IN THE SUPREME COURT OF THE STATE OF NEVADA

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JARELL WASHINGTON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82896

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

JAMES A. ORONOZ, ESQ.
Nevada Bar #006769
THOMAS A. ERICSSON, ESQ.
Nevada Bar #004982
Oronoz & Ericsson, LLC
1050 Indigo, Suite 120
Las Vegas, Nevada 89145
(702) 878-2889

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Supreme Court as it involves a challenge to a Judgement of Conviction for a Category A felony. NRAP 17(b)(3).

STATEMENT OF THE ISSUE

1. Whether the district court erred by denying Appellant's Motion to Withdraw his Guilty Plea.

STATEMENT OF THE CASE

On June 26, 2019, the State filed an Indictment charging Jarell Washington ("Appellant") with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50001) and ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 -

NOC 50138). I AA 137. On July 24, 2019, Appellant was arraigned, pled not guilty, and waived his right to a speedy trial. Respondent's Appendix ("RA") 001.

At calendar call on February 6, 2020, both the State and defense counsel, Frank Kocka, Esq., announced ready for trial. II AA 168. However, Appellant requested to continue trial to obtain and review discovery. II AA 168. The district court denied that request, finding that Mr. Kocka had provided Appellant with discovery and that Mr. Kocka was prepared to go to trial. II AA 169.

On the morning of February 10, 2020, the same day trial was set to begin, the district court held a hearing at the request of both parties for Appellant to enter a guilty plea. II AA 180. Instead of pleading guilty, Appellant renewed his request to continue trial and moved to dismiss Mr. Kocka as counsel. II AA 179-182. The district court denied Appellant's motion and stated that trial would proceed that afternoon should Appellant choose not to plead guilty pursuant to the offer the State had made. II AA 183-184. After speaking with his attorney, Appellant chose to accept the State's offer and plead guilty to MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony- NRS 200.010, 200.030(2), 193.165- NOC 50011). I AA 172. The matter was set for sentencing. II AA 184-189.

On February 18, 2020, Appellant filed a pro per Motion to Dismiss Counsel. II AA 191. On March 12, 2020, the court held a hearing to address Appellant's pro per Motion. II AA 190. Defense counsel had not been served the motion and was

unaware Appellant had filed it. II AA 190. During the hearing, Appellant expressed a desire to withdraw his guilty plea. II AA 191-192. The Court granted Appellant's Motion but stated that it was granting the Motion strictly due to Appellant's desire to withdraw his plea, not due to any of Appellant's alleged issues with Mr. Kocka. II AA 191. A status check was set for appointment of counsel. II AA 193.

New counsel, James Oronoz, Esq., was appointed and Appellant subsequently filed a Motion to Withdraw Plea on August 13, 2020. II AA 203. On August 28, 2020, the State filed an Opposition. RA 004. On September 2, 2020, Appellant filed a Reply. II AA 320. On February 19, 2021, the District Court conducted an evidentiary hearing during which both Mr. Kocka and Appellant testified. II AA 248-300. On March 17, 2021, the Court heard arguments for Appellant's Motion to Withdraw Guilty Plea. AA II 308-320. On March 19, 2021, the District Court denied Appellant's Motion to Withdraw Guilty Plea. II AA 322. An Order Denying Defendant's Motion to Withdraw Guilty Plea was filed on March 23, 2021. II AA 324.

On April 16, 2021, Appellant was sentenced to pay $3,580.00 Restitution to Victims of Crime and to serve a minimum of one hundred twenty (120) months and a maximum of three hundred (300) months in the Nevada Department of Corrections ("NDOC") plus a consecutive minimum of seventy-two (72) months and a maximum of one hundred eighty (180) months in the NDOC for the deadly weapon

enhancement, with six hundred eighty (680) days credit for time served. II AA 351. The district court also made a record that it considered all the factors under NRS 193.165 in determining the length of the additional penalty to be imposed for the deadly weapon enhancement. II AA 353-354.

The Judgment of Conviction was filed on May 6, 2021. II AA 353-354. Appellant filed a Notice of Appeal on May 7, 2021. RA 014.

STATEMENT OF THE FACTS

On August 19, 2007, Cory Iascone, a Palo Verde High School student, and Andrew Brock were at Cory Iascone's mother's house when he received a call from Appellant. I AA 022-023; 030. Appellant, a Cimmaron Memorial High School student, had contacted Cory Iascone to purchase marijuana. I AA 023; 030. Cory Iascone regularly sold approximately one (1) quarter pound of marijuana every two (2) weeks. I AA 023. Cory Iascone told Andrew Brock that he needed to leave his mother's house to sell Appellant an ounce of marijuana. I AA 024-025. Andrew Brock told Cory Iascone he wanted to be dropped off at his house when they left to sell Appellant marijuana. I AA 025. Cory Iascone and Andrew Brock agreed that they would first stop at Appellant's house, as he was located on the way to Andrew Brock's house, and then Andrew Brock would be dropped off. I AA 024-025.

Cory Iascone and Andrew Brock arrived at Appellant's house at around 12:30 P.M., and Appellant was waiting outside. I AA 027. Andrew Brock did not know

Appellant but believed that Cory Iascone was familiar with him. I AA 028-029. Appellant came to the car window and told Cory Iascone and Andrew Brock that the marijuana was for his cousin, and his cousin would be available to buy it at 2:00 PM. I AA 027. Cory Iascone told Appellant he could ride around with him and Andrew Brock while they were waiting for Appellant's cousin. I AA 027-028. Appellant got in the seat behind Cory Iascone, who was driving his mother's car, and the three (3) teenagers left Appellant's house. I AA 028. While waiting for Appellant's cousin, both Cory Iascone and Andrew Brock received calls to sell smaller amounts of marijuana, and the three men drove to meet those buyers. I AA 029. At one point, the three men met a buyer at a Chevron gas station, and Cory Iascone went inside to purchase supplies to smoke a "blunt". I AA 029. While Andrew Brock and Appellant were waiting in the car, Appellant asked Andrew Brock questions about he and Cory Iascone selling marijuana, which Andrew Brock found strange. I AA 029. Cory Iascone returned to the car, and the three (3) men drove around listening to music and smoking marijuana on the way to drop Andrew Brock off at his house. I AA 30.

Cory Iascone and Appellant dropped Andrew Brock off at his house near the cross streets of Lake Mead and Rampart at 2:26 P.M. I AA 030-032; 086. Andrew Brock exited the car, told Cory Iascone that he would call him later, and Cory Iascone drove away with Appellant. I AA 32. Andrew Brock stated that when Cory Iascone and Appellant dropped him off, Cory Iascone had between $250 and $325

and an ounce of marijuana in a black backpack that he always carried. I AA 032-033. Andrew Brock never knew Cory Iascone to own or possess a firearm. I AA 033.

Later that afternoon, Las Vegas Metropolitan Police Department (LVMPD) crime scene analyst Randal McLaughlin was called to a homicide scene in the area of Point Conception Drive just east of Rampart Blvd, in the Desert Shores community. I AA 056. Police found Cory Iascone dead in the driver's seat of his mother's vehicle with a single gunshot wound to the head. I AA 058. The vehicle was in the middle of the westbound travel lane of Point Conception, and the passenger side door was open. I AA 057. There was $20 in the center console of the vehicle, but otherwise police located no money, marijuana, firearms, or a backpack in the vehicle. I AA 060. In Cory Iascone's lap was his cell phone and a live .25 caliber bullet. I AA 060. An investigation into Cory Iascone's murder followed but the case ultimately went cold. I AA 084.

On August 18, 2018, Michael Cutright, a cooperating witness, came forward and met with Detectives to provide information on a 2007 murder. I AA 038. Michael Cutright and Appellant were friends who attended Cimarron Memorial High School together and both played on the basketball team. I AA 039. Michael Cutright told detectives that in the summer of 2007 he got a call from Appellant who told him that Appellant was down the street from Michael Cutright's home in Desert Shores and needed to be picked up. I AA 041-042. On the phone, Appellant was

breathing hard, panicked, and was on the verge of crying. I AA 042. Appellant told Michael Cutright that he would give him money and/or marijuana, but he needed Michael Cutright to come and get him. I AA 042-043.

Michael Cutright was driving out of his neighborhood to pick up Appellant, when he nearly hit Appellant who was sprinting towards his car. I AA 044. Appellant got in the car sweating, crying, out of breath, and carrying a black backpack. I AA 045-046. Appellant told Michael Cutright thank you, that he had marijuana, and that he loved him. I AA 044. Michael Cutright asked Appellant what was wrong, and Appellant said he had just shot "a little white boy" that he was trying to rob. I AA 045. Appellant told Michael Cutright that he shot the "white boy" in the head while they were in his car because he had reached for a gun when Appellant tried to rob him. I AA 046. Michael Cutright believed that Appellant told him he had shot the victim with a .22 caliber gun that Appellant had thrown in a lake following the murder. I AA 047. Michael Cutright then drove Appellant back to Appellant's house and dropped him off. I AA 049. The two never spoke of the incident again. I AA 050.

Following the information provided by Michael Cutright, LVMPD Detective Kenneth Hefner determined that the firearm used in the murder was likely thrown in Lake Lindsey in Desert Shores. I AA 088. Search and Rescue volunteers with LVMPD performed multiple dives in Lake Lindsey before finding a Raven MP-25

semi-automatic pistol in .25 auto caliber. I AA 091; 073. LVMPD firearms detail forensic scientist Glenn Davis was able to return the firearm to a state in which a bullet could be fired from the barrel. I AA 076. Glenn Davis determined through analysis of microscopic markings that the bullet recovered from Cory Iascone's autopsy was fired by the same gun found in Lake Lindsey. I AA 078. Based on this information, Appellant was indicted by a Grand Jury on June 25, 2019. I AA 095.

SUMMARY OF THE ARGUMENT

The district court correctly denied Appellant's Motion to Withdraw his Guilty Plea and this Court should affirm that decision. The district court considered the totality of the circumstances and determined that Appellant failed to show a fair and just reason requiring the district court to allow him to withdraw his plea.

Frist, Appellant's plea was freely and voluntarily entered. Both the signed Guilty Plea Agreement and the oral canvas of Appellant are replete with evidence that Appellant understood the nature and consequences of pleading guilty, and did so freely, knowingly, and voluntarily when faced with the options of going to trial or entering a plea.

Second, Appellant had more than sufficient time to consider the State's offer before accepting it. Appellant received the State's offer more than a month prior to pleading guilty. Appellant had time discuss the State's offer with his attorney, ask both his attorney and the court questions about anything he did not understand, and

fully weigh his options. Appellant's argument that he was presented with the State's offer for the first time on the morning of trial is incorrect and completely misconstrues the record.

Third, the fact that Appellant pled guilty in the face of an impending trial is not a fair and just reason to withdraw his plea and controlling case law belies any contrary argument. Additionally, the district court found that Appellant insisted on proceeding to trial on multiple occasions and defense counsel was prepared to proceed to trial.

Fourth, Appellant was provided all discovery to which he was entitled prior to accepting his plea. He had been fully briefed by his counsel of the evidence against him and was given everything he was permitted to have in jail including Grand Jury transcripts and police reports that were the basis of witness testimony.

Finally, Appellant relies on case law that does not control this jurisdiction and holds that the time between a guilty plea and a motion to withdraw a guilty plea is but one consideration in the "fair and just" analysis of the totality of the circumstances.

As such, the district court properly considered the totality of the circumstances and found that Appellant failed to demonstrate any fair and just reason to withdraw his guilty plea. This Court should therefore affirm the lower court's decision.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA

Appellant alleges that he entered his plea with "an unsure heart and confused mind" and that he offered fair and just reasons under the totality of the circumstances to withdraw his plea. Appellant's Opening Brief ("AOB") 9-10; II AA 227-228. Appellant's claims are belied by the record.

A. Standard of Review

In reviewing a district court's ruling on a pre-sentence motion to withdraw a plea, "'this Court will presume that the lower court correctly assessed the validity of the plea and will not reverse absent a clear showing of an abuse of discretion.'" Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (*quoting* Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)); Mitchell v. State, 109 Nev. 137, 138, 848 P.2d 1060, 1060 (1993). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). To show that the district court abused its discretion, the defendant has the burden of proving that the district court failed to consider the totality of the circumstances when determining whether the defendant knowingly and intelligently entered the plea. Stevenson v. State, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015); Crawford v. State, 117 Nev.

718, 721-22, 30 P.3d 1123, 1125-26 (2001). This Court must give deference to the factual findings made by the district court in the course of a motion to withdraw a guilty plea as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

When a defendant moves to withdraw a guilty plea before sentencing, the district court must examine the totality of the circumstances to determine whether the plea was valid, and consider whether the defendant has any fair and just reason to withdraw their plea. NRS 176.165; State v. Second Judicial Dist. Court (Bernardelli), 85 Nev. 381, 385, 455 P.2d 923, 926 (1969); Bryant, 102 Nev. at 271, 721 P.2d at 367; Stevenson, 131 Nev. at 599-600, 354 P.3d at 1278. A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985).

In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. “A district court may not simply review the plea canvass in a vacuum.” Mitchel, 109 Nev. at141, 848 P.2d at 1062. While a more lenient standard applies pre-sentence motions to withdraw a guilty plea,

Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); a defendant has no right to withdraw his plea merely because the State failed to establish actual prejudice. See Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

The proper standard set forth in Bryant requires the trial court to personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970). Importantly, "the record

must affirmatively disclose that a defendant is entering his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970). Consequently, in applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

When the Nevada Supreme Court decided Stevenson v. State, it explained that district courts must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. 131 Nev. 598, 354 P.3d 1277(2015). In doing so, the Court explained that Crawford v. State's, 117 Nev. 718, 30 P.3d 1123 (2001), holding is more narrow than contemplated by NRS 176.165 and disavowed an analysis focused solely upon whether the plea was knowing, voluntary, and intelligent in determining the validity of the plea. However, the Court in Stevenson also held that the appellant had failed to present a fair and just reason favoring withdrawal of his plea, and therefore affirmed his judgment of conviction. 131 Nev at 603, 354 P.3d at 1281.

In Stevenson, the Nevada Supreme Court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. Id. The Court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the

compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. Id. As the Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id. (quoting Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir. 2007)). Time constraints and pressure exist in every criminal case, are hallmarks of pretrial discussions, and do not individually or in the aggregate make a plea involuntary. Id. at 605, 354 P.3d at 1281 (quoting Miles v. Dorsey, 61 F.3d 1459, 1470 (10th Cir. 1995)). Instead, the key inquiry for determining the validity of a plea is "'whether the plea itself was a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" Id. at 604-05, 354 P.3d at 1281 (quoting Doe, 508 F. 3d at 570).

The Nevada Supreme Court also rejected Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. Id. at 604-05, 354 P.3d at 1281. The Court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id. at 604-05, 354 P.3d at 1281-82 (quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991)). After considering the totality of the

circumstances, the Court found no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Id. at 605, 354 P.3d at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id. (quoting United States v. Barker, 514 F. 2d 208, 222 (D.C. Cir. 1975)).

B. Appellant knowingly and voluntarily pled guilty.

Appellant alleges that he entered his guilty plea "with an unsure heart and confused mind." II AA 227-228. Appellant also alleges that he was "misled and coerced" and told by counsel that if he signed the Guilty Plea Agreement he would "go home on probation." II AA 191; 277. Appellant's allegations are belied by the record.

Appellant knowingly and voluntarily signed a Guilty Plea Agreement on February 10, 2020, and in doing so he affirmed that he understood the nature and consequences of pleading guilty. The section of the Guilty Plea Agreement entitled "Voluntariness of Plea" delineates the following statements that Appellant acknowledged with his signature as true:

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
> I understand that the State would have to prove each element of the charge(s) against me at trial.

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.
> *I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest*
> *I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.*
> I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

I AA 175-176 (emphasis added).

Appellant attested that he was freely and voluntarily pleading guilty and that he was not being coerced as a result of promises of leniency, except those contained in the Guilty Plea Agreement. The Guilty Plea Agreement explicitly stated that he would not be eligible for probation:

> I understand that I am not eligible for probation for the offense to which I am pleading.

I AA 173.

After the signed Guilty Plea Agreement was filed in open court, the district court orally canvassed Appellant regarding the terms and consequences of the plea. II AA 185-189. Again, Appellant affirmed that his plea of guilty was free and

voluntary and that he was not relying on anything other than the terms of the plea agreement in making his decision:

> THE COURT: Before I accept your plea I need to make sure it's freely and voluntarily made, is it?
> THE DEFENDANT: Yes.
> THE COURT: Anybody force you or threaten you in any way to get you to plead guilty today?
> THE DEFENDANT: No, sir.
> THE COURT: Anybody make any promises to you other than the plea negotiations to get you to plead guilty today?
> THE DEFENDANT: No, sir.

II AA 187.

After clarifying that the plea was being entered freely and voluntarily, the district court reiterated to Appellant that he was not eligible for probation:

> THE COURT: All right. You understand that you're not eligible for probation, so that means you have to serve a prison sentence on the case.
> THE DEFENDANT: Yes, sir.

II AA 188.

The district court then gave the Appellant an opportunity to have any terms or consequences of pleading guilty that were unclear explained to him:

> THE COURT: All right. Anything you don't understand about the plea agreement or have any questions about?
> THE DEFENDANT: No, sir.

II AA 188-189.

Mr. Kocka, as an officer of the Court, testified at the February 19, 2021 evidentiary hearing that he fully discussed the plea negotiations with Appellant:

> MR. PORTZ: And you discussed -- well, I guess, just go through what you would -- what you would have discussed with Mr. Washington in January when you conveyed what the State's offer was with him.
> MR. KOCKA: What I would have discussed with him is what the charge entailed, what the State would have to prove in order to substantiate the second-degree murder, because of course, if it did go through a guilty plea, he would have to acknowledge the facts that support the charge. So, we went through the elements of the charge of second degree. We talked about that with regards to what the State would have to prove if we went to trial with the charge that he was currently facing.
> The benefit of accepting the deal in terms of what the sentence here would include versus what he was currently charged with. And also, based upon the facts in the case whether or not it was a strategically wise decision to accept the State's offer based upon what the State had evidence-wise and what they could prove, and the potential likelihood of the State being successful in coming back with a conviction on a higher charge.

II AA 260.

Appellant understood the terms of the plea agreement as they were explained to him by the district court, Mr. Kocka, and the written plea agreement. Appellant affirmed both orally and in writing that he was entering his guilty plea freely and voluntarily.

Accordingly, any claim that Appellant was unsure, confused, coerced, or misled, is belied by the record.

C. Appellant had sufficient time to review and consider the State's offer before accepting it.

Appellant alleges that the State's offer was "presented for the first time… on the morning his trial was scheduled to begin" AOB 9. That argument misconstrues

the record entirely. Appellant had over month to consider the State's offer before he ultimately accepted it on February 10, 2020. II AA 258-259. Mr. Kocka testified at the evidentiary hearing that Appellant received the State's offer on January 3, 2020:

> Q: Okay. And in fact, on January 7th, 2020, more than a month before trial, you had put on the record, and it's in the minutes, that you had received an offer from the State on February 3rd of 2020; does that sound right?
> A: That sounds -- actually, I believe that we received the offer January 3rd, not February 3rd, 2020.
> Q: You're right, I misspoke, I apologize. January 3rd, 2020 –
> A: Uh-huh.
> Q: -- is what you put on the record. So, that's –
> A: Right, and –
> Q: -- five weeks prior to trial, not the morning of trial, in which you received that offer?
> *A: That is correct. And once I received the offer on January 3rd, I relayed it to my client, which I believe he at some point -- I believe it was around January 7th acknowledged in court that he did receive the offer. So, there was a period of about four or five days that -- since the time that it was relayed to me that I did discuss it with him, and he acknowledged receiving the offer.*
> Q: Okay. And that was the same offer that he ultimately entered a plea deal to on February 10th?
> A: Correct.
> Q: Okay. So, he had had that particular offer for at least four weeks, give or take, to mull over?
> A: Correct.

II AA 258-259 (emphasis added).

After Mr. Kocka relayed the State's offer to Appellant in early January, Appellant rejected it and elected to proceed to trial. II AA 260-261. The State therefore did not prepare a written Guilty Plea Agreement, as there would be no reason to prepare a Guilty Plea Agreement for a rejected offer. II AA 261. However,

on February 9, 2020, the day before trial was set to begin, Mr. Kocka contacted the State and indicated that Appellant now wished to accept the offer extended in early January:

> MR. KOCKA: … and it was actually during that meeting on Sunday at the jail, prior to starting trial on Monday, that he told me at that point he wanted to take the deal.
> MR. PORTZ: And that would be the deal that the State had offered back in early January?
> A: That's correct. And after going through everything with him and confirming he wanted to take the deal, I actually left the jail. And I'm sure you recall this on Sunday afternoon, I got ahold of you on your cellphone and quite literally had to -- you were very reluctant to re-offer the deal, and I had to do quite a bit of begging to actually get the deal back for him.
> And that's why we did not have -- or I did not have the benefit of the guilty plea agreement prior to Monday morning at trial because it was not in existence until your staff had the opportunity to put it together for me Monday morning.

II AA 268-269.

After Appellant indicated through Mr. Kocka that he wanted to accept the negotiations, the State then prepared a written Guilty Plea Agreement and an Amended Indictment to reflect the exact same offer that was extended on January 3, 2020. II AA 268-269. The district court made accommodations the take the plea the next morning before trial was set to begin. II AA 269.

On February 10, 2020, rather than entering his plea as planned, Appellant moved to continue trial, which the district court denied finding that parties were ready for trial II AA 183-184. The Court then gave Mr. Kocka time to discuss the

written Guilty Plea Agreement with Appellant. II AA 185-186. At the evidentiary hearing, Mr. Kocka explained in detail the discussion he had with Appellant regarding taking the guilty plea or going to trial:

> STATE: Okay. After he denied that request, did the Court explain to Mr. Washington, you can either go to trial or if the State keeps the offer open, you can take it, but one way or the other, you wanted a trial, you're getting a trial. If you want the deal, we can take it; we can deal?
> MR KOCKA: Correct.
> Q: And after that, did you meet again with Mr. Washington in private?
> A: I did.
> Q: And would you discuss what happened during that meeting?
> A: During that meeting, I said we're prepared to go to trial. I actually had the trial notebook there with me because if we had not dealt it, I anticipated in a couple hours we were about ready to start. And I believe we actually had an opportunity to meet back in the holding cell. He indicated to me that he did want to take the guilty plea. At that point, I did have the benefit of having the guilty plea, and we went through it line by line. He signed it, and after that Judge Herndon canvassed him.
> Q: When you went through it line by line, did he have any questions for you that you were unable to answer?
> A: No.
> Q: Did he appear to understand everything contained in the guilty plea agreement as you described it to him?
> A: Yes.

II AA 268-269.

After taking time to go over the written Guilty Plea Agreement and speak with Mr. Kocka, and after having over a month to consider the terms of the plea, Appellant chose to accept the negotiations. II AA 268-269. The case was recalled

and the district court canvassed Appellant as to whether he had time to review the State's offer and whether he wanted to accept it:

> THE COURT: We will be on the record. 341380. Mr. Washington is here with his attorney, Mr. Kocka. My understanding, Mr. Washington, is that you decided to go ahead and accept the negotiations that had been offered by the State.
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. We do have an Amended Indictment that was filed this morning charging one count of second-degree murder with use of a deadly weapon. My understanding, sir, is that you've agreed to plead guilty to that charge, correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: That as part of the negotiation, the State retains the full right to argue at the time of sentencing. You and your attorney will also have the right to argue at the time of sentencing as to what the sentence should be. You understand that?
> THE DEFENDANT: Yes, sir.
> . . . .
> THE COURT: You've received a copy of the plea agreement and attached to that is an Amended Indictment. That's what lists the charge that you're pleading to; is that correct?
> THE DEFENDANT: Yes, sir.
> *THE COURT: Have you had a chance to discuss that your charge and your case with your attorney, Mr. Kocka?*
> *THE DEFENDANT: Yes, sir.*
> THE COURT: And when you were discussing the charges and your case, did you all have discussions about the four different levels of a homicide charge, meaning first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter?
> THE DEFENDANT: Yes, sir.
> THE COURT: All right. And you're comfortable that you understand all of those?
> THE DEFENDANT: Yes, sir.
> THE COURT: And are you comfortable that you understand, with this particular charge that you're going to be pleading guilty to, what this charge is saying that you did wrong.
> THE DEFENDANT: Yes, sir.

> THE COURT: How do you plead to the one count of second-degree murder with use of a deadly weapon?
> THE DEFENDANT: Guilty.
> …
> THE COURT: I have before me a written plea agreement which looks like you signed it on page 5. Did you sign that sir?
> THE DEFENDANT: Yes, sir.
> *THE COURT: Did you have a chance to read the document before you signed it?*
> *THE DEFENDANT: Yes, sir.*
> *THE COURT: And was your attorney available to answer any questions you had before you signed it?*
> *THE DEFENDANT: Yes, sir.*
> *THE COURT: Do you believe you understood everything in it?*
> *THE DEFENDANT: Yes, sir.*

II AA 216-218 (emphasis added).

The court then gave Appellant the opportunity to ask his attorney or the court any other questions he had regarding the agreement:

> THE COURT: … Okay. You have any questions for me or your attorney before I accept your plea?
> THE DEFENDANT: No, sir.
> THE COURT: All right. Anything you don't understand about the plea agreement or have any questions about?
> THE DEFENDANT: No, sir.

II AA 219- 220.

Appellant affirmed during his canvas that he understood the charges that he was pleading guilty to, the sentencing range for those charges, and that he had the opportunity to read, discuss, and understand the Guilty Plea Agreement prior to signing it and pleading guilty. Not only had Appellant discussed the State's offer with Mr. Kocka over the month that he had to consider it, but the court also gave

Appellant time directly before entering his plea to discuss it with Mr. Kocka and gave him the opportunity to ask the court any questions about his plea.

To suggest that the State's offer was thrust upon Appellant at the last minute is incorrect; more importantly, even if it were true, it is not grounds to withdraw a plea as Appellant still had sufficient time to discuss the plea with Mr. Kocka.

Thus, any argument that Appellant did not have adequate time to review the State's offer prior to pleading guilty is belied by the record and without merit.

D. The imminence of approaching trial is not a substantial reason to withdraw a plea that was knowingly and voluntarily entered.

Appellant's suggestion that he should be entitled to withdraw his plea because he was coerced by the trial's "imminent start" is also without merit. As noted in Stevenson v. State, 131 Nev. 598, 354 P.3d 1277 (2015) (which Defendant cites to in his motion), "time constraints and pressure from interested parties *exist in every criminal case*, and there is no indication in the record that their presence here prevented [appellant] from making a voluntary and intelligent choice among the options available." Stevenson, 131 Nev. at 604-05 (emphasis added); see also, Doe, 508 F.3d at 570 ("The test for determining whether a plea is valid is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." (internal quotation marks omitted)); Miles v. Dorsey, 61 F.3d 1459, 1470 (10th Cir.1995) ("Although deadlines, mental anguish, depression, and stress are inevitable hallmarks of pretrial plea discussions, such factors

considered individually or in aggregate do not establish that [a defendant's] plea was involuntary.").

First, it was Appellant who had pushed the trial to go forward in the months preceding his Calendar Call:

> MR. PORTZ: Okay. Another claim put forward by Mr. Washington in his motion to withdraw is it should not be considered valid because he wasn't prepared to go forward to trial. In the months leading up to this, as you've discussed, you talked to your client on multiple occasions, you talked to his family on multiple occasions, you went over the State's plea negotiations with him, and he told you he was not interested in taking that offer, and he wanted to go to trial. Were there not multiple court appearances since he was indicted in which he stated and made clear to the Court that he wanted to go forward to trial in February?
> MR. KOCKA: Yes.
> Q: And did he also make repeated statements that he did not want his trial continued, that he wanted it to go forward?
> A: Yes.
> Q: Did you advise him that he didn't have to go forward at the February trial date, that he could have more time if he wanted?
> A: Yes.
> Q: And did he still insist on wanting to go forward to the February trial date?
> A: He did, and I remember discussions that you and I had about being very hard-pressed to -- from both your side and my side, with the extent of the witnesses, and get this ready, which I know I dropped everything. And I know discussions with you, you did as well, to get this case ready to go in February.

II AA 265-266.

In addition to Mr. Kocka's testimony, the district court found that Appellant "insisted on proceeding to trial on multiple occasions." II AA 325. Appellant cannot

push everyone involved to ensure that trial goes forward and then use the imminence of trial as a basis to claim he was rushed into making a decision regarding his plea.

Additionally, any argument by Appellant that Mr. Kocka was not prepared to go to trial is belied by the record. Mr. Kocka announced ready for trial on both January 7, 2020, and January 16, 2020. RA 002-003. Mr. Kocka made the same representations at Appellant's entry of plea on the morning trial was to begin when Appellant requested a continuance:

> MR. KOCKA: In my opinion, I -- I've done this for about 34 years now, Judge. We have adequately prepared for the case and I have told my client absolutely every element that would be relative to his defense in the State's case.

II AA 213.

Mr. Kocka further explained his level of preparedness at the evidentiary hearing:

> Q: And is it also correct that on January 7th, 2020, again per the Court minutes, you announced that you were prepared to go to trial, the trial that would be set on February 10th?
> A: That's correct.
> Q: All right. And in the weeks leading up to trial, was it your understanding that both parties had come to the conclusion that this would likely go to trial in early February, so we would begin preparation in earnest for trial itself?
> A: Correct.
> Q: Okay. So, then the weeks leading up to trial, did you have conversations with me and my co-Counsel about various pretrial issues, witness coordination, etcetera?
> A: I did, yes.
> Q: And did you also hold meetings with your client during the course of that time?

> A: With my client and also my client's family. There was one particular piece of evidence after the discovery [indiscernible] and the forensics that caused me great concern, I actually met with members of his family because that specific part of the evidence had to do with a family member of Mr. Washington's. And based upon the discovery that was given to me by the State and statements by that family member caused me great concern regarding the weapon. And once the weapon was forensically able to be tied to the bullet that was found in the Decedent, that caused me great concern. And during that two-week period, I met with Mr. Jarrel Washington, his brother, and various members of the family regarding that specific piece of evidence.
> Q: Okay. And then at the calendar call in this case, did you in fact announce ready?
> A: I did.
> *Q: Okay. Was there any legal reason to continue the case or were you fully prepared to go forward?*
> *A: I was fully prepared.*

II AA 263-264 (emphasis added).

The options available to Appellant were clear. He could accept the State's offer and plead guilty, or he could go to trial with an experienced criminal defense attorney who was fully prepared. When faced with these two reasonable options, the record reflects that Appellant freely, voluntarily, and knowingly chose to plead guilty. Controlling case law is clear that Appellant cannot assert that the imminence of trial alone coerced him into accepting a plea, especially when he had a viable option to proceed to trial with a prepared attorney.

Accordingly, any argument that Appellant was coerced by the pressure of trial's imminent start is without merit.

E. Appellant received the discovery he was entitled to.

Appellant alleged at his entry of plea that he was not prepared for trial because he did not have a hard copy of all discovery. Appellant was in receipt of all discovery in the State's possession at the time of Indictment. II AA 262. Supplemental forensic testing results were provided to defense at the time of their distribution by the various forensic labs of the Las Vegas Metropolitan Police Department. On December 5, 2019, Appellant acknowledged receipt of the final forensic results in the case. II AA 263.

To the extent Defendant suggests that he should be entitled to withdraw the plea because he was not prepared for trial due to not being given a hard copy of all discovery, case law clearly belies the argument. Courts routinely find defendants do not have a right to their own personal copy of discovery materials. People v. Krueger, 296 P.3d 294 (Colo. 2012); U.S. v. Shrake, 515 F.3d 743 (7th Cir. 2008); State v. Marks, 297 Kan. 131, 289 P.3d 1102 (2013); State v. Thompson, 141 Ohio St.3d 254, 23 N.E.3d 1096 (Ohio 2014). The United States Supreme Court has specifically found that defendants are not constitutionally entitled to discovery. Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837 (1977); Gray v. Nethereland, 518 U.S. 152, 116 U.S. 152 (1996). Some jurisdictions even affirmatively preclude defendants' possession of materials related to their cases pre-trial. See People v. Savage, 361 Ill. App. 3d 750, 757 (2005).

Mr. Kocka testified at the evidentiary hearing he had strategic reasons for not providing a hard copy of certain portions of discovery to Appellant for him to take back to the detention center:

> MR. KOCKA: Number one, as addressed both at the calendar call and also the morning of trial, I made a very clear record that it is my policy, especially in cases like this where the entire case revolves around a witness with, shall we say, ulterior motives, a snitch, giving information as to the whereabouts of the murder weapon and my client's involvement, I did not want him having that in jail where others could have access to it. And as we've often seen, corroborate the statement for their own benefit.
> Number two, Mr. Washington required glasses, and we had a great deal of difficulty getting glasses to him. I, on a number of occasions, dealt with Post-10 with the nurses trying to get him his prescription glasses because he could not read without his glasses. And it was my fear that him having someone read the discovery to him would not only accelerate the possibility of someone finding the discovery, but learning about the discovery and be -- the possibility of one of the inmates becoming opportunistic and corroborating the State's case against Mr. Washington. So, I did not give him the specific part of discovery which entailed the actual details regarding the statements that were given by the snitch in this case.

II AA 256. (emphasis added).

Mr. Kocka did not want to jeopardize Appellant's case by allowing a fellow inmate to obtain information and use that information to their advantage by corroborating information given by the State's criminal informant. Mr. Kocka had explained this reasoning multiple times previously, at the calendar call and at the entry of plea on the day of trial. I AA 168-169; II AA 181-182. At Appellant's entry

of plea, the district court agreed with Mr. Kocka's rationale while noting the fact that CCDC rules would preclude Appellant from having certain items of discovery:

> THE COURT: So here's the thing, Mr. Washington. There are, in my mind at least, it should be very rare that an attorney gives a client in a detention center all of their discovery, because my record of trials is replete with informants coming in and testifying. And a lot of times those folks end up having their discovery in the detention center and you question whether or not these guys are getting a hold of your discovery or figuring things out and becoming snitches or whether or not they truly had conversations with the defendant they are testifying against.
> *And there's certain things that the jail won't let you have anyway. So I think Mr. Kocka is very appropriate in telling you that there are very good reasons not to give you that discovery, so that doesn't constitute any type of grounds to continue the trial.*

II AA 183 (emphasis added).

Finally, Mr. Kocka explained at the evidentiary hearing the extent to which he went to ensure that Appellant was fully apprised of the discovery, despite not giving him a hard copy of some specific information:

> MR. PORTZ: And the week following the calendar call and the buildup to trial, did you continue to meet with your client?
> MR. KOCKA: I did. And as a matter of fact, I met with him the day before trial was to start, which was on Sunday, brought my entire trial notebook with me again, we went through everything, and at that point, we had discussions with regard to the reasons he felt he was not ready to go to trial. And he said he did not have anything, didn't know anything. And at that point, I sat and I broke down everything with him with regard to the specific phone calls that were made on the date of the murder. There's long series of phone calls, we went through those. We went through also that very concerning bit of evidence that I alluded to earlier with regard to one of his family members.

> We went through the forensics. We went through the testimony of the, lack of a better word again, snitch witness. And also, Mr. Washington had the benefit since very early on, he had the entire Grand Jury transcript. I gave him the entire hard copy, so he would know at least the basis of the testimony, not only of the police officers, but also the snitch witness. And so, what he was facing, should that witness get on the stand, we went over that yet again. And it was actually during that meeting on Sunday at the jail, prior to starting trial on Monday, that he told me at that point he wanted to take the deal.

II AA 267- 268.

Appellant had the information he needed to be prepared for trial. Mr. Kocka broke down the entire case for Appellant. Appellant had a hard copy of the Grand Jury testimony and police reports that would provide the basis for witness testimony.

Accordingly, Appellant's allegation that he did not have necessary discovery is belied by the record and a lack of hard copies of some specific discovery is an insufficient reason to continue trial or withdraw his guilty plea.

F. The case law Appellant relies on is both not controlling and distinguishable.

Appellant relies on two cases cited in Stevenson to support his position: United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991), and United States v. Barker, 514 F.2d 208, 222 (D.C. Cir. 1975). First, neither of these decisions control the Nevada Supreme Court. Second, the holdings in both cases stand for the contention that the time between a guilty plea and the motion to withdraw that guilty plea is but one consideration in the "fair and just" analysis.

In Alexander, the Appellant waited five (5) months before moving to vacate his plea. The court in Alexander explained that one of the goals of the fair and just analysis "is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty." Alexander, 948 F.2d 1002, 1004. Barker is a case that concerns defendants in the Watergate break-in during President Nixon's 1972 presidential campaign. The Appellants in that case plead guilty and waited eight (8) months to move to withdraw their pleas. The court noted that "A swift change of heart is itself strong indication that the plea was entered in haste and confusion[.]"). Barker, 514 F.2d 208, 222.

Appellant argues that because he moved to withdraw his plea soon after entering it, that he therefore entered it "with an unsure heart and confused mind" AOB 9-10.

As discussed extensively above, Appellant's plea was not entered "hastily" nor was it entered with "and unsure heart and confused mind." Appellant had over a month to consider the State's offer. He had ample opportunity to discuss the evidence against him and ask his attorney questions. He affirmed to the district court both in writing and orally during his canvas that he understood the terms of the

agreement and that he was entering his guilty plea because that is what he wanted to do.

Appellant cannot now assert that because he felt his buyer's remorse more quickly than the Defendants in Alexander or Barker, that the entirety of his free, voluntary, and knowing plea is negated. This one consideration also does not render the district court's consideration of the totality of the circumstances in denying his Motion to Withdraw his Guilty Plea null and void. Many factors determine whether a defendant should be permitted to withdraw his or her guilty plea, which is the very reason that the Stevenson holds that the lower court is required to consider the totality of the circumstances.

As such, the lower court appropriately considered and weighed all circumstances in denying Appellant's Motion to Withdraw his Guilty Plea.

CONCLUSION

Wherefore, the State respectfully requests that Appellant's Judgment of Conviction be AFFIRMED.

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Dated this 9th day of December, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **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 Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 8,766 words.
3. **Finally, 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 and volume number, if any, 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 9th day of December, 2021.

Respectfully submitted

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*

TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on December 9, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JAMES A. ORONOZ, ESQ.
THOMAS A. ERICSSON, ESQ.
Counsels for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ *E. Davis*
Employee, Clark County
District Attorney's Office

TP/Glenn Anderson/ed