IN THE SUPREME COURT OF THE STATE OF NEVADA

Hamza Zalyaul, Appellant vs. State of Nevada, Respondent,	)	Supreme Court Case No.: 83334 **APPELLANT'S MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF** **Extension Requested: April 13, 2022**

COMES NOW, KELSEY BERNSTEIN, ESQ., Retained Counsel, hereby moves this Court for an extension of time within which to file Appellant's reply brief based on the following declaration.

DATED this 13 day of April, 2022.

NEVADA DEFENSE GROUP

By: Kelsey Bernstein

Kelsey Bernstein, Esq.
Nevada Bar No.: 13825
Damian Sheets, Esq.
Nevada Bar No.: 10755
Nevada Defense Group
714 S. Fourth Street
Las Vegas, NV 89101
Attorney for Appellant

MEMORANDUM/DECLARATION

Counsel, Kelsey Bernstein, is a duly licensed attorney in the State of Nevada and has been retained to represent Appellant Hamza Zalyaul in the instant proceedings.

Appellant was previously in a murder trial that was expected to end on approximately April 1, 2022; however, said trial concluded after 5pm on April 4, 2022.

Appellant has since drafted the Reply Brief in this matter (see **Exhibit 1**, attached hereto).

I declare under penalty of perjury that the information set forth in this Memorandum is true and correct.

DATED this 13 day of April, 2022.

NEVADA DEFENSE GROUP

By: Kelsey Bernstein

Kelsey Bernstein, Esq.
Nevada Bar No.: 13825
Nevada Defense Group

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of April, 2022, I faxed and/or mailed a true and correct copy of the foregoing **MOTION FOR EXTENSION OF TIME**, to the following:

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

Kelsey Bernstein

EXHIBIT 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I. This Court has Proper Jurisdiction and Authority to Consider All Claims Raised

Respondent State of Nevada asks this Court to dismiss Appellant's direct appeal because this Court lacks jurisdiction. Respondent's position is incorrect as a matter of law, and this Court has full jurisdiction to consider the arguments presented.

Respondent contends this Court lacks jurisdiction in three respects: first, that Appellant waived his right to appeal when he executed a guilty plea agreement containing limitations on his appellate rights (State's Answering Brief, hereinafter "SAB," 8); second, that Appellant waived his argument regarding the lower court's lack of subject matter jurisdiction (SAB, 10); and third, that Appellant does not have statutory authority to appeal the Motion to Dismiss that was filed two days after the Judgment of Conviction, but prior to the Notice of Appeal. All three of these arguments are without merit.

All of Appellant's arguments concern proceedings and motions filed after the guilty plea agreement had been entered. While a guilty plea agreement waives appellate issues that occur *prior to* entry of the plea, it does not necessarily apply prospectively.

> [A] guilty plea represents a break in the chain of events which has *preceded* it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea*. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the [acceptable] standards. *Gonzales v. State*, 492 P.3d 556, 561 (Nev. 2021) (citing *Tollett v. Henderson*, 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973)) (emphasis in original).

As to the second issue, subject matter jurisdiction as a matter of law can be raised at any time – even for the first time on appeal – and can never be waived. *Colwell v. State*, 118 Nev. 807, 812 (2002) (holding that lack of subject matter jurisdiction can be raised for the first time on appeal). "It is fundamental that jurisdiction of the court cannot be waived by the parties, and that the court must have jurisdiction of the parties and the subject matter in order to render a valid decree." *Wilson v. Wilson*, 66 Nev. 405, 415-16, 212 P.2d 1066, 1071 (1949).

Finally, this Court has full authority to consider the arguments raised in the Motion to Dismiss, which was also heard and decided on the merits in District Court. During sentencing, when making an oral motion to withdraw the plea, Appellant specifically requested a briefing schedule, and that request was

denied. Ultimately, Appellant filed its Motion two days after the Judgment of Conviction, but prior to the appeal being taken.

The Motion was fully briefed by both parties and the District Court made factual and legal findings on the issues raised. The District Court's Order in this regard is inherently contradictory – it found that the District Court did not have jurisdiction to consider the Motion (but did not provide any legal authority for this assertion), and subsequently continued to make factual and legal findings on the merits of the Motion.

To the extent that the District Court held it lacked jurisdiction to consider Appellant's Motion, this would be an abuse of discretion because the Court provided no legal basis as to why jurisdiction was improper, and the law is clear that subject matter jurisdiction can be raised at any time (see, *supra*). However, since the District Court made factual findings on the merits of Appellant's Motion, it is appealable pursuant to NRS 177.045.

The statute provides, in its entirety: "Upon the appeal, any decision of the court in an intermediate order or proceeding, forming a part of the record, may be reviewed." The appeal was filed on August 4, 2022, shortly after the Order Denying the Motion to Dismiss was filed. Therefore, the contents of the Order

is a "decision of the court" in a proceeding "forming a part of the record" prior to appeal, and is appealable in the instant direct appeal.

II. The State's Delay in Prosecution Created a Lack of Subject Matter Jurisdiction

At the time of the allegation, Appellant was a child as defined in NRS 62A.030, and as such his case was governed by the "exclusive original jurisdiction" of the juvenile court. See, NRS 62B.330. Both Appellant and his charges would have made him a "child living or found within the county who is alleged or adjudicated to have committed a delinquent act."

There is only one statute that governs instances when a child who commits a delinquent act can still be under the jurisdiction of the juvenile court, even after the child has attained the age of 21. NRS 62B.335 states, in pertinent part:

> 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.

Subsections (b), (c), and (d) all apply to this case. The delinquent act would have been a category A felony if committed by an adult, which is apparent from Appellant in fact being charged with category A felonies as an adult; he was identified by law enforcement in 2013, when he was 14 years old; and he was apprehended by law enforcement after reaching 21 years of age. The only reason Appellant's case is not more clearly in the jurisdiction of the juvenile court is because he was *younger* than 16 at the time.

Respondent argues that because no juvenile jurisdiction statutes apply to his case (ironically as a result of him being *too young* when the offense occurred), by default the District Court must have jurisdiction. The law is clear that a defendant may not escape jurisdiction by way of his own wrongful conduct, such as illegally fleeing prosecution. The law is much less clear, however, about the remedy when it is the *State's* wrongdoing or negligence which defeats juvenile jurisdiction, and this would seem to be an issue of first impression in Nevada.

In *Castillo v. State*, 110 Nev. 535, 874 P.2d 1252 (1994), the defendant committed an act as a juvenile, subsequently fled the State, and then sought to have his case heard in juvenile court based on subsequent amendments to juvenile jurisdiction statutes, even though he was an adult at the time of arrest. This Court held "[a]llowing Castillo benefit from his intentional, illegal absence from the State goes against common notions of fairness and justice. In a similar case, the Supreme Court of Minnesota refused to allow such a benefit to a seventeen year old charged with homicide in the juvenile court. The juvenile left the state, moved to Texas, and was not arrested until after he turned twenty-one… Refusing to accept this 'home free' argument allowing the offender to benefit from his illegal flight, the court ruled that the adult court automatically obtained jurisdiction. We likewise refuse to allow Castillo to illegally flee the state and come back yelling 'home free' now that NRS 62.080 has been amended." *Id.* The law is well settled that a *defendant's* wrongdoing or illegal flight cannot be used to defeat jurisdiction, but what if the delay is the result of the *State's* gross negligence in timely prosecution?

Although Respondent argues that Appellant "fled to Morocco after S.D. made her accusations of sexual assault on a minor, showing Zalyaul certainly understood there were legal ramifications for his actions," this speculative

assertion conspicuously contains no citation to the record (SAB, 23). Appellant did not "flee" to Morocco to escape prosecution – he was a 14 year old boy that moved with his parents back to their home country. At the time, even though the victim had disclosed the offenses to law enforcement, law enforcement had taken no action to even inform Appellant of the charges, nor did they undertake any effort to do so for the next six years.

Had Appellant's case been timely brought in the juvenile court, the disposition of his case would be remarkably different. Appellant was only 14 years old, *possibly even only 13*, at the time of the offense, which was committed against an 11 year old. The dates of the allegations are unclear; the State represented at various times that Appellant was 13 at the time of the offense ("Accordingly, as Defendant was 13 when he committed the instant offenses, he was not 16-18 years of age…") (Bates 062). It is unclear whether Appellant would have even had the requisite mental intent to commit a category A felony at that age.

If Appellant's case had been identically adjudicated in the juvenile court, his sentence would be mandatory probation for three years, juvenile sex offender registration with a separate hearing to determine the possibility for registration after he turned 18, and the State could have sought commitment

for a period of 9 months at a youth camp or similar juvenile correctional placement. Instead, because the State delayed its prosecution until after Appellant turned 21 years old, the same conduct resulted in Appellant being charged as an adult and receiving a 4-10 year prison sentence with lifetime sex offender registration.

Allowing the State to defeat juvenile jurisdiction through its own delays in prosecution violates nearly every public policy that exists which led to the very creation of the juvenile justice system.

It would be absurd to assume that the absence of a juvenile statute wholly applicable to Appellant means that the legislature intended for someone in his unique situation to lose the protections and privileges of the juvenile statutes.[1] Indeed, the intention to protect juvenile offenders is clear both in the legislative history[2] and the courts[3] for a multitude of reasons. Juvenile offenders, as a

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[1] "These rulings have not been made on the uncritical assumption that the constitution rights of children are indistinguishable from those of adults. Indeed, our acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults." *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

[2] *See*, S.B. 197 Committee Minutes, March 7, 2003, excerpt attached hereto as Exhibit A; A.B. 267 Committee Minutes, March 27, 2015, excerpt attached hereto as Exhibit B.

[3] "The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the corpus juris. Its

general group, lack the mental capacity and fortitude possessed by adult defendants.[4] Most juvenile statutes, including those in Nevada, limit penalties imposed upon juvenile offenders[5] and afford more protections than those available to adult defendants.[6]

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proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge." *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

[4] "What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child -- an easy victim of the law - - is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens. This is the period of great instability which the crisis of adolescence produces." *Haley v. Ohio*, 332 U.S. 596, 599 (1948).

[5] "The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until his is 21 years of age." *Kent,* 383 U.S. at 556 (1966).

[6] "A juvenile or "child" is placed in a more protected position than an adult, not by the Constitution but by an Act of Congress. In that category he is theoretically subject to rehabilitative treatment. Can he, on the whim or caprice of a prosecutor, be put in the class of the run-of-the-mill criminal defendants, without any hearing, without any chance to be heard, without an opportunity to rebut the evidence against him, without a chance of showing that he is being given an invidiously different treatment from others in his group? *Kent* and *Gault* suggest that those are very substantial constitutional

The legislature and the courts have given much consideration to the societal benefits of focusing juvenile justice programs on rehabilitation rather than punishment or retribution.[7] The purpose behind treating juvenile delinquents differently from adult defendants hinges on distinctions between the two groups; notably the "lack of maturity and an undeveloped sense of responsibility [] found in youth more often than adults"[8] and that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[9] "These differences render suspect

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questions." *Bland v. United States*, 412 U.S. 909, 910 (1973) (Douglas, J., dissenting).

[7] "The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The child -- essentially good, as they saw it -- was to be made "to feel that he is the object of [the state's] care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable. The apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law were therefore to be discarded. The idea of crime and punishment was to be abandoned. The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive." *In re Gault*, 387 U.S. 1, 15-16 (1967).

[8] *Roper v. Simmons*, 543 U.S. 551, 569, 125 S. Ct. 1183 (2005).

[9] *Id*. at 570.

any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'" *Roper v. Simmons,* 543 U.S. 551, 570, 125 S. Ct. 1183 (2005), quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 108 S. Ct. 2687 (1988) (plurality opinion). The goals and intentions behind the formation of juvenile courts clearly indicate that juvenile offenders, such as Mr. Zalyaul, are to be adjudicated in the juvenile system, not through adult criminal proceedings.

Just as the defendant cannot request more lenient treatment in the juvenile system as a result of his own unlawful conduct, *Castillo v. State*, 110 Nev. 535, 874 P.2d 1252 (1994), the State should not be allowed to defeat juvenile jurisdiction as a result of their own unlawful delays in prosecution. This not only deprives Appellant of the resources and rehabilitative efforts of the juvenile system, but allows the State to request and obtain significantly harsher punishment in the adult system than would ever be allowed if the case was timely brought in juvenile court. Conversely, Appellant should not suffer the consequences of a significant prison sentence, including lifetime registration as a sex offender, because of the State's delay for offenses committed when he was only 13 or 14 years old.

NRS 171.010 holds that "every person… is liable to punishment by the laws of this state for a public offense committed therein." Appellant was liable to punishment in the juvenile courts. Had Appellant's case been timely prosecuted, he would fall squarely within the *exclusive* jurisdiction of the juvenile court. There are no statutes that would confer jurisdiction to the juvenile court because Appellant was prosecuted after turning 21, and there are no statutes to confer jurisdiction to the adult court for offenses committed by a child at the age of 13 or 14, absent certification. As such, the proper remedy is dismissal.

III. Violation of Appellant's Speedy Trial Rights

Respondent first argues that Appellant waived his speedy trial violation under *Doggett* and *Barker* because he signed a guilty plea agreement wherein he waived his right to a speedy and public trial by jury (SAB, 17). This argument is twofold: first, that Appellant's subsequent waiver of his right to a speedy trial obviates a violation that occurs prior to his arrest; second, that the guilty plea agreement generally waives any pre-trial evidentiary argument. The second prong of this argument will be discussed in greater detail in §4, *infra*, as it pertains to Appellant's justifiable expectations regarding this waiver.

The waiver of his right to a speedy trial pursuant a guilty plea agreement goes towards *one* of the *Barker/Doggett* factors, but it does not preclude the argument in its entirety. A subsequent waiver does not affect an existing violation. The central timeline in any *Doggett* analysis is the time period from accusation to arrest and trial. In this case, that timeline encompasses a six year gap, and that six year gap is the basis of the violation. For purposes of this analysis, the clock stopped upon Appellant's arrest.

Appellant does and must acknowledge that his subsequent waiver pursuant to plea negotiations goes towards factor three, the assertion of his right, but a prospective waiver of trial does not retroactively cure a prior speedy trial violation to the extent of creating a complete procedural bar, and Respondent has cited no legal authority in support of its assertion otherwise.

Appellant contends the first, second and fourth factors of the *Doggett* analysis strongly favor dismissal, notwithstanding the post-violation waiver pursuant to a plea agreement that was not followed.

Regarding the length of the delay, Respondent mistakenly claims that the delay here was only 87 days, which is the time period from warrant to arrest. However, even Respondent's own citation to *Doggett* confirm it is not the date of the warrant that always controls, but rather the date of the accusations. From

the State's Answering Brief, "[s]imply to trigger a speedy trial analysis, an accused must allege that the interval between **accusation** and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay" (SAB, 19, quoting *Doggett*, 505 U.S. at 651-52). Indeed, even *Barker* addressed the violation in the context of the delay from arraignment to trial, which confirms the issuance of a warrant does not exclusively control the analysis.

In this case, the victim and her mother made a formal report to law enforcement in 2014, and the victim underwent a medical examination the same day. No reasons were provided for why no further action was taken at that time.[10] No reasons were given for why the case was suddenly "reopened" and a warrant issued more than five years later in October of 2019.

The time at issue here from the date of the formal accusation to law enforcement on September 13, 2014 to the filing of the complaint on October

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[10] Respondent argues that Appellant presents a "bare and naked allegation" when asserting that law enforcement knew where Appellant was located (SAB, 24). However, in the lower court proceedings, Respondent never disagreed with Appellant's assertion that law enforcement knew Appellant had relocated with his parents to Morocco. In fact, in its Opposition to the Motion which raised this issue, Respondent writes, "In fact, it should also be pointed out that Defendant had moved to Morocco and the State waited to charge him until he had been located within the United States, honoring his speedy trial rights" (Bates 66-67).

14, 2019 is 1,857 days, or approximately 5 years, 1 month – more than enough to trigger the *Doggett* analysis, and also enough to create a "strong presumption of prejudice" under Ninth Circuit precedent. *U.S. v. Shell*, 974 F.2d 1035, 1036 (9th Cir. 1992) (since the delay is in excess of five years, an even greater "strong presumption of prejudice" applies).

Regarding the second factor, reason for the delay, Respondent's concessions in its Answering Brief is concerning: specifically, that law enforcement "waited" to charge him until he had been located within the United States. This is gross negligence at best, per *Doggett*, because law enforcement did not even issue a warrant or undertake any effort to apprehend Appellant once he returned to the United States. As a result of this failure, law enforcement also "waited" more than four years *after* Appellant had re-entered to the United States to even issue a warrant.

In *Doggett*, the government took affirmative efforts to locate the defendant after he had left the country, but the government's failure to diligently pursue those efforts was negligent. *T*he *Doggett* Court noted that the government could have found the defendant within minutes had its agents bothered to try, explaining that "[w]hile the government's lethargy may have reflected no more than Doggett's relative unimportance in the world of drug

trafficking, it was still findable negligence, and that finding stands." *Doggett*, 112 S.Ct. at 2693. The Court acknowledged that federal agents made "some" efforts to try to locate and apprehend him, including sending word of his arrest warrant to all United States customs stations and updating national registries, but this was negligently insufficient.

In this case, Respondent concedes (both here and in the lower court proceedings) that law enforcement decided to "wait" to take any action until Appellant returned to the United States. This is substantially worse than *Doggett*, because law enforcement did not even issue a warrant or enter it in any database so that Appellant would be apprehended or notified upon his return. Because law enforcement took (quite literally) no action whatsoever when the accusations were made, Appellant actually lived in the United States for more than four years before his eventual arrest. Thus, even if this Court discounts the time period that Appellant lived in Morocco with his parents, the delay in his apprehension even after he returned to the United States is still sufficient standing alone to trigger the *Doggett* analysis.

However, there is greater concern as to whether the delay from "reopening" the case to the filing of the complaint is merely negligent. Although there is no precise date given for when the case was "reopened" in 2019,

Respondent represented in the District Court that the investigation reopened in February 2019 (Bates 59). There was another 8 month delay until the filing of the complaint in October 2019. Appellant turned 21 in September 2019, meaning the complaint was conspicuously filed only *one month* after the juvenile court lost jurisdiction.

Regarding the third factor, Appellant's assertion of his rights, Appellant acknowledges that this factor does not necessarily weigh in his favor, given that he waived his right to a speedy trial when he entered the guilty plea. However, as Appellant details *infra*, his waiver was premised on the justified expectation of receiving not just a particular sentence, but a subsequent drop-down to a different offense and a stipulation to seal his criminal record. Because his waiver was premised on receiving a benefit in return, the fact that he did not receive this benefit calls the strength of the waiver into question. Nonetheless, the Supreme Court has repeatedly held that no one factor in the *Doggett* analysis is determinative. "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant." *Barker v. Wingo*, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193 (1972).

Lastly, Respondent argues that Appellant has not shown any "particularized prejudice" to support his claim. The need for "particularized prejudice" is based on the mistaken fact that the delay in this case is only 87 days – which is not long enough to create a presumption of prejudice – rather than 1,857 days. The actual delay in this case not only creates a presumption of prejudice, but a *strong* presumption of prejudice since the delay is in excess of 5 years.

Notwithstanding the strong presumption of prejudice that supersedes the need to show particularized prejudice, there is particularized prejudice in that Appellant was deprived of the resources and rehabilitative efforts of the juvenile justice system, as detailed above. Appellant committed this offense when he was 13 or 14 years old. Had the case been timely charged, Appellant would have received probation with sex offender specific counseling and the possibility to end sex offender registration at 18 years old. Instead, law enforcement delayed for over six years, ultimately filing only *one month* after Appellant turned 21, and so Appellant received a 4-10 year prison sentence and lifetime sex offender registration. This delay is solely due to law enforcement's decision to "wait" to issue a warrant or file charges.

IV. Application of Contract Principles Permits Appellant to Withdraw His Plea

Appellant in this case waived numerous fundamental constitutional rights in exchange for anticipated benefits pursuant to a contractual guilty plea agreement (among them, his right to a speedy trial, his right to confront his accuser, and his right to testify or remain silent). As a result of these waivers, acknowledging that the District Court retained discretion as to his ultimate sentence, Appellant had justified expectations of the outcome of his matter. Even if Appellant were to discount the "no opposition to probation" component of his plea, there were other significant benefits to his plea negotiation as well: first, Appellant would be permitted to earn a drop-down to a non-felony, non-registrable offense. If he successfully earned the reduction to that lesser charge, the State would further have no opposition to sealing his record once the requisite statutory time period elapsed.

Thus, even if this Court agrees with Respondent and holds that Appellant did not have any justified expectations of receiving probation as part of his sentence, Appellant still had a justified expectation of the ultimate *charge* of which he would be adjudicated. By sentencing Appellant to 4-10 years in prison, he was also deprived of the opportunity to earn the reduction to the

significantly less egregious gross misdemeanor charge (because he must successfully complete probation to be entitled to the reduction).

Respondent argues that Appellant can not have justified expectations of receiving probation because he also acknowledges in the guilty plea agreement that the Court has final discretion on sentencing (SAB, 34). However, Respondent's position that Appellant knew the District Court retained discretion on his *sentence* is materially distinct from his justified expectations of the ultimate *charge* of which he would be convicted. By denying him the opportunity of probation, the District Court also substantially changed the terms of the agreement by precluding him from getting the drop down to a non-felony, non-registrable offense.

The utilization of contract principles in guilty plea agreements has been recognized in Nevada for almost three decades, and the trend is growing among other circuit courts as well. "While plea agreements are a matter of criminal jurisprudence, most courts have held that they are also subject to contract principles." *State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994) (also citing *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")).

Appellant's ultimate conclusion is also fairly straightforward: applying contract principles, either party may withdraw a plea if the District Court exercises its discretion in a way that does not comport with the justified expectations of the parties. It must be emphasized that this conclusion does *not* limit the discretion of the District Court in any way – the Court is still free to accept the plea terms, reject the plea terms, or render any sentence which is within the bounds of the law. However, should the District Court choose to exercise its discretion in a way that is contrary to the justified expectations of *either* the prosecution or the defense, that party has a remedy which is appropriate both in law and in equity: withdrawal of the plea.

Appellant's position is not a "leap" as Respondent suggests, but rests on sound legal and contractual principles based on controlling Nevada law. In fact, there are two separate legal avenues which both lead to this same conclusion, depending on when the District Court "accepts" a plea and gives it legal effect.

As stated in Appellant's Opening Brief, District Court proceedings are bifurcated into two separate hearings: first for entry of plea, and a second for final sentencing. This makes full application of *Crockett* difficult, because the case adopts the following Ninth Circuit reasoning: "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. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992)) (emphasis added).

A plea agreement will only bind the prosecution and defense, per *Crockett*, upon the satisfaction of two conditions: first "the plea is tendered," and second "the bargain as it then exists is accepted by the court." Because the District Court bifurcates these two conditions, it is unclear precisely *when* the plea agreement becomes binding. The plea is tendered and accepted by the District Court at the first hearing, but the "bargain as it then exists" is not accepted or rejected until final sentencing. Nonetheless, as stated above, the remedy proposed by Appellant is appropriate regardless of when the District Court formally "accepts" the plea, and *Crockett* is instructive as to both theories.

Crockett strongly infers that a plea bargain becomes binding when the defendant tenders his plea at the first hearing. Because "neither a defendant nor the government is bound by a plea offer until it is approved by the Court… 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." *Id.* Under current Nevada law, a defendant is *not*

entitled to withdraw his consent to the bargain after the first hearing when the plea is tendered. Rather, he must demonstrate a "fair and just reason" to do so. *Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015).

The defendant's inability to withdraw his consent to the plea once it has been tendered at the first hearing would seemingly indicate that the plea is "accepted," and thus binding, at the entry of plea stage. "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." *Crockett*, 110 Nev. at 842 (citing *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495 (1971). If the plea is accepted by the Court at the first stage, then both the prosecution and defense would have justified expectations that the "bargain as it then exists" would be followed, including the material terms of the negotiations. If the District Court exercises its discretion in a manner contrary to those justified expectations, either party may then move to withdraw the plea.

On the other hand, a plain-language reading of *Crockett* would also indicate that the "bargain as it then exists" is not formally determined until the second hearing for final sentencing, because it is only at this hearing that the Court will exercise its discretion to accept the terms of the bargain or reject them. This is where Appellant's position applies regarding the illusory nature

of such a contract, both in law (as a legal contract cannot exist with the unfettered discretion of a third party) and in equity (as an issue of unconscionability wherein a defendant waives fundamental constitutional rights and fails to receive the expected benefit in return).

In order to avoid these pitfalls of contract law, there must be a remedy for the parties. Specific to guilty plea agreements, there are only two practical remedies: specific performance, or withdrawal of the plea. Requiring specific performance of the plea would be contrary to established law providing for the District Court's discretion to accept or reject the terms of the plea. *Stahl v. State*, 109 Nev. 442, 851 P.2d 436 (1993). By process of elimination, the only available remedy would likewise be the option to withdraw the 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 Reply Brief are true and correct to the best of my knowledge.

Dated this 13 day of April, 2022.

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 5,849 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 13 day of April, 2022.

Respectfully Submitted By:

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 13 day of April, 2022, 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
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Las Vegas, Nevada 89101

Kelsey Bernstein
Employee of Nevada Defense Group