IN THE SUPREME COURT OF THE STATE OF NEVADA

Hamza Zalyaul, Appellant vs. The State of Nevada, Respondent.	Supreme Court Case No.: 83334 **APPELLANT'S OPENING BRIEF**

Nevada Defense Group
KELSEY BERNSTEIN, ESQ.
Nevada Bar No. 13825
DAMIAN SHEETS, ESQ.
Nevada Bar No. 10755
714 S. Fourth Street
Las Vegas, Nevada 89101
(702) 988-2600
Attorney for Appellant
Hamza Zalyaul

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 20 day of December, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein

KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER SOURCES

JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a judgment in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on August 4, 2021, approximately 27 days after the Judgment of Conviction was filed on July 7, 2021.

NRAP 17 ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Did the District Court err in denying the Motion to Dismiss for lack of subject matter jurisdiction when the District Court lacked jurisdiction since Appellant was 14 years old at the time of the offense, but the Juvenile Court also lost jurisdiction because Appellant was arrested after the age of 21?

2. Did the District Court err in denying the Motion to Dismiss following an excessive delay in prosecution after law enforcement took no action on the allegations for seven years after disclosure?

3. Did the District Court err in denying Appellant's request to withdraw his plea, pursuant to contractual obligations and expectations of the parties, when the District Court imposed a sentence over and above that which was contemplated by the parties pursuant to a plea bargain?

II. Statement of Relevant Facts

Appellant Hamza Zalyaul was charged by way of criminal complaint with six counts of Sexual Assault Against a Child Under Fourteen (Category A felony) (Bates 043). The complaint alleged that Mr. Zalyaul assaulted a family friend during the summer of 2013, when she was 11 years old and he was 14 years old (*id*.). The named victim, S.D., and her mother reported the assaults to law enforcement in September 2013, shortly after the reported incidents took place, but the case closed without any further action at that time (*id*.). Almost six years later, in February 2019, a different detective was assigned to reopen the case and re-interviewed S.D. and her mother in July 2019 (*id*.). Several months after these second interviews, law enforcement applied for an arrest warrant, which was granted on October 17, 2019 (*id*.). Mr. Zalyaul was eventually arrested on January 2020, when he was 22 years old (*id*.).

On March 8, 2021, a guilty plea agreement was filed wherein Mr. Zalyaul would plead guilty to one count of Attempt Sexual Assault. Pursuant to the negotiations, the State would have no opposition to probation, and if honorably discharged, Mr. Zalyaul could withdraw his plea and enter a plea to Open or Gross Lewdness (Gross Misdemeanor) with credit for time served; the State further agreed not to object to formally sealing Mr. Zalyaul's criminal record

once the requisite time period had passed, and Mr. Zalyaul would be released from electronic monitoring and placed on intensive supervision after entry of plea (Bates 001). He entered his plea pursuant to these negotiations on March 9, 2021 (Bates 010; 012).

The intent of the parties was to craft a negotiation similar to one that would be made in juvenile court, as Mr. Zalyaul was 14 years old at the time of the offense while the victim was 11 years old (Bates 024; 025). Despite early disclosure to law enforcement, no action was taken on the case until Mr. Zalyaul was 21 years old at the time of the warrant request, resulting in charges filed as an adult (Bates 043). During negotiations, the parties agreed that because of Mr. Zalyaul's young age at the time of the offense, but the arrest being executed after the age of 21, this case fell within a statutory grey area as it pertains to jurisdiction, and whether the case belongs in the adult or juvenile justice system (Bates 025).

At sentencing, the District Court did not follow the negotiations, and *substantially* deviated upwards, sentencing Mr. Zalyaul to 4-10 years in the Nevada Department of Corrections (Bates 032), despite the fact that he was 14 years old at the time and had no adverse contact with law enforcement prior to this case.

After the District Court pronounced its sentence, Defense Counsel moved to withdraw Mr. Zalyaul's plea. Defense argued that the District Court accepted the plea and its terms, Mr. Zalyaul waived substantial constitutional rights pursuant to that plea, and if the District Court was going to thwart the expectations of the parties by deviating upward from the plea negotiation, Mr. Zalyaul was entitled to withdraw his plea (Bates 034). The argument was contractual in nature, and argued that a negotiation is premised upon specific conditions, and if those conditions are rejected, the contract becomes illusory because the Defendant gives the State certain benefits, but does not receive the expected benefits in return (Bates 035).

Defense requested a briefing schedule on the issue, but the briefing request and motion to withdraw his plea was denied (Bates 036). The Judgment of Conviction was filed on July 7, 2021 (Bates 038).

Two days later, on July 9, 2021, Defense filed a Motion to Dismiss or, In the Alternative, Motion to Reconsider Sentence (Bates 041). The Motion to Dismiss sought to dismiss the case on both the issue of improper jurisdiction, as well as the issue of Mr. Zalyaul's delayed prosecution (Bates 098). The State's Opposition was filed on July 26, 2021, one day before the scheduled hearing on the Motion (Bates 058). Defense asked for a quick continuance to file a written

reply, noting that Mr. Zalyaul was running up against the deadline to file a notice of appeal (Bates 074). The Reply was filed two days later on July 29, 2021 (Bates 076).

The hearing was held on August 3, 2021 (Bates 096). During the hearing, the Court adopted the substantive reasoning as set forth in the State's opposition, but simultaneously denied the Motion to Dismiss because the District Court lacked jurisdiction to consider the Motion once the Judgment of Conviction was filed (Bates 108). The Order Denying the Motion to Dismiss was filed on August 4, 2021 (Bates 110). Appellant's Notice of Appeal was filed the same day (Bates 113).

III. Summary of the Argument

The delayed prosecution of Mr. Zalyaul's case resulted in a jurisdictional void; as the juvenile court is a product of statute, its jurisdiction is governed by this statutory authority. Juvenile courts retain jurisdiction for crimes committed by minor children, and Mr. Zalyaul qualified for juvenile treatment because he was 14 years old at the time of the offense. However, law enforcement's seven-year delay in prosecution from the initial disclosure resulted in Mr. Zalyaul's arrest at the age of 22.

Juvenile courts lose jurisdiction over cases once the minor child attains the age of 21, and although there are statutes that govern jurisdiction in the vast majority of cases, none of them apply here. A jurisdictional transfer to the adult court once the minor has attained the age of 21 only applies for offenses committed when the minor was 16-18 years old. Because Mr. Zalyaul was only 14 at the time of the offense, there are no statutory provisions that govern his case – the District Court lacks jurisdiction because he was 14 at the time of the offense, but the Juvenile Court lacks jurisdiction because he was arrested over the age of 21.

The delay in prosecution cannot be used against him, as it was solely the lackluster efforts of law enforcement that resulted in this delay. Mr. Zalyaul was not hiding from law enforcement, and law enforcement was further provided information of his whereabouts. Although Mr. Zalyaul relocated out of the country with his parents for two years until he completed high school, upon his return to the United States, still no further action was taken for another four years.

This delay in prosecution not only created a jurisdictional conundrum (which ultimately resulted in an adult filing for a juvenile crime), but further resulted in a speedy trial violation as articled by *Doggett, Barker* and *Inzunza.*

Application of the four-part *Doggett* test concludes that a speedy trial violation occurred, Mr. Zalyaul was prejudiced, and the delay is solely attributable to law enforcement.

Lastly, Courts have begun to apply principles of contract in the criminal context, specifically with application to guilty plea agreements. As enforcement of the bargain is contingent upon acceptance by the trial court, the trial court has become an indispensable party to the contract itself.

As a party to the contract, the court (as with all other parties) is subject to certain obligations. Although the court retains the discretion of whether to accept a plea, if that plea is accepted, the discretion of the court in imposing sentence must be tempered with the implied covenant of good faith and fair dealing. While the covenant does not restrict what the decisions the court can make in its sentencing discretion, it does recognize that all acts of discretion must be exercised in good faith and in accordance with the justified expectations of the other parties.

In this case, where the parties bargained for a specific sentence and charge (as the negotiations further contemplated a reduced offense to a gross misdemeanor upon completion of probation), the justified expectation of the parties was to receive that specific sentence and charge, as both the prosecution

and defense believe the negotiated sentence was appropriate for the circumstances of this specific case. Although the court still retains the discretion of whether or not to accept the terms of the bargain itself, contract law provides a remedy when the court acts in a manner inconsistent with their justified expectations of the parties: an option to withdraw the plea.

Permitting a defendant to withdraw his plea when the trial court imposes a sentence over and above that contemplated in the plea bargain is not only sound application of contract principles, but also comports with public policy and equity favoring plea bargains by providing predictability and assurances that a defendant is not waiving valuable constitutional rights in exchange for a completely unknown outcome with no remedy for when the expectations of the parties are thwarted.

ARGUMENT

I. The District Court Lacks Subject Matter Jurisdiction, as the Case Should Have Been Brought in the Juvenile Court Pending Certification to Adult Court; the District Court Further Lacks Subject Matter Jurisdiction Because Mr. Zalyaul was Arrested After the Age of 21

As an initial matter, the District Court erred in finding that it lacked jurisdiction to consider the Defense's argument on the matter of subject matter jurisdiction simply because the issue was raised after the filing of the Judgment

of Conviction (Bates 108). Jurisdictional issues can be raised at any point in the proceeding. "While Barber did not challenged jurisdiction in juvenile court or district court, jurisdiction issues can be raised at any time." *Barber v. State*, 131 Nev. 1065 (2015) (citing *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011); see also, *Colwell v. State*, 118 Nev. 807, 812 (2002) (holding that lack of subject matter jurisdiction can be raised for the first time on appeal).

Additionally, jurisdiction over the case still remained with the District Court until it vests in the Nevada Supreme Court with the filing of a Notice of Appeal. "Upon the filing of a timely notice of appeal, the district court is divested of jurisdiction and jurisdiction vests in this court." *Rust v. Clark Cty. School District*, 103 Nev. 686, 747 P.2d 1380 (1987); *Smith v. Emery*, 109 Nev. 737, 740, 856 P.2d 1386, 1388 (1993). As such, the District Court did have the lawful ability to consider Appellant's Motion to Dismiss for lack of subject matter jurisdiction on the merits. Nonetheless, as the District Court held it did not have jurisdiction to consider the Motion while simultaneously adopting the substantive reasoning set by the State, Appellant will also address the substantive issues ruled upon by the Court.

The Juvenile Courts for the State of Nevada are a creation of statute. *Kell v. State*, 96 Nev. 791, 792, 681 P.2d 350 (1980). "Although the juvenile court is

structurally organized as a division of the district court, the juvenile court is separate court with separate and exclusive jurisdiction" *Castillo v. State*, 106 Nev. 349, 353 n.2 (1990).

By statute, "the juvenile court has exclusive original jurisdiction over a child living or found within the county who is alleged or adjudicated to have committed a delinquent act." NRS 62B.330(1) (emphasis added). A "child" is defined as "[a] person who is less than 21 years of age and subject to the jurisdiction of the juvenile court for an unlawful act that was committed before the person reached 18 years of age." NRS 62A.030(1)(b). There is no reasonable dispute that Mr. Zalyaul was a legally defined "child" when the acts were committed, as he was 14 years old.

Further, the juvenile court does not have jurisdiction over acts that are not considered to be "delinquent acts," as outlined in NRS 62B.330(3) (emphasis added):

> For the purposes of this section, each of the following acts shall be deemed not to be a delinquent act, and the juvenile court does not have jurisdiction over a person who is charged with committing such an act:
> ….
>
> (b) Sexual assault or attempted sexual assault involving the use or threatened use of force or violence against the victim and any other related offense arising out of the same facts as

> the sexual assault or attempted sexual assault, regardless of the nature of the related offense, if:
>
> (1) **The person was 16 years of age or older** when the sexual assault or attempted sexual assault was committed; and
> (2) Before the sexual assault or attempted sexual assault was committed, the person previously had been adjudicated for an act that would have been a felony if committed by an adult.
> ….
> (e) A category A or B felony and any other related offense arising out of the same facts as the Category A or B felony, regardless of the nature of the related offense, **if the person was at least 16 years of age but less than 18 years of age** when the offense was committed, and:
> ….
> the person is not identified by law enforcement as having committed the offense before the person is at least 20 years, 3 months of age, but less than 21 years of age…

Applied here, neither of these criteria for non-delinquent acts fully apply to Mr. Zalyaul's case. Mr. Zalyaul was only 14 years old at the time the acts occurred. It is unclear precisely when the victim made the initial report to law enforcement, but based on the year of the disclosure, Mr. Zalyaul would have been either 14 or 15 years old during the initial investigation period. Had the State prosecuted Mr. Zalyaul at the time the allegations were made, or within a reasonable period of time thereafter, the case would have fallen squarely within the purview of the juvenile court. Once the delinquency petition is filed, the juvenile court would determine whether Mr. Zalyaul would remain in the

juvenile court for delinquency proceedings or be certified to the adult criminal court depending on a variety of statutory factors.

Unlike the mandatory certification set forth in NRS 62B.390(2), Mr. Zalyaul's case falls within discretionary certification pursuant to NRS 62B.390(1).[1] The certification process requires a motion filed by the district attorney and a full investigation by the juvenile court. The statute also sets forth factors for the juvenile court to consider against certification. If the juvenile court does not certify the child, the juvenile court retains jurisdiction over the child until the child reaches twenty-one years of age. See, NRS 62B.410(2).

In light of these statutes, there is a jurisdictional "gap" when determining what process exists for defendants who commit offenses while under the age of 16, but who are not prosecuted until *after* they turn 21 and are no longer eligible for the juvenile court's exercise of jurisdiction. NRS 62B.335 grants the juvenile court jurisdiction over an adult charged with delinquent acts

---

[1] "Except as otherwise provided in subsection 2 and NRS 62B.400, upon a motion by the district attorney and after a full investigation, the juvenile court **may** certify a child for proper criminal proceedings as an adult to any court that would have jurisdiction to try the offense if committed by an adult, if the child:

(a) Except as otherwise provided in paragraph (b), is charged with an offense that would have been a felony if committed by an adult and was 14 years of age or older at the time the child allegedly committed the offense…" (emphasis added)

committed as a child, but does not apply because it only covers crimes committed by minors between the age of 16-18.[2]

Law enforcement's delay in prosecuting the allegations against Mr. Zalyaul has placed him in a limbo of sorts, where none of the juvenile court statutes clearly apply to his case and no clear jurisdictional determination exists in either the juvenile or district court. "The determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is critically important." *Kent v. United States*, 383 U.S. 541, 560 (1966) (internal quotations omitted).

---

[2] (1) If:

> (a) A person is charged with the commission of a delinquent act that occurred when the person was at least 16 years of age but less than 18 years of age;
> (b) The delinquent act would have been a category A or B felony if committed by an adult;
> (c) The person is identified by law enforcement as having committed the delinquent act before the person reaches 21 years of age; and
> (d) The person is apprehended by law enforcement after the person reaches 21 years of age, the juvenile court has jurisdiction over the person to conduct a hearing and make the determinations required by this section in accordance with the provisions of this section.

Additionally, there exists no sufficient justification to excuse the State's delay in prosecuting Mr. Zalyaul. The named victim, S. D., and her mother filed a report with the Las Vegas Metropolitan Police Department on September 13, 2013. Specific dates of the allegations were not disclosed. S. D. underwent a general medical examination at Sunrise Hospital on September 13, 2013.

According to the police report, attempts were made to locate Mr. Zalyaul, but S.D. and her mother provided information that he and his family had relocated back to Morocco where he attended high school. Mr. Zalyaul and his family returned to Las Vegas, Nevada in 2016, but still no action was taken for many years. In February 2019, Metro reopened their investigation. Five months later, on July 30, 2019, S.D. and her mother were again interviewed by Metro. Metro applied for an arrest warrant on or around October 14, 2019, which the Las Vegas Justice Court granted. Mr. Zalyaul was arrested on the warrant on January 7, 2020.

But for the State's delay, Mr. Zalyaul would have been prosecuted as a juvenile in the juvenile court, afforded all of the rights and resources available

to juveniles deemed delinquent.[3] The entire purpose of the juvenile court serves to treat juveniles rather than punish them.[4] The juvenile system focuses on treatment and rehabilitation more than punishment and incarceration.[5]

The adult court lacked subject-matter jurisdiction over Mr. Zalyaul's case, due to his age and juvenile status at the time of the alleged offenses, as the juvenile court has exclusive jurisdiction over offenses committed by children absent certification or a statutory exception. Absent proper subject matter jurisdiction over the case, it must be dismissed; further, the case could not be transferred back to the juvenile court due to Mr. Zalyaul being over the age of 21 at the time of his arrest. Although outright dismissal of these charges is an extraordinary remedy, it is the State's delay in prosecution that effectively

---

[3] *See*, NRS 62 – Disposition of Cases by Juvenile Court (setting forth options for juveniles after adjudication, including but not limited to, commitment, restitution, community service, and alternative programs).

[4] "Truly we want to keep children in juvenile court if we can help them. We do not want to escalate them up into adult circumstances and give them a record at such a young age and perhaps impact the rest of their lives." Hearing on S.B. 197 Before the Senate Judiciary Comm., 72d Leg. (Nev., March 7, 2003) (statement by Judge Cynthia Dianne Steel) (Bates 085).

[5] "A child who is adjudicated pursuant to the provisions of this title is not a criminal and any adjudication is not a conviction, and a child may be charged with a crime or convicted in a criminal proceeding only as provided in this title." NRS 62E.010(1).

deprived *both* the juvenile and the adult courts of subject matter jurisdiction, and the only proper remedy is dismissal.

II. Law Enforcement's Seven-Year Delay in Prosecution Violated Appellant's Right to a Speedy Trial and Resulted in Substantial Prejudice to the Defense

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. CONST. AMEND. VI. The right to a speedy trial is a "fundamental right" applied to the states through the Fourteenth Amendment. *Barker v. Wingo*, 407 U.S. 514, 515, 92 S. Ct. 2182 (1972). The definition of "speedy trial" has been explored by the Supreme Court of the United States in *Barker v. Wingo* and more recently *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686 (1992), both of which set forth the standard utilized by the Nevada Supreme Court in *Inzunza v. State*. 135 Nev. Adv. Rep. 69, 454 P.3d 727 (2019).

Put simply, excessive delay between the disclosure of accusations and eventual apprehension or arrest of the accused unfairly prejudices a defendant. In *Barker*, the U.S. Supreme Court set forth four factors the courts should use to determine whether a defendant has been deprived his speedy trial right: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of his

right, and (4) prejudice to the defendant. 407 U.S. at 530. While none of the factors hold more weight than the others, the first factor, length of delay, "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors." *Id*. *Doggett* furthered the applicability of *Barker* by establishing not a bright-line rule, but a guideline for courts to consider, holding that delay in excess of one year supports a finding of prejudice to the accused. The Nevada Supreme Court has also held that one-year between accusation and arrest supports a finding of prejudice against the Defendant. *Inzunza*, 454 P.3d at 731 (2019), quoting, *Doggett*, 505 U.S. at 652 n.1 (1992).

The purpose behind the speedy trial right granted by *Barker* and *Doggett*, is to protect the following interests of the defendant:

> (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurate events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. *Barker*, 407 U.S. at 532 (1972).

"No one factor is determinative; rather, they are related factors which must be considered together with such other circumstances as may be relevant." *United States v. Ferreira*, 665 F.3d 701, 705 (6th Cir. 2011) (internal quotation marks omitted).

All four-factors in the Barker and Doggett analysis favor dismissal of the instant case. The first factor, the length of the delay, is a "double [i]nquiry." *Doggett*, 505 U.S. at 651 (1992). The first question asks whether the length of the delay is presumptively prejudicial; consistent with the federal analysis, the Nevada Supreme Court has held that delay approaching one year supports this factor. The second question asks the court to consider "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim" because the "presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.*

The second factor, the reason for the delay, examines whether the government is responsible for the delay and its justification. *Inzunza*, 454 P.3d at 731 (2019). Here, clearly the responsibility for the excessive, prejudicial delay rests with the State (as law enforcement are agents of the State). No efforts were made to locate Mr. Zalyaul, despite the breadth of information provided by S.D. and her mother regarding Mr. Zalyaul and his family. Even

though Mr. Zalyaul was no longer in the United States, the government still had an obligation to make attempts to find him and bring him to trial. "After *Doggett*, the government was required to make some effort to notify Mendoza of the indictment, or otherwise continue to actively attempt to bring him to trial, or else risk that Mendoza would remain abroad while the constitutional speedy-trial clock ticked. However, the government made no serious efforts to do so. Further, there is no evidence that Mendoza was keeping his whereabouts unknown." *United States v. Mendoza*, 530 F.3d 758, 763 (9th Cir. 2008). Similarly, the U.S. Supreme Court found that law enforcement's efforts to locate *Doggett*, who had also left the country, were equally lacking.

The accused is under no obligation to bring himself to trial, see *Barker*, 407 U.S. at 527 (1972), but his assertion of or failure to assert his speedy trial right is one of the factors for the court to consider in determining if that right has been violated. "[A] defendant must know that the State has filed charges against him to have it weighed against him." *Inzunza*, 454 P.3d at 732. There is nothing in the record to suggest that Mr. Zalyaul knew of pending charges against him until his arrest, more than seven years after the alleged incidents.

The final factor, prejudice against the defendant, holds particular significance here. Examining prejudice against Mr. Zalyaul applies to two

proceedings: criminal trial proceedings in the adult court and certification proceedings in the juvenile court. Clearly a speedy trial violation affects a defendant's trial proceeding, but here the same prejudice created must also be considered toward the certification hearing that never happened. Pursuant to NRS 62B.390 (1) explained above, Mr. Zalyaul's case needed to originate in the juvenile court system as a delinquency petition. Only after a proper certification hearing in which the juvenile court determined to certify Mr. Zalyaul to the adult criminal court could the State file a criminal complaint in the Las Vegas Justice Court.

The speedy trial delay not only prevent such a process from occurring, but also leaves Mr. Zalyaul with no available remedy. To attempt a certification hearing now would prove futile; the same obstacles present in a speedy trial violation exist here. "[T]he inability of the defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." *Barker*, 407 U.S. at 532 (1972). Mr. Zalyaul's ability to adequately prepare evidence to refute certification has been hindered

by the lengthy delay between accusations made in 2013 and a hearing now in 2021.

"Once triggered by arrest, indictment or *other official accusations*, however, the speedy trial enquiry must weigh the effect of delay on the accused's defense just as it has to weigh any other form of prejudice that *Barker* recognized." *Doggett v. United States*, 505 at 655 (1992) (emphasis added). Though the *Barker*, *Doggett*, *Inzunza* analysis primarily finds itself applied to post-warrant delays, nothing in these seminal cases *requires* the filing of an arrest warrant or a charging document. All three cases utilize the term "accusation" as a starting point in the timeframe analysis, which must be determined on a case-by-case basis. "[U]nreasonable delay between formal accusation and trial threatens to produce more than one sort of harm." *Doggett*, 505 U.S. at 654 (1992). "What is prevalent throughout speedy trial challenges is that "there [are] no hard and fast rule[s] to apply . . ., and each case must be decided on its own facts." *Inzunza*, 454 P.3d at 731 (2019), quoting *United States v. Clark*, 83 F.3d 1350, 1354 (11th Cir. 1996).

Mr. Zalyaul was arrested on January 7, 2020 in the instant case; it was more than six years after the named victim and her mother made a formal report to the Las Vegas Metropolitan Police Department; it was almost an entire

year after law enforcement reopened the investigation, having allowed it to grow cold years earlier. Mr. Zalyaul and his family returned to Las Vegas in 2016 after he completed high school in Morocco and yet there were no officers, no warrants, and no criminal charges until more than four years after his return.

Here, excessive delay is evident and prejudicial. Calculating the delay from S.D.'s initial disclosure, nearly seven years passed before Mr. Zalyaul's arrest. Law enforcement knew of the allegations, knew who the suspect was, and knew where to find him. However, no further action was taken following S.D.'s initial disclosure and medical examination. Law enforcement did not apply for an arrest warrant, reach out to Mr. Zalyaul or his family, investigate locations or addresses he frequented, conduct internet searches for his social media, or make any significant steps toward apprehending him. See, *United States v. Hidalgo*, 711 Fed. Appx. 819, 822 n.1 (9th Cir. 2017) (holding that the Government's efforts – which included conducting surveillance, placing a warrant into the NCIC database, seeking the assistance of the local police department, conducting internet searches for the defendant, including on social media websites, and arresting him at the airport after receiving

information that he was scheduled to return to the United States – were sustained and targeted efforts to locate the defendant).

"Condoning prolonged and unjustifiable delays in prosecution would both penalize many defendants for the state's fault and simply encourage the government to gamble with the interests of criminal suspects assigned a low prosecutorial priority. The Government, indeed, can hardly complain too loudly, for persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the Government attaches to securing a conviction, the harder it will try to get it." *Doggett*, 505 U.S. at 657 (1992).

Because this case meets all four factors of the *Doggett/Barker* analysis, the District Court erred in failing to dismiss his case.

III. Under Modern Application of Contract Principles to Guilty Plea Agreements, Appellant was Entitled to Withdraw His Plea

There has been a growing trend in both State and Federal courts to recognize and apply traditional principles of contract to guilty plea agreements in criminal cases. This appeal presents an issue of first impression in Nevada courts: whether application of contract principles to plea agreements creates the right to withdraw a guilty plea when the trial court imposes a sentence over

and above that contemplated in the bargain (Appellant made an oral request to withdraw his plea at the time of sentencing, and further requested additional briefing on the issue; both requests were denied). Appellant contends that such a right does exist, which ultimately stems from the formal recognition of the trial court as a necessary party to the contract itself.

The Nevada Supreme Court best articulated the evolution of contractual elements in guilty plea agreements in *State v. Crockett*, 110 Nev. 838, 877 P.2d 1077 (1994). Although plea agreements are facially comparable to ordinary contracts, historically in the criminal context, plea bargains were viewed strictly through the lens of constitutional rights, with the obligations of the parties determined by Due Process considerations. "A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. However, once a defendant enters a guilty plea and the plea is accepted by the court, due process requires that the plea bargain be honored." *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1078-79 (1994) (quoting *Mabry v. Johnson*, 467 U.S. 504, 81 L. Ed. 2d 437,

104 S. Ct. 2543 (1984); *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971)).

Crockett, however, went further to analyze how other jurisdictions, both state and federal, have begun to analyze plea agreements under traditional principles of contract that had previously been applied only in private or civil matters.

> While plea agreements are a matter of criminal jurisprudence, most courts have held that they are also subject to contract principles. See, e.g., *United States v. Kingsley*, 851 F.2d 16, 21 (1st Cir. 1988) (using contractual analysis to enforce plea agreement and award "benefit of the bargain"); *United States v. Read*, 778 F.2d 1437, 1441 (9th Cir. 1985) ("a plea bargain is contractual in nature and is measured by contract-law standards"), cert. denied, 479 U.S. 835, 93 L. Ed. 2d 75, 107 S. Ct. 131 (1986); *United States v. Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985) ("plea bargains are subject to contract law principles insofar as their application will insure the defendant what is reasonably due him"); *United States v. Fields*, 766 F.2d 1161, 1168 (7th Cir. 1985) ("A plea bargain is a contract."). *Crockett*, 110 Nev. at 842.

Lastly, *Crockett* further recognized what had already been established through federal case law, that plea bargains are not enforceable on either the prosecution or the defense until the plea is accepted by the court. “Similarly, other federal and state courts have dealt with the issue at bar and have generally concluded that neither a defendant nor the government is bound by

a plea offer until it is approved by the court." In adopting this view, the Ninth Circuit Court agreed with the Fifth Circuit's reasoning that:

> the realization of whatever expectations the prosecutor and defendant have as a result of their bargain depends entirely upon the approval of the trial court. Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves the plea. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party would be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and the bargain as it then exists is accepted by the court." *Crockett*, 110 Nev. at 843 (internal citations omitted).

However, the contractual analysis has always stopped one step short: the Courts have not yet formally recognized the trial court to be a *party* to the plea agreement itself, despite the recognized condition that all plea bargains are not enforceable unless and until it is accepted by the trial court. In fact, it is *only* upon the trial court's acceptance of a plea bargain that it becomes an enforceable contract with obligations imposed on the prosecution and defense. Without the trial court's approval, the bargain is merely an offer or informal agreement that may be revoked, modified or withdrawn at any time (subject to detrimental reliance and other contractual estoppel principles).

Although there is no contract-specific legal definition for a "contractually necessary party," under Nevada Rule of Civil Procedure 19 for litigation purposes, a "required party" (previously termed a "necessary party") must be joined in the litigation if, "in that person's absence, the court cannot accord complete relief among existing parties."

Applied in this context, the trial court would be a "necessary party" to any guilty plea agreement because execution and enforcement of the agreement is strictly contingent on the trial court's approval of the bargain; without the court's approval, there is no plea agreement, i.e. no contract. Citing with approval the First Circuit case of *United States v. Papaleo*, 853 F.2d 16, 20 (1st Cir. 1988), the *Crockett* court reiterated the First Circuit's conclusion that "[a]pplying these general contract principles… a plea agreement is nothing more than an offer until it is approved by the court." *Crockett*, 110 Nev. at 842. "We hold that neither the defendant nor the government is bound by a plea agreement until it is approved by the court." *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992).

In summation, the Courts have not formally recognized the trial court as an indispensable party to a plea bargain contract, but have applied this very concept in reaching the fundamental premise that a plea bargain is not legally

enforceable until accepted by the trial court. If any plea agreement is not a binding contract until it is accepted by the trial court, then the trial court has become a necessary and indispensable party to the contract itself because, in the court's absence, the contract does not exist and affords no relief.

This premise is already being applied in a practical context, but formal recognition of the trial court as a party to a plea bargain contract carries with it several noteworthy consequences, as all parties to a contract are subject to certain conditions, obligations, and discretions.

There is little question that once a plea is accepted by the trial court, both the defendant and the prosecutor are bound to its terms. "[I]f the defendant pleads guilty and if that plea is accepted by the court, then the government will perform as stipulated in the agreement. Until performance took place by [defendant], the government was free to withdraw its offer." *State v. Crockett*, 110 Nev. 838, 842-43, 877 P.2d 1077, 1079 (1994) (citing *United States v. Papaleo*, 853 F.2d 16, 20 (1st Cir. 1988)). "Surely neither party contemplates any benefit from the agreement unless and until the trial judge approves the bargain and accepts the guilty plea. Neither party is justified in relying substantially on the bargain until the trial court approves it." *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992) (quoting *United States v.*

Ocanas, 628 F.2d 353, 358 (5th Cir. 1980)). "Where the 'plea bargain' is not kept by the prosecutor, the sentence must be vacated and the state court will decide in light of the circumstances of each case whether due process requires (a) that there be specific performance of the plea bargain or (b) that the defendant be given the option to go to trial on the original charges." *Santobello v. New York*, 404 U.S. 257, 267, 92 S. Ct. 495, 501 (1971).

Once a plea bargain has been accepted by the trial court, the obligations imposed on the prosecution and defendant are fairly well established; however, there is much less legal analysis available on what obligations are imposed on the court itself.

The current state of the law is clear that the trial court has complete discretion and is under no obligation to accept the plea. "Accepting a tendered plea of guilty is within the sound discretion of the trial court." *Schoels v. State*, 114 Nev. 981, 984, 966 P.2d 735, 737 (1998); *Sturrock v. State*, 95 Nev. 938, 940, 604 P.2d 341, 343 (1979). Recognition of the trial court as a necessary party does not change or restrict this discretion, just as a person provided with a proposed agreement is under no obligation to sign it.

The question is less clear, however, when the trial court accepts the plea, thus creating a binding contract between the prosecution, the defense, and

now, the trial court itself. The material terms of the contract are bargained between the prosecution and the defense, who are then bound to the agreed terms. The law has not established what obligations exist on the court, which is not otherwise a party during the negotiation process and only becomes a party upon acceptance of the negotiation as determined by the defense and the prosecution.

Nevada case law currently holds that trial courts are under no obligation to sentence a defendant to the terms agreed upon by the prosecution and defense, as the court retains ultimate discretion in the determination of a final sentence. "When a defendant pleads guilty pursuant to a plea agreement containing a sentencing recommendation, and the district court accepts the proffered guilty plea, the district court retains wide discretion in imposing sentence." *Stahl v. State*, 109 Nev. 442, 444, 851 P.2d 436, 438 (1993); see also, *Houk v. State*, 103 Nev. 659, 747 P.2d 1376 (1987).

This is where the application of contractual principles to guilty plea agreements alters the analysis, but not in a manner that would restrict the existing discretion of the trial court. Historically, if a party is given unfettered discretion to perform its obligations under a contract, the contract itself is considered illusory. As best summarized by a California federal district court:

"An agreement is illusory, and no enforceable contract has been created, if a promisor is 'free to perform or to withdraw from the agreement at his own unrestricted pleasure.' Generally, '[a] contract is unenforceable as illusory when one of the parties has the unfettered or arbitrary right to modify or terminate the agreement or assumes no obligations thereunder.'" *Moua v. Optum Servs.*, 320 F. Supp. 3d 1109, 1113 (C.D. Cal. 2018) (quoting *Mattei v. Hopper*, 51 Cal. 2d 119, 122, 330 P.2d 625 (1958); *Harris v. Tap Worldwide, LLC*, 248 Cal. App. 4th 373, 385, 203 Cal. Rptr. 3d 522 (2016)).

On its face, the trial court's "wide discretion" in determining whether to follow the recommendation of the parties would seemingly create a situation where all guilty plea agreements are illusory; the trial court, despite being a necessary party to a plea agreement (and a party whose approval is what creates a binding contract), has the "unfettered or arbitrary right to modify or terminate the agreement" because it is under no obligation to follow the sentencing recommendation; the trial court further "assumes no obligations" to follow the sentencing recommendation, even after the plea becomes binding. However, it would be an absurd result to conclude that all guilty plea agreements are inherently illusory simply by virtue of the court's discretion.

The solution lies in the implied covenant of good faith and fair dealing. The existence of contractual discretion which is textually unlimited on its face does not render the contract illusory because every contract inherently includes the implied covenant of good faith and fair dealing. "It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods*., 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993).

The implied covenant of good faith and fair dealing acts as an automatic and inherent limitation to every instance of discretion in a contract – regardless of the level of discretion that exists, it must always be exercised in a manner that comports with this implied covenant.

Nonetheless, as the application of contractual principles in the criminal context is still relatively novel in the State of Nevada, the question has not yet been answered as to if and how the implied covenant of good faith and fair dealing applies to a guilty plea agreement.

Yet, it is the existence of this implied covenant that prevents guilty plea agreements from being illusory *ab initio* because all parties – the prosecution, the defense, and the court – are bound to act in good faith. The Ninth Circuit has

held that contracts with unlimited discretion may nonetheless be valid because all discretionary action must still accord with the implied covenant.

> Thus, a court will not find a contract to be illusory if the implied covenant of good faith and fair dealing can be read to impose an obligation on each party. The covenant of good faith "finds particular application in situations where one party is invested with a discretionary power affecting the rights of another."… [W]e conclude that the contract is not illusory because West's duty to exercise its discretion is limited by its duty of good faith and fair dealing. *Chodos v. W. Publ'g Co.*, 292 F.3d 992, 997 (9th Cir. 2002) (internal citations omitted).

In determining how the implied covenant of good faith and fair dealing applies specifically to criminal plea bargains, the analysis turns to whether the exercise of discretion is faithful to the *justified expectations* of the other parties. "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.' Questions of good-faith performance thus necessarily are related to the application of terms of the contractual agreement." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217 n.11, 105 S. Ct. 1904, 1914 (1985) (quoting Restatement (Second) of Contracts § 205, Comment a, p. 100 (1981)). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied,

damages may be awarded against the party who does not act in good faith. Whether the controlling party's actions fall outside the reasonable expectations of the dependent party is determined by the various factors and special circumstances that shape these expectations." *Hilton Hotels Corp. v. Butch Lewis Prods*., 107 Nev. 226, 234, 808 P.2d 919, 923-24 (1991) (citing *A.C. Shaw Construction v. Washoe County*, 105 Nev. 913, 784 P.2d 9 (1989); *Maddaloni v. Western Mass. Bus Lines, Inc*., 438 N.E.2d 351 (Mass. 1982)).

To summarize, the parties to a contractual guilty plea agreement (the prosecution, the defense, and the trial court) have varying amounts of discretion at different points in the plea bargain process, but regardless of that discretion, all parties are obligated under the implied covenant of good faith and fair dealing to execute the contract in a manner consistent with the justified expectations of the remaining parties.

This leads to the final piece of criminal contractual analysis: what are the justified expectations of the parties; when are those expectations thwarted; and what is the remedy.

What constitutes the "justified expectations" of a party must be determined on a case-by-case basis. However, language from the Fifth Circuit,

cited with approval in both the Ninth Circuit and Nevada Supreme Court in *Crockett*, is instructive; specifically,

> Neither party is justified in relying substantially on the bargain until the trial court approves the plea. We are therefore reluctant to bind them to the agreement until that time. As a general rule, then, we think that either party would be entitled to modify its position and even withdraw its consent to the bargain until the plea is tendered and **the bargain as it then exists is accepted by the court**. *State v. Crockett*, 110 Nev. 838, 843, 877 P.2d 1077, 1079 (1994) (quoting *United States v. Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980)) (emphasis added).

In current practice, a plea bargain is typically bifurcated into two hearings: the entry of the guilty plea, and final sentencing. It is not clear, however, when "the bargain as it then exists is accepted by the court." In cases where the plea bargain contemplates a plea of guilty to a specified charge with the parties retaining the right to argue, the only justified expectation is for the trial court to accept the plea of guilty to the specified charge, as the bargain itself contemplates leaving the decision of an appropriate sentence in the hands of the trial court. However, when plea bargains contemplate a specific sentence, (or even more importantly, a specific charge), Appellant contends the "bargain as it then exists" is more than simply entering a plea of guilty to the charge itself – the bargain as it exists includes both an agreement as to the ultimate charge

as well as a justified expectation of the sentence both parties have agreed is appropriate.

The law states the justified reliance of the parties exists when the plea is tendered *and* the bargain as it then exists is accepted by the Court. As applied to this case, Mr. Zalyaul bargained for, and had a justified expectation of, probation with a subsequent drop down to a gross misdemeanor, and an agreement to seal his criminal record. That was the bargain between the parties, the plea was tendered, but the "bargain as it then exists" was not accepted by the District Court, which sentenced him to 4-10 years in prison and precluded him from meeting the conditions that would warrant the reduction in his charge and agreement to seal. In doing so, the court did not act in bad faith or unlawfully, but rather executed the guilty plea agreement in a manner that was inconsistent with the justified expectations of the other parties.

The intuitive counterargument is to question whether a defendant's expectations of a particular sentence are justified when the plea agreement itself expressly notes the discretion of the sentencing court; however, Appellant maintains the mere existence of discretion does not render a defendant's expectations to be unjustified. In fact, Appellant would argue such a position creates a quandary of unconscionability.

Contractual unconscionability exists when "the clauses of that contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party." *Bill Stremmel Motors v. IDS Leasing Corp*., 89 Nev. 414, 418, 514 P.2d 654, 657 (1973). "An illusory contract is an agreement where the only consideration given by one or both parties is insufficiently valuable to form an enforcement contract, as when the consideration offered by one party is an unperformable or unenforceable promise **or is of very little value** compared to the consideration offered by the other party." *Illusory Contract*, BOUVIER LAW DICTIONARY (emphasis added).

When entering a plea of guilty pursuant to a plea bargain, criminal defendants relinquish multiple substantial and fundamental constitutional rights upon entering into a plea bargain. As summarized by the U.S. Supreme Court in *Santobello*,

> However important plea bargaining may be in the administration of criminal justice, our opinions have established that a guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, to confront one's accusers, *Pointer v. Texas*, 380 U.S. 400, to present witnesses in one's defense, *Washington v. Texas*, 388 U.S. 14, to remain silent, *Malloy v. Hogan*, 378 U.S. 1, and to be convicted by proof beyond all reasonable doubt, *In re Winship*, 397 U.S. 358. *Santobello v. New York*, 404 U.S. 257, 264, 92 S. Ct. 495, 500 (1971).

When the consideration by the defendant is the voluntary relinquishment of not less than five fundamental rights, it is unconscionable to conclude that his only justified expected benefit in return is for the State to merely utter words at a hearing, which may or may not be heeded; in giving up these significant rights, the defendant has the justified expectation that he will receive the benefit of a sentence he has bargained for and which both other parties (the defense and the prosecution) believe is appropriate.

This justified expectation must still be determined on an individualized basis, as it does not exist with the same degree of force in "no recommendation" or "right to argue" plea bargains. But in situations such as this one when both parties contemplated a specific sentence and reduced charge, in giving up his constitutional rights, Mr. Zalyaul had a justified expectation to receive the appropriate bargained sentence.

The existence of a justified expectation of the parties when they have bargained for a particular sentence does not remove any discretion from the trial court, which still maintains their existing discretion to reject "the bargain as it then exists" (whether rejecting the plea to the charge itself or rejecting the negotiated particular sentence). The Court is not limited in its ability to exercise its discretion, but rather when the Court goes above and beyond the sentence

contemplated by the parties, thereby thwarting their justified expectations, the parties in turn have a legally recognized contractual remedy.

The remedy, as already established through case law, is a choice of withdrawing the plea or specific enforcement.

> We have previously agreed with the following pronouncement by the California Supreme Court:
>
> The goal in providing a remedy for breach of the [plea] bargain is to redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge. The remedy chosen will vary depending on the circumstances of each case. Factors to be considered include who broke the bargain and whether the violation was deliberate or inadvertent, whether circumstances have changed between entry of the plea and the time of sentencing, and whether additional information has been obtained that, if not considered, would constrain the court to a disposition that it determines to be inappropriate. . . .
>
> The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances. *Citti v. State*, 107 Nev. 89, 92, 807 P.2d 724, 726-27 (1991).

Once a plea bargain becomes binding, the available remedy should exist whether the justified expectations of the parties are thwarted by the defendant (wherein the prosecution can withdraw the plea), by the prosecution (wherein the defendant can withdraw the plea), or by the trial court (wherein either the prosecution or defense can withdraw the plea). The remedy is objective, and equally applicable to all parties: if the trial court imposes a sentence over and above that contemplated by the parties, the justified expectations of the defense are not met, and the defense can withdraw his plea; on the other hand, if the trial court imposes a sentence lower than that contemplated by the parties, the justified expectations of the prosecution are not met, and the prosecution can withdraw the plea. Thus, the discretion of the court in determining the final sentence still remains unchanged, as the court still has the ultimate choice to accept or reject the bargain (as there can be no specific performance remedy since the law already recognizes the discretion of the court to accept or reject a plea bargain, the only available remedy is withdrawing the plea).

Providing this remedy to the other parties to the contract (the defense and the prosecution) is not only equitable in nature, but it supports important public policy considerations as well. Plea bargaining is an integral part of the

criminal justice system, providing for faster resolution of cases, reducing the expense of judicial resources, and lightening the burden on a taxed court system to "keep the wheels of the system turning": "Plea bargaining in our judicial system is virtually a necessity. It is largely justified in terms of keeping the wheels of the system turning." *Jezierski v. State*, 107 Nev. 395, 399, 812 P.2d 355, 357 (1991) (dissent). "In this regard, the legislature has expressed the public policy favoring the candid and honest negotiations necessary for the successful operation of our plea bargaining system." *Mann v. State*, 96 Nev. 62, 65, 605 P.2d 209, 210 (1980).

Providing an alternative remedy for when the trial court acts in a manner inconsistent with the justified expectations of the parties provides a level of predictability and assurances that does not currently exist; the fear of the trial court's discretion, and the likelihood that plea bargains will not be followed acts significantly to discourage plea bargaining. This contractual remedy does not limit the existing discretion of any party, but merely provides additional assurances that a defendant is not waiving valuable constitutional rights in exchange for nothing more than an unknown outcome. This remedy is the natural and uncontrived result of applying basic contract principles, and

ensuring that those who relinquish their rights by participating in the invaluable plea bargaining system simply get what they bargained for.

In this case, Mr. Zalyaul opted to participate in a plea bargain, and in doing so voluntarily waived (among others) his right to a trial by jury, his right to present witnesses, his right to remain silent, his right to confront and cross examine his accusers, and his right to be convicted by proof beyond a reasonable doubt. He did so with the justified expectation that he would receive probation with an opportunity to earn a reduction to a gross misdemeanor, and an agreement to seal his record, as both the defense and prosecution agreed this sentence was appropriate under the specific circumstances of this case. Because the trial court exercised its discretion in a manner that did not comport with the justified expectation of either party, as a matter of contract, public policy, and equity, Mr. Zalyaul should be entitled to withdraw his plea.

CONCLUSION

For these reasons, Appellant respectfully requests this Court remand the matter to dismiss this case and/or to permit Mr. Zalyaul to withdraw his plea.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 20 day of December, 2021.

NEVADA DEFENSE GROUP
Respectfully Submitted By:

Kelsey Bernstein
KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I 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 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 10,056 words.

3. 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(c), 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 matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20 day of December, 2021.

Respectfully Submitted By:

Kelsey Bernstein

Nevada Defense Group
KELSEY BERNSTEIN, ESQ.
Nevada Bar No. 13825
714 S. Fourth Street
Las Vegas, Nevada 89101
(702) 988-2600
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 20 day of December, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

Steve Wolfson, Esq.
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89101

Kelsey Bernstein
Employee of Nevada Defense Group