brill (“Aric”), and Angelo Gilbert (“Angelo”) were held up at gun point by four or five individuals. Joseph, Aric, and Angelo ran and were shot at by the robbers. Id. Aric was shot and would later die from his wounds. Joseph was shot in the arm, but he survived. Terrell called the police and was the first to be interviewed. Terrell gave a taped statement indicating he did not run and was face to face with who he believed was the person in charge of the crew robbing them. After the shooting Terrell called for help, but everyone at the party went inside the house, closed the door and did nothing. Terrell stated that the area was dark, but described the ring leader and shooter as being a dark skinned black male, approximately 5’ 7” in height, approximately 17-20 years old, with a deep, raspy voice. Terrell couldn’t see the other people involved in the robbery were dark black males that he

couldn't identify because it was dark outside during the incident. Joseph could not make an identification. Shannon did not want to testify and was largely questioned through leading questions using her prior statement given to police. She was shown her statement describing the shooter as wearing a burgundy sweater, 6'3' in height, with a "nappy afro". Angelo looked directly at the shooter. After the shooting he saw the robbers get in a 2000 Malibu and leave the area. Angelo confirmed there were no street lights where the incident occurred. However, he did describe the shooter as a dark skinned male, approximately 5' 7" in height with short hair with a fade. Angelo described the person as not having a deep or raspy voice. The party was hosted by Tatiana Jackson ("Tatiana"). She stated that four individuals – Devonte Wash ("Devonte"), Devon Phillips ("Devon"), and two twins she didn't know – showed up in a blue Chevy Malibu. Devonte walked around the party with gun exposed in his waist band. Devonte, Devon and the twins left the party and were sitting on a pony wall just outside the residence.

Tatiana would be interviewed by Detective Cook later that year, months after the incident. He provided a photo "six pack" lineup and was asked if she could identify any one from the lineup. She identified Devonte.

Detective Cook interviewed Devonte in 2016 based on a tip from a cellmate of Devonte in an unrelated case. Detective Cook also interviewed Devon who

supposedly told him that he, Devonte and the twins were at the party with Defendant, Arthur Moore. Detective Cook testified that Devon told him that Arthur said “I’m going to hit a lick” – a slang term for commit a robbery. Devon allegedly then told Detective Cook that Arthur robbed a group of individuals and shot at them when they attempted to flee. Devonte confirmed the same events. Detective Cook interviewed Arthur who allegedly said he visited lots of house parties. Arthur is claimed to have told Detective Cook that he was standing on the wall when another person robbed the group and a third person shot at the group. Supposedly, Arthur broke down in tears stating he was going to prison when he spoke to Detective Cook. No other evidence was presented tying Arthur to the robbery or shooting. The Grand Jury returned an Indictment on Arthur on July 7, 2016.

A. Defendant’s Decision to Enter Into a Guilty Plea Agreement.

With a July 10, 2018 trial date looming, the Defendant filed a proper person motion to dismiss counsel. As a result, the calendar call was vacated. After a two (2) day settlement conference on February 7 and 21, 2020, Moore received an offer from the State which he was pressured by his prior counsel to accept. The plea offer was never fully explained to Moore and he was told by his prior counsel that he must sign the plea agreement, or he would lose at trial and spend the rest of

his life in prison. Moore was told by prior counsel that if he signed the guilty plea agreement, that he would serve only ten (10) to twenty -five(25) years in prison.

At the insistence of his prior legal counsel, Defendant accepted the State's offered guilty plea negotiation. Pursuant to an executed guilty plea agreement, Defendant entered guilty pleas to three counts; Murder in the Second Degree, Conspiracy to Commit Murder and Robbery. Pursuant to the plea agreement, Moore agreed to serve ten (10) to twenty-five (25) years in prison on count one (1) and the State retained the right to argue as to counts two (2) and three (3). Moreover, the State retained the right to argue for consecutive sentences on counts 2 and 3. Based upon the guilty plea negotiations, the trial date was vacated and a sentencing hearing was scheduled. This motion follows.

B. Defendant's Motion to Withdraw Guilty Plea Agreement.

Defendant's sentencing hearing was originally scheduled for May 20, 2020 and continued five (5) times until July 17, 2020. Prior to the date of the sentencing, this Court deemed it necessary to appoint counsel to brief the issue of withdrawing Moore's plea. Thereafter, as sentencing neared, this Court granted defendant's request to appoint new counsel for this motion to withdraw his plea and to possibly assist Mr. Moore with his sentencing hearing if the case proceeded in that direction. It has always been Moore's position that his plea was not taken

knowingly, voluntarily, or in a free manner as Mr. Moore was rushed and pressured by prior counsel. To avoid a possibility of life in prison, Mr. Moore accepted the plea under terms that were not the ones he had agreed. His plea should be withdrawn for these and the following reasons:

1. Moore was never given explanation as to the consequences of the plea.

Moore was led to believe, by prior counsel, that his plea was for concurrent time between all three (3) counts.

2. Moore has a remedial IQ and is of special needs and was confused about the meaning of concurrent and consecutive.

3. Moore would not have entered plea if he understood that he was getting consecutive time in addition to the stipulated second degree murder sentence.

4. Moore never had opportunity to speak with prior counsel personally. He was only afforded the chance to speak with his two inexperienced associates.

5. Prior counsel had been personally assigned responsibility for this case, but he assigned responsibility to two associated attorneys with very little

experience. Neither had the requisite knowledge or experience or understanding of his case.

6. Moore felt under extreme pressure to immediately make a decision on accepting the plea agreement and did not have any time to review plea with prior counsel directly.

7. Moore was told he either signed the plea agreement, or he would go to trial immediately and lose resulting in his doing a life sentence.

8. Moore has always made it clear to prior counsel that in order to avoid trial, he would only accept a 10-25, but never agreed to anything more than that amount.

V. STATEMENT OF THE ISSUES

THE DISTRICT COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO WITHDRAW HIS PLEA.

VI. LEGAL ARGUMENT

A. Introduction

The Defendant argues to this Court that he should be permitted to withdraw

his plea due to various coercive circumstances in existence at the time the State conveyed the plea offer that he ultimately accepted. After Defendant entered his guilty plea, it was discovered that Defendant was misinformed about the length of the sentence he was ultimately going to serve. Critical facts were inaccurately communicated to Defendant by prior counsel and/or his inexperienced associates within a short period of time prior to the court hearing where Defendant was forced to make a final decision to accept or reject the State's offer to negotiate. As detailed herein, these various factors are certainly relevant to a determination of whether Defendant's guilty plea was knowing, voluntary, and intelligent.

However, these same factors are more adequately analyzed under a framework that determines if the proceedings below, and Defendant's guilty plea, were not the product of a fundamentally fair process. Moore asks this Court to find that he presented a substantial, fair, or just reason to withdraw his plea of guilt when he filed a motion to withdraw his plea before sentencing. See Woods v. State, 114 Nev. 468, 475 (1998).

Before those legal principles can be applied to this case, it is necessary to determine how Nevada law defines a substantial, fair, and just reason to withdraw a guilty plea. It must be inquired whether, "the provision allowing a defendant to withdraw his guilty plea prior to sentencing for any substantial, fair, and just

reason encompass reasons other than merely whether the guilty plea was knowing, voluntary, or intelligent?” Answering that question requires one to trace the origin of the “substantial, fair, and just” language and to determine if the Nevada Legislature intended NRS 176.165 to include those principles. Moore argues herein that these historical treks reveal that Nevada Law is properly interpreted to allow a defendant to withdraw a guilty plea before sentencing for reasons beyond the issue of whether the plea was knowing, voluntary, or intelligent.

As applied to this case, the Defendant has, in fact, presented a substantial, fair, and just reason to withdraw his plea.

B. The Origin of the “Substantial, Fair, and Just Reason” Standard.

Nevada Law, for the decades preceding the 1960’s, did not explicitly provide a defendant with the avenue to withdraw a previously entered plea of guilty no matter when that request was made relative to sentencing. Prior to 1967, neither a Nevada statute nor an Opinion published by the Nevada Supreme Court addressed the right to withdraw a guilty plea after it was entered by the defendant. In 1967, the Nevada Legislature, during its 54th Session, sought to enact a fairly comprehensive set of laws to govern the rules of criminal procedure for all Nevada state courts. Report of the Assembly Committee to Judiciary for Revision of the Criminal Law to the Legislative Commission, 54th Leg., at 2-3. As stated at the

time, the goal of the subcommittee tasked with enacting the rules of criminal procedure was:

“[T]o adopt in statutory form, but not as rules of court, the Federal Rules of Criminal Procedure, discarding those not applicable in state courts and retaining existing Nevada statutes concerning matters not covered by the federal rules.”

As part of that effort to enact a comprehensive scheme governing the rules of criminal procedure, the Assembly Committee to the Judiciary recommended a section that addressed motions to withdraw guilty pleas made by a defendant before and after sentencing. *Id.* at § 245. The committee’s recommendation was then included within Assembly Bill 81 of the 54th Legislature. See A.B. 81, 54th Leg., Sec. 245. During that same legislative session, Assembly Bill 81 was passed and enacted into law in 1967. See NRS 176.165. While the same cannot be said for all proposed rules of criminal procedure, the language proposed for the section that became NRS 176.165 was not altered from its original form as it was proposed by the subcommittee.

Compare A.B. 81, 54th Leg., Sec. 245; NRS 176.165. The language of NRS 176.165 has remained nearly unchanged since it was enacted in 1967. In its

current form, NRS 176.165 reads:

Except as otherwise provided in this section, a motion to withdraw a plea of guilty, guilty but mentally ill or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.

As the subcommittee to the 54th Legislature indicated, NRS 176.165 borrowed its legal foundation from the Federal Rule of Criminal Procedure that addressed the same subject. See Fed. R. Crim. P. 11(d). While Rule 11 of the Federal Rules of Criminal Procedure covers issues beyond motions to withdraw guilty pleas, the relevant subsection states:

The only changes that have occurred to NRS 176.165 involved amending the language concerning pleas of insanity and mentally ill to conform to changes in that body of law.

(d) *Withdrawing a Guilty or Nolo Contendere Plea.* A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason;

or

(2) after the court accepts the plea, but before it imposes sentence

if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

Fed. R. Crim. P. 11(d)-(e).

A comparison of NRS 176.165 to its federal counterpart reveals that the specific phrase “fair and just reason” was not included in the Nevada version. However, the jurisprudence of Nevada’s High Court swiftly interpreted the Nevada statute to include the “fair and just” language found in the Federal rule. See State v. Second Judicial Dist. Court, 85 Nev. 381 (1969).

After the enactment of NRS 176.165, the Nevada Supreme Court’s first occasion to specifically address the statute occurred two years later, in 1969. State

v. Second Judicial Dist. Court, 85 Nev. 381 (1969). After quoting NRS 176.165, the 1969 Nevada Supreme Court wrote:

The above statute was taken from and is substantially the same as Rule 32(d)[now rule 11], Fed.Rules Crim.Proc. The action of the lower court is discretionary and will not be reversed unless there has been a clear abuse of that discretion. Gearhart v. United States, 106 U.S.App.D.C. 270, 272 F.2d 499 (1959); Bergen v. United States, 145 F.2d 181 (8th Cir.1944). The granting of the motion to withdraw one's plea before sentencing is proper where for any substantial reason the granting of the privilege seems 'fair and just.' Gearhart v. United States, *supra*. It is even held in Woodring v. United States, 248 F.2d 166 (8th Cir.1957): 'The question of a defendant's guilt or innocence is not an issue on a motion under Rule 32(d) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., for leave to withdraw a plea of guilty * * *.' (emphasis added) See also United States v. Paglia, 190 F.2d 445 (2d Cir.1951).
Id. at 385

Since the aforementioned case, the opinions of the Nevada Supreme Court

have consistently approved of, cited to and quoted the “fair and just” language without exception. See e.g., Mitchell v. State, 109 Nev. 137, 141 (1993); Woods v. State, 114 Nev. 468, 475 (1998); Molina v. State, 120 Nev. 185, 191 (2004).

Eventually, the Court provided greater definition and detailed more contours to guide Nevada trial courts when deciding a defendant’s presentence motion to withdraw a guilty plea. See Woods v. State, 114 Nev. 468, 475 (1998). In Woods, the Nevada Supreme Court observed that “a district court may, in its discretion, grant a defendant's motion to withdraw a guilty plea for any “substantial reason” if it is “fair and just.” 114 Nev. at 475 (citing State v. Second Judicial Dist. Court, 85 Nev. 381 (1969)).

The Woods Court also stressed that a district court “must also look to the totality of the circumstances and the entire record” when making such a determination. 114 Nev. at 475 (citations omitted). The Nevada Supreme Court also observed that a court “may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what she was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea.” Mitchell v. State, 109 Nev. 137, 141 (1993).

From 1967, when NRS 176.165 was first enacted, through the end of the twentieth century, the jurisprudence of this Court recognized that district courts

had discretion to allow a defendant to withdraw a guilty plea before sentencing for any “substantial reason” if it is “fair and just.” For the most part, the “substantial reason” basis to withdraw a plea stood separate from those issues surrounding whether a guilty plea was knowing, voluntary, and intelligent. See Mitchell, 109 Nev. at 141-43.

The Mitchell opinion, 109 Nev. at 141-43, illustrates this Court’s willingness to permit a defendant to withdraw a guilty plea for reasons other than a showing that the plea was not knowing, voluntary, and intelligent. In Mitchell, the defendant pled guilty to Attempt Burglary for entering an apartment within an apartment complex where she worked as a maid. Id. at 141. Prior to sentencing, the defendant filed a motion to withdraw her guilty plea. Within that motion, the defendant wrote:

[T]hat she was a maid at the apartment complex and had a master key to every room. The buildings of the complex were designated A, B, C, etc., and the rooms within each building were numbered identically. On the day in question, Defendant was given a list of rooms to clean. Defendant accidentally went to an apartment which corresponded to a number on her list, but was in the wrong building. When she entered the apartment, it appeared to be vacant. Tenants sometimes leave

loose change in the apartments when they vacate them, and when Defendant saw some loose change, she assumed that it had been left by the tenants. After she had been in the apartment just a few minutes and had touched nothing but the loose change, she realized that the apartment was still occupied. Defendant realized that she had mistakenly entered the wrong apartment, but no one would allow her to explain. One occupant of the apartment held her at gun point until the police arrived. Defendant stated that she never had an opportunity to speak with her public defender about what really happened because he never had time. Defendant emphasized that she had simply entered the apartment by mistake and had not entered with the intention to commit a crime.

In reversing the district court's denial of defendant's motion to withdraw, this Court held:

Under the circumstances of this case, it was a clear abuse of discretion for the district court to deny Defendant's motion to withdraw w her guilty plea. Defendant provided the court with a credible story explaining her actions and denying any criminal intent, and only a very minor amount of money was

involved. Moreover, Defendant filed her motion to withdraw her plea before sentencing, thereby avoiding any prejudice to the state. Thus, viewing the record as a whole, especially in light of Defendant's credible claim of factual innocence and the lack of prejudice to the state, we conclude that it was a clear abuse of discretion for the district court to deny Defendant's motion to withdraw her guilty plea.

Id. at 143 (citations omitted).

Appellant, herein submits that Mitchell illustrates an occasion where this Court deemed it fair and just to permit a defendant to withdraw his guilty plea for reasons beyond a strict analysis concerning the knowing, voluntary, and intelligent nature of the guilty plea itself. The Mitchell Court's reliance on (1) defendant's credible claim of factual innocence, and (2) the lack of prejudice to the State are indicative of an analysis wholly apart from deciding whether the plea was knowing, voluntary, and intelligent. Logic dictates that a defendant's claim of innocence and prejudice to the State would be irrelevant if the sole basis to withdraw a plea under NRS 176.165 was a showing that the plea was not knowing, voluntary, or intelligent. See Mitchell, 109 Nev. at 143; Taylor v. Warden, 96 Nev. 272, 274 (1980) ("In reviewing an attack on a guilty plea a court must consider

whether the plea was voluntarily entered as well as whether, considered as a whole, the process by which the plea was obtained was fundamentally fair.”)

In 2001, the opinions published by the Nevada Supreme Court started to blend the concepts of whether a plea was knowing, voluntary, and intelligent with that of what constitutes a substantial reason that is fair and just. See Crawford v. State, 117 Nev. 718, 721 (2001). As a result, the question as to whether the provision, found in the Nevada appellate jurisprudence, allowing a defendant to withdraw his guilty plea prior to sentencing for any substantial, fair, and just reason encompasses reasons other than merely whether the guilty plea was knowing, voluntary, or intelligent became more difficult to decisively answer. Defendant submits that this blending of these two concepts was inadvertent and not intended to abolish a defendant’s ability, pursuant to NRS 176.165, to withdraw a plea by showing a fair and just substantial reason to do so.

The Crawford Court wrote:

“District courts may grant a motion to withdraw a guilty plea prior to sentencing for any substantial, fair, and just reason. Woods v. State, 114 Nev. 468, 475, 958 P.2d 91, 95 (1998). To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances

to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently. *Id.* at 475; see also State v. Freese, 116 Nev. 1097, 13 P.3d 442, 448 (2000). Crawford, 117 Nev. at 721-22.

The primary case relied upon and cited by the Crawford opinion, Woods v. State, did not provide support for language in Crawford that blended these two, previously distinct, doctrines. Instead, Woods, 114 Nev. at 475, stated:

A district court may, in its discretion, grant a defendant's motion to withdraw a guilty plea for any “substantial reason” if it is “fair and just.” State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). Woods concedes that the canvass was “textbook” perfect, and we defer to the district court judge who concluded that Woods' reactions were not “robot-like”; however, this court has held that the district court must also look to the totality of the circumstances and the entire record. Mitchell v. State, 109 Nev. 137, 140–41, 848 P.2d 1060, 1061–62 (1993). In Mitchell, we concluded that, “viewing the record as a whole, especially in light of Defendant's credible claim of factual innocence and the lack of prejudice to the state,” the district court abused its discretion in denying the motion to withdraw Defendant's guilty plea. 109 Nev. at 141, 848 P.2d at 1062.

Following Crawford, 117 Nev. at 721, no Nevada Supreme Court published opinion has quoted the sentences in Crawford, supra, which blended these two doctrines into one. Defendant submits that legislative history of NRS 176.165 and the Nevada appellate jurisprudence predating 2001 decisively illustrate that the provision allowing a defendant to withdraw his guilty plea prior to sentencing for any substantial, fair, and just reason encompasses reasons other than a finding that the guilty plea was not knowing, voluntary, or intelligent.

C. The Legislative History & Intent of NRS 176.165.

When interpreting a Nevada statute, legislative intent “is the controlling factor.” Robert E. v. Justice Court, 99 Nev. 443, 445 (1983). The initial focus when determining legislative intent centers on the statute's plain meaning. *Id.* When a statute “is clear on its face, a court cannot go beyond the statute in determining legislative intent.” *Id.* However, if “the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and we may then look beyond the statute in determining legislative intent.” State v. Lucero, 127 Nev. Adv. Op. 7, 249 P.3d 1226, 1228 (2011). To interpret an ambiguous statute, the Court must look to the legislative history and construe the statute in a manner that is consistent with reason and public policy. *Id.*

NRS 176.165, in regards to the issue at bar, is ambiguous in that it does not

state what a defendant must show in order to withdraw a guilty plea before sentencing. NRS 176.165 does provide that a defendant must show “manifest injustice” before a guilty plea may be withdrawn after sentence is imposed. Logic dictates that the defendant who makes a presentence motion can show less than “manifest injustice” and withdraw a guilty plea based on a showing of this lesser degree of egregiousness. However, the plain language of the statute does not lend itself to logical implications of greater specificity regarding what a defendant must show to withdraw a guilty plea before sentencing. Thus, one must look beyond the statute to discover the legislative intent behind the enactment of NRS 176.165 to determine the statute’s meaning.

As previously mentioned, *supra* at § 5.2, the intent of the 1967 Nevada Legislature was “to adopt in statutory form of the Federal Rules of Criminal Procedure[.]” Report of the Subcommittee for Revision of the Criminal Law to the Legislative Commission, 54th Leg., at 2. That statement evidencing the legislative intent at the time does not stand in isolation. Within the 1967 Legislative Session, during a Joint Meeting of the Assembly and Senate Committee on the Judiciary, the same intent is evident. “Most of AB 81 is taken from or conforms to the Federal rules. It is just a matter of transplating the entire language from the Federal to 81.” Minutes of the Joint Subcommittee Meeting of Assembly

Committee on Judiciary: 54th Leg., February 8, 1967, at 38 (statement of W. Raggio). Approximately a month later, when discussing a different criminal procedure rule within AB 81, it was noted that the subcommittee “wanted to stay with the Federal Rules.” Minutes of the Meeting of Assembly Committee on Judiciary: 54th Leg., March 9, 1967, at 169 (statement of F. Daykin).

The Federal Rule of Criminal Procedure addressing motions to withdraw a guilty plea in both 1967 and today provides that a presentence motion to withdraw should be granted if “the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)-(e). From 1967 through present day, Federal Court consistently interpreted the federal counterpart to NRS 176.165 in the same manner the Nevada Supreme Court did when it held that a court should grant a defendant's motion to withdraw a guilty plea for any “substantial reason” if it is “fair and just.” Woods, 114 Nev. at 475 (citing State v. Second Judicial Dist. Court, 85 Nev. 381 (1969)); see also, United States v. Rosen, 409 F.3d 535, 538 (2d Cir. 2005); United States v. Wilson, 81 F.3d 1300, 1303 (4th Cir. 1996); United States v. Gaitan, 954 F.2d 1005, 1008 (5th Cir. 1992).

In all Federal Circuits, the test used in determining whether defendant should be allowed to withdraw plea of guilty requires trial court to weigh whether defendant has offered credible evidence that his plea was not knowing or not

voluntary, whether defendant has credibly asserted his legal innocence, whether there has been delay between entering of plea and filing of motion, whether defendant has had close assistance of competent counsel, whether withdrawal will cause prejudice to government, and whether it will inconvenience court and waste judicial resources. See e.g., Wilson, 81 F.3d at 1304; United States v. Puckett, 505 F.3d 377, 382-83 (5th Cir. 2007).

Following the 1967 enactment of NRS 176.165, the Nevada Supreme Court interpreted the intent of the statute in the exact same manner in which Federal Courts interpreted the comparable Federal statute. The Nevada Supreme Court implicitly recognized the legislative intent behind NRS 176.165 in 1969 when it started using the “fair and just” language from the Federal Rule to review district court’s refusal to permit a defendant to withdraw a guilty plea before sentencing. See State v. Second Judicial Dist. Court, 85 Nev. 381 (1969); see also, Woods, 114 Nev. at 475; Mitchell, 109 Nev. at 141-43. Defendant submits that the legislative intent behind 176.165 remains unchanged and no reason exists to revisit and reevaluate the legislative intent at this point in time. Stevenson v. State, 131 Nev. 598, 354 P. 3d 1277 (2015).

D. Defense Counsel's Lack of Work Product and Lack of Contact with the Client During the Time Pending Trial are Grounds to Be Considered in its

Ruling on a Fair and Just Reason to Withdraw the Plea.

A defendant may move to withdraw a guilty plea before sentencing. NRS 176.165. A district court can grant the motion "for any reason where permitting withdrawal would be fair and just." Stevenson v. State, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015) (disavowing the previous standard, which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made). When making this determination, "the district court must consider the totality of the circumstances." *Id.* at 603, 354 P.3d at 1281. "This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion." Johnson v. State, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007).

The Nevada Supreme Court has held that an ineffective assistance of counsel argument can form the basis of a motion to withdraw a guilty plea. See Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004) (A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution." (internal quotation marks omitted)).

Defendant in the instant matter has established that counsel was ineffective,

and he has proven that, but for counsel's errors, he would not have pleaded guilty.

E. It Was Error to Deny Defendant's Presentence Motion to Withdraw Guilty

Plea

Appellant's motion asking the District Court to allow him to withdraw his guilty plea before sentencing required the District Court to apply a "more relaxed standard" to the merits of Defendant's request. Molina v. State, 120 Nev. 185, 189 (2004). To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the court must evaluate the "totality of the circumstances." State v. Freese, 116 Nev. 1097, 1104 (2000).

As part of that analysis, a defendant's credible claims of misrepresentations by prior counsel, ineffectiveness of prior counsel and an absence of prejudice to the State are important factors that heavily weigh in favor of permitting a Defendant to withdraw his plea. Woods, 114 Nev. at 475. Appellant herein has previously confirmed that those issues exist herein and must be considered by this Court. Using all of those factors, this District Court should have allowed Appellant to withdraw his previously entered guilty plea and allowed this matter to proceed to trial.

VII. CONCLUSION

Appellant entered the plea because of the information given to him by

defense counsel and/or his associates. Specifically, Appellant was led to believe that his sentences would be run concurrent to one another and the he would do no more than a sentence of ten (10) to twenty-five (25) years in prison. Since that ended up not being the case, Appellant should have been permitted to withdraw his plea and proceed to trial. As such, based on the numerous improprieties, as outlined herein, it is respectfully requested that this Court reverse and remand this case back to the District Court and allow this matter to proceed to trial.

DATED this 28th day of October, 2021.

/s/ Dan M. Winder
DAN M. WINDER, ESQ.
Nevada Bar No. 001569
3507 W. Charleston Blvd.
Las Vegas, Nevada 89102
(702) 878-6000

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Office - Version X5 in Times New Roman, font size 14.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)©, it does not exceed thirty (30) pages.

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

///

///

Rules of Appellate Procedure.

DATED this 28th day of October, 2021.

Respectfully submitted,

/s/ Dan M. Winder

DAN M. WINDER, ESQ.

Nevada Bar No. 001569

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 28th day of October, 2021, a true and accurate copy of the Appellant's Opening Brief was electronically filed with the Nevada Supreme Court. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Steven B. Wolfson, Esq.
Clark County District Attorney
200 Lewis Ave.
Las Vegas, Nevada 89101

Aaron D. Ford, Esq.
Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(702) 486-3420

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

Arthur Moore
NDOC No. 1090745
Southern Desert Correctional Center
20825 Cold Creek Rd.
Indian Springs, NV 89018

/s/ Sherrie Martin
An Employee of Dan M. Winder, Esq.