

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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LARENZO PINKEY,  
Appellant,  
v.  
THE STATE OF NEVADA,  
Respondent.

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Case No. 83336

Electronically Filed  
Mar 22 2022 11:08 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**RESPONDENT'S APPENDIX  
Volume 1**

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Counsel for Appellant

Counsel for Respondent

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- Court Minutes from C-17-32776101 on July 30, 2018 (Jury Trial)
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- State’s Response to Defendant’s Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)
  - Filed 3/24/2021
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- Supplemental Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction)
  - Filed 1/18/2021
  - Vol. 2, RA 184-234

## **CERTIFICATE OF SERVICE**

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 22, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD  
Nevada Attorney General

BETSY ALLEN, ESQ.  
Counsel for Appellant

TALEEN PANDUKHT  
Chief Deputy District Attorney

BY /s/ E. Davis  
Employee, District Attorney's Office

TP/Elan Eldar/ed



Felony/Gross Misdemeanor

COURT MINUTES

July 30, 2018

---

C-17-327767-1      State of Nevada  
   vs  
   Lorenzo Pinkey

---

July 30, 2018      12:30 PM      Jury Trial

HEARD BY:      Israel, Ronald J.      COURTROOM: RJC Courtroom 15C

COURT CLERK: Klein, Kathy

RECORDER:      Chappell, Judy

REPORTER:

PARTIES PRESENT:

Benjamin C. Durham      Attorney for Defendant

John Giordani      Attorney for Plaintiff

Lorenzo Pinkey      Defendant

Michael Dickerson      Attorney for Plaintiff

State of Nevada      Plaintiff

**JOURNAL ENTRIES**

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY: Colloquy regarding a prospective juror with medical issues and a doctor appointment. Counsel agreed to excuse the juror prior to bringing the prospective jury into the courtroom. State noted they agreed to dismiss the original count 10 and provided an Amended Indictment. Amended Indictment, FILED IN OPEN COURT. Deft. rejected the State's offer and proceeded to trial. Mr. Durham requested the jail calls recently provided be excluded as being untimely. State noted they had provided other jail calls previously, However these are the latest jail calls from 07/12/18 to current, they had just received them last night and the State had not reviewed them. Court stated the jail calls could go on, timeliness is not a factor and Deft's are aware their calls are recorded, COURT ORDERED, Deft's Oral Motion to Exclude the Jail Calls, DENIED.

PROSPECTIVE JURY PANEL PRESENT: Voir Dire.

CUSTODY

07/31/18 11:00 AM JURY TRIAL

DISTRICT COURT  
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

July 31, 2018

---

C-17-327767-1      State of Nevada  
   vs  
   Lorenzo Pinkey

---

July 31, 2018      11:00 AM      Jury Trial

HEARD BY:      Israel, Ronald J.      COURTROOM: RJC Courtroom 15C

COURT CLERK: Klein, Kathy

RECORDER:      Chappell, Judy

REPORTER:

PARTIES PRESENT:

Benjamin C. Durham	Attorney for Defendant
John Giordani	Attorney for Plaintiff
Lorenzo Pinkey	Defendant
Michael Dickerson	Attorney for Plaintiff
State of Nevada	Plaintiff

## JOURNAL ENTRIES

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY: Negotiations.

Deft. present, in custody. Plea Entered: Mr. Durham stated the NEGOTIATIONS as contained in the Guilty Plea Agreement, FILED IN OPEN COURT. Amended Indictment, FILED IN OPEN COURT. The State is not seeking life sentences on any of the charges. Pursuant to negotiations COURT ORDERED, Guilty Plea Agreement, AMENDED BY INTERLINEATION TO REFLECT, on page 4, line 18; As to Count 12, the maximum punishment is 364 days in CCDC. Deft. stated his AKA Name, PINKNEY, As Deft's true name. Upon Court's inquiry, the State noted the range of each count and Deft. understood the minimum and maximums of each range. Mr. Durham noted the Deft. signed he was competent and understood the agreement. Court canvased the Deft. regarding his disability. DEFENDANT PINKNEY ARRAIGNED AND PLED GUILTY TO;

COUNTS 1 AND 8 - CONSPIRACY TO COMMIT ROBBERY (F)  
COUNTS 2 AND 9 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (F)  
COUNTS 3 AND 13 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (F)  
COUNTS 4,5,6,7,10,11 AND 14 - ROBBERY WITH USE OF A DEADLY WEAPON (F)  
COUNT 12 - UNLAWFUL TAKING OF VEHICLE (GM),

Court ACCEPTED plea and, ORDERED, matter referred to the Division of Parole and Probation (P&P) for a Presentence Investigative (PSI) Report and set for SENTENCING. COURT FURTHER ORDERED, Deft. REMANDED into Custody.

PROSPECTIVE JURY PRESENT: Court informed the prospective jury the Deft's had agreed to the negotiations and excused the jury. Exhibits returned to the State.

CUSTODY

09/12/18 9:30 AM SENTENCING

Printed Date: 8/9/2018

Page 1 of 1

Minutes Date:

July 31, 2018

Prepared by: Kathy Klein

RA 002



1 **MOT**

2 MONIQUE A. MCNEILL, ESQ.  
3 Nevada Bar No. 9862  
4 325 S. Third Street  
5 Suite 200  
6 Las Vegas, Nevada 89101  
7 Telephone: (702) 497-9734  
8 Attorney for Defendant

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

9 THE STATE OF NEVADA,  
10  
11 Plaintiff,  
12  
13 vs.

CASE NO.: C-17-327767-2

DEPT. NO.: 28

Date:

14 ADRIAN POWELL,  
15  
16 Defendant.

Time:

**MOTION TO WITHDRAW GUILTY PLEA**

17 **COMES NOW** the Defendant, by and through his attorney of record, MONIQUE  
18 MCNEILL, Esq., and respectfully submits the above-titled Motion. This Motion is based upon  
19 the following Memorandum of Points and Authorities, the pleadings and papers on file herein,  
20 and argument of Counsel at the time set for hearing this matter.

21 DATED this 10th day of January, 2019.

/s/ MONIQUE MCNEILL

22 By: \_\_\_\_\_  
23 MONIQUE MCNEILL, ESQ.  
24 Nevada Bar No. 9862  
Attorney for Defendant

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. BACKGROUND**

3 On July 31, 2018, Defendant pleaded guilty to two counts of Conspiracy to Commit  
4 Robbery and two counts of Burglary While in Possession of a Firearm, two counts of First Degree  
5 Kidnapping with a Deadly Weapon, and seven counts of Robbery with Use of a Deadly Weapon.  
6 The entry of plea took place on the second day of trial. On the date of his sentencing, Mr. Powell  
7 indicated a desire to withdraw his guilty plea and current defense counsel was appointed  
8 accordingly.

9 Mr. Powell contends that he entered his guilty plea without first being given the  
10 opportunity to review a full and complete copy of his discovery. Additionally, his attorney did  
11 not go through the discovery with him, never discussed the defense that the attorney was going  
12 to present to the jury, did not have substantial contact with Mr. Powell before trial, and failed to  
13 give well-educated advice regarding the soundness of the plea negotiations. Mr. Powell's attorney  
14 told him that he was going to spend the rest of his life in prison unless he took the deal, and further  
15 informed Mr. Powell that the deal was a good deal because of the State agreeing not to file charges  
16 on multiple cases in which the police suspected Mr. Powell and his co-defendant. However, not  
17 only had Mr. Powell never seen discovery from those incidents, but the attorney did not even have  
18 the discovery from those events and did not have any idea about the strength of those cases. But  
19 for counsel's failure to adequately prepare his client for trial, and his counsel's failure to give well  
20 researched and advice founded on actual due diligence, Mr. Powell would not have entered the  
21 plea. Mr. Powell's contentions are listed in the attached affidavit. See Exhibit A. This Court can  
22 see from the attached jail records that prior counsel had very limited contact with Mr. Powell over  
23 the course of his representation. See Exhibit B.

1 A review of the discovery provided regarding the uncharged acts indicates that there is no  
2 evidence that connects Mr. Powell to those cases. According to counsel for the co-defendant, the  
3 discovery on those incidents was not even provided to counsel until AFTER the defendants  
4 entered their pleas, despite the State using the incidents as leverage. The discovery lists police  
5 reports and witness statements for ten different metro event numbers. Those reports and witness  
6 statements show that the descriptions of the perpetrators varies between the events, and that in  
7 almost all of those occurrences, the suspects had their faces and hands covered. There is no  
8 mention of any processing of any fingerprints or DNA. It should be noted that in the instant case,  
9 the Metro crime lab did process Mr. Powell's DNA and compared to samples recovered in the  
10 instant case. It stands to reason that if there had been DNA collected in the uncharged cases,  
11 Metro could have processed it at the same time. There is no forensic evidence tying Mr. Powell  
12 to those uncharged incidents. As it stands, there is not enough evidence to even charge Mr. Powell  
13 in those cases, so it was a grave error for his attorney to use those cases to inform Mr. Powell as  
14 to the nature of the plea offer.

## 15 II. ARGUMENT

16 In Nevada, a district court may grant a defendant's pre-conviction motion to withdraw a  
17 guilty plea for any "substantial reason" if it is "fair and just." *Woods v. State*, 114 Nev. 468, 475,  
18 958 P. 2d 91, 95 (1998) (citing *State v. District Court*, 85 Nev. 381, 385, 455 P.2d 923, 926  
19 (1969)). *See also Stevenson v. State*, 131 Nev. \_\_\_, \_\_\_, 354 P.3d 1277, 1281 (2015). To determine  
20 whether the defendant advances a substantial, fair, and just reason to withdraw a guilty plea, the  
21 district court must consider the totality of the circumstances surrounding the defendant's plea.  
22 *Woods*, 114 Nev. at 475, 958 P. 2d at 95-96 (1998). In *Stevenson v. State*, the Nevada Supreme  
23 Court noted that fair and just reasons include reasons such as a defendant establishing that there  
24

1 are “circumstances which might lead a jury to refuse to convict, notwithstanding technical guilt,”  
2 or the defendants becoming aware of some collateral consequences. *Id.*

3 A criminal defendant may withdraw his guilty plea if, under the totality of the  
4 circumstances, the court finds that he did not enter that plea voluntarily, knowingly, and  
5 intelligently. *Woods*, 114 Nev. at 475, 958 P.2d at 95-96 (1998); *Crawford v. State*, 117 Nev.  
6 718, 722, 30 P. 3d 1123, 1125-26 (2001); *Baal v. State*, 106 Nev. 69, 787 P.2d 391 (1990). The  
7 guidelines for voluntariness of guilty pleas require that the record affirmatively show that the  
8 defendant entered his plea understandingly and voluntarily. See *Heffley v. Warden*, 89 Nev. 573,  
9 574, 516 P.2d 1403, 1404 (1973). A “knowing” plea is one entered into with a full understanding  
10 of the nature of the charge and all the consequences of the plea. *Boykin v. Alabama*, 395 US 238  
11 (1969). Here, Mr. Powell’s plea was not knowing, as he did not have a full understanding of the  
12 nature of the charges against him due to counsel’s failure to provide Mr. Powell with a review of  
13 the discovery and a discussion regarding potential defenses. Additionally, counsel advised Mr.  
14 Powell regarding incidents that counsel had never even seen discovery regarding. Because Mr.  
15 Powell’s attorney did not provide meaningful communication, the plea is not knowing. Because  
16 Mr. Powell’s counsel himself was uneducated regarding the evidence being used to broker a deal,  
17 the plea was not knowing. This is one fair and just reason this Court should allow Mr. Powell to  
18 withdraw his plea.

19 Furthermore, a plea agreement is construed according to what the defendant reasonably  
20 understood when he entered the plea. *Statz v. State*, 113 Nev. 987, 993, 944 P.2d 813, 817 (1997);  
21 *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). The defendant’s reasonable  
22 understanding is distinguishable from the mere subjective belief of defendant as to any potential  
23 sentence, or hope of leniency, unsupported by a promise from the State or an indication by the  
24 court. See *Rouse v. State*, 91 Nev. 677, 541 P. 2d 643 (1975). Mr. Powell reasonably understood

1 that counsel informed him that he was going to serve approximately six to fifteen years in prison.  
2 This was not based on any offer from the State, but was communicated to Mr. Powell at the time  
3 counsel discussed the plea negotiations with Mr. Powell on the second day of trial.

4 A defendant who enters a guilty plea based on the advice of counsel may refute the guilty  
5 plea by demonstrating the ineffectiveness of counsel's performance violated the defendant's right  
6 to counsel guaranteed under the Sixth Amendment to the United States Constitution. *Nollette v.*  
7 *State*, 118 Nev. 341, 348-349, 46 P.3d 87, 92 (2002); *Strickland v. Washington*, 466 U.S. 668,  
8 687-88 (1984). A defendant must substantiate their claim of ineffective assistance of counsel by  
9 showing counsel's performance fell below an objective standard of reasonableness, and a  
10 reasonable probability exists that, but for counsel's erroneous advice, the defendant would not  
11 have pled guilty. *Id.*; *Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984); *Hill v.*  
12 *Lockhart*, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

13 Prior counsel's performance did not meet objective standards regarding criminal  
14 representation. In 2007, the Nevada Supreme Court convened a commission on the state of  
15 indigent defense in Nevada. See Exhibit C. As part of that commission, the committee came up  
16 with recommended standards of performance, which provide a guideline for this Court to  
17 measure counsel's performance. Those standards indicate that counsel should engage in a  
18 continuing interactive dialogue with the client concerning all matters that might reasonably be  
19 expected to have a material impact on the case, such as the development of a defense theory,  
20 presentation of the defense case, potential agreed-upon dispositions of the case. Mr. Powell's  
21 attorney did not meet this standard, and certainly communicating in person with a client two  
22 times before a felony jury trial on a life sentence case cannot be reasonable.  
23 The standards also indicate that "under no circumstances should defense counsel recommend to  
24 a defendant acceptance of a plea unless appropriate investigation and study of the case has

1 been completed, including an analysis of controlling law and the evidence likely  
2 to be introduced at trial.” ADKT 411. Mr. Powell’s counsel had done none of that. His  
3 representation certainly fell below an objective standard of reasonableness. And, but for  
4 counsel using uninvestigated uncharged bad acts to make assurances that this plea was the best  
5 outcome, Mr. Powell would not have entered this plea.

6 In this case, Mr. Powell’s plea was the product of ineffective assistance of counsel, which  
7 lead to him accepting a plea that was based on assurance that were later discovered to be untrue  
8 and unfounded. His counsel made him assurances about the sentence he would receive, telling  
9 him it was all but a given, despite what the guilty plea agreement states, and his counsel coerced  
10 the plea by informing Mr. Powell there were ten other uncharged cases looming over his head.  
11 His counsel’s performance was deficient in keeping his client informed at every step of the  
12 proceedings, and was based on a lack of understanding regarding the true nature of the plea  
13 negotiations.

### 14 15 III. CONCLUSION

16 In light of the foregoing, Defendant respectfully requests that this Honorable Court grant  
17 his Motion to Withdraw Guilty Plea.

18  
19 DATED this 11th day of Janaury, 2019.

20 /s/ MONIQUE A. MCNEILL

21 By: \_\_\_\_\_  
22 MONIQUE MCNEILL, ESQ.  
23 Nevada Bar No. 9862  
24 Attorney for Defendant



1  
2 **CERTIFICATE OF SERVICE**

3 **IT IS HEREBY CERTIFIED** by the undersigned that on the 14th day of January, 2019,  
4 I served a true and correct copy of the foregoing **MOTION** to the parties listed on the attached  
5 service list via one or more of the methods of service described below as indicated next to the  
6 name of the served individual or entity by a checked box:

7 **VIA U.S. MAIL:** by placing a true copy thereof enclosed in a sealed envelope with postage  
thereon fully prepaid, in the United States mail at Las Vegas, Nevada.

8 **VIA FACSIMILE:** by transmitting to a facsimile machine maintained by the attorney or the  
party who has filed a written consent for such manner of service.

9 **BY PERSONAL SERVICE:** by personally hand-delivering or causing to be hand delivered by  
such designated individual whose particular duties include delivery of such on behalf of the firm,  
10 addressed to the individual(s) listed, signed by such individual or his/her representative accepting  
on his/her behalf. A receipt of copy signed and dated by such an individual confirming delivery  
of the document will be maintained with the document and is attached.

11 **BY E-MAIL:** by transmitting a copy of the document in the format to be used for attachments to  
12 the electronic-mail address designated by the attorney or the party who has filed a written consent  
for such manner of service.

13  
14 **BY:** /s/ MONIQUE MCNEILL, Esq.  
15  
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17  
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24

**SERVICE LIST**

ATTORNEYS OF RECORD	PARTIES REPRESENTED	METHOD OF SERVICE
PDMotions@clarkcountyda.com	State of Nevada	<input type="checkbox"/> Personal service <input checked="" type="checkbox"/> Email service <input type="checkbox"/> Fax service <input type="checkbox"/> Mail service

ADDITIONAL INDIVIDUALS	PARTIES REPRESENTED	METHOD OF SERVICE
	N/A	<input type="checkbox"/> Personal service <input type="checkbox"/> Email service <input type="checkbox"/> Fax service <input type="checkbox"/> Mail service

## EXHIBIT A

## AFFIDAVIT

**ADRIAN POWELL** makes the following declaration:

1. Prior to trial, my attorney had only visited me twice at the Clark County Detention Center, and only spoke to me on the phone a few times.
2. During the first visit with my attorney, he told me that he was going to "get me home." That led me to believe he felt that the case was winnable. He never sat down with me and provided full discovery on my case.
3. My attorney did not go through the discovery with me. In fact, my attorney did not provide me with all the discovery in the case. In fact, I have never seen the discovery regarding the uncharged incidents in which the State alleges that I am a person of interest. The only discovery I received was at my second preliminary hearing setting, and never received anything after that, until the bailiff handed me a DNA report the second day of trial.
4. My attorney did not show me the results from the DNA processing until we had already started jury selection. My attorney gave the Marshall the paperwork with the results, and had him provide it me. He never explained to me what any of it meant.
5. Prior to trial, I did not know anything about how my attorney was going to defend the case. At no point, did he discuss the discovery with me, or discuss the theory of defense at trial.
6. My attorney told me that I was going to spend the rest of my life in prison if I did not take the deal. He told me that it was this deal or the rest of my life. This was said to me as we were in the middle of trial. At that point., I was unaware of how he was going to defend me at trial. I did not know the entirety of the evidence against me and was scared. He told me that were it not for the uncharged cases, I could have been offered a 3-8 year sentence.
7. My attorney told me that regardless of what the Guilty Plea Agreement said, I was going to get a sentence of six to fifteen years.

- 1 8. At sentencing, when I told my attorney I was scared that I was not going to get the six to  
2 fifteen years he promised me, he became angry.
- 3 9. The advice my attorney gave me about taking the plea involved the uncharged cases listed  
4 in my guilty plea agreement; however, he misled me about the strength of the evidence in  
5 those cases. In fact, I have since learned that he had not actually reviewed the discovery  
6 regarding those cases until September, months after he advised me that those cases not  
7 being filed against me was beneficial to me. I have since reviewed that discovery and it is  
8 clear that the evidence in those charges is not strong and I do not believe should have been  
9 used to pressure me into this plea.
- 10 10. My attorney never went through the PSI with me, but instead handed it to me and left the  
11 visiting room. Prior to my interview, he told me not to tell the PSI writer that I had a  
12 substance abuse problem, and not to let the PSI writer see my tattoos, but instead to try to  
13 make the PSI writer think I was a "scholar and a student."
- 14 11. At sentencing, my co-defendant told me that his attorney had advised him about the lack of  
15 evidence in the uncharged cases.
- 16 12. I declare under penalty of perjury that the foregoing is true and correct. (NRS 53.045).

17 EXECUTED this 7<sup>TH</sup> day of January, 2018.

18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
  
\_\_\_\_\_  
ADRIAN POWELL

## EXHIBIT B

NT-7B-14-4

NT

LAS VEGAS METROPOLITAN POLICE DEPARTMENT  
CLARK COUNTY DETENTION CENTER; RECORDS SUPPORT UNIT

Inmate ID#:

8387748

INMATE CORRESPONDENCE REQUEST

Floor:

7B

Inmate Name:

Powell, Adrian

Housing  
Unit:

14-4

QTY	TYPE OF RECORD	COST	QTY	TYPE OF RECORD	COST
<input type="checkbox"/>	LETTER OF INCARCERATION (UP TO 5 LODGINGS)	\$6.00	<input type="checkbox"/>	REPLACEMENT COPY OF TCR	\$0.50 PER PAGE
<input type="checkbox"/>	SCOPE RECORD	\$9.00	<input type="checkbox"/>	COPY OF PROPERTY SHEET	\$0.50 PER PAGE
<input type="checkbox"/>	SOCIAL SECURITY REINSTATEMENT FORM	\$6.00	<input checked="" type="checkbox"/>	VISITOR LOG	\$0.50 PER PAGE
<input type="checkbox"/>	1 ADDITIONAL COPY (OF ABOVE ONLY)	\$0.29 PER PAGE	<input type="checkbox"/>	INMATE KITES/ MISC DOCUMENT	\$0.50 PER PAGE

By signing below, I authorize the appropriate charge to be applied to my inmate trust account. If I do not have sufficient funds, an obligation will be applied to my account and any funds I receive will be deducted to pay for the debt. I understand that the Social Security Reinstatement form and/or Letter of Incarceration will be placed in my file and given to me upon my release from custody. All other items will be sent to me along with a copy of this form.

C.R. 7.11.18

Inmate Signature / Date

T. Glover 16703 7/11/18

Officer Signature &amp; P# / Date

.....Below to be completed by RSU ONLY.....

'COMPLIED WITH'

MGB 7/16/18  
P#/INIT

DATE

'TOTAL AMOUNT DUE'

\$ 50¢

ATTENTION: I am stating that I want the copy of my visits with me down not my regular visits. I should be fine if not than you may charge me.

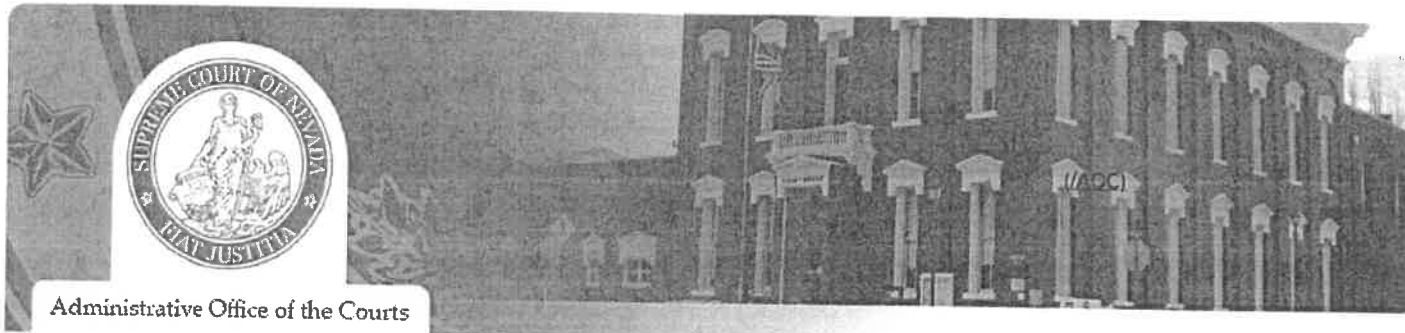


Visits With Visitor										
(Contact Only after May 2010, Non-Contact in Renovo)										
ID Number : '0008387748' , Start Date : '28-SEP-2017' , End Date : '16-JUL-2018'										

	Current Housing	Inmate Last Name	Inmate First Name	Offender ID	Start Date/Time	End Date/Time	Visit Type	Relation Type	Visitor Last name	Visitor First name	Visitor Middle name
1	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	06-Oct-17 09:00:00	06-Oct-17 09:30:00	LEG	INV	LAWSON	ROBERT	
2	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	13-Oct-17 08:00:00	13-Oct-17 08:05:00	LEG	INV	LAWSON	ROBERT	
3	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	17-Oct-17 13:00:00	17-Oct-17 13:30:00	LEG	ATT	KANE	MICHAEL	
4	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	08-Nov-17 13:00:00	08-Nov-17 13:05:00	LEG	INV	LAWSON	ROBERT	
5	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	08-Feb-18 13:00:00	08-Feb-18 13:30:00	LEG	INV	CAMPBELL	SKYE	
6	LVMPD-NT-7B-14-U	POWELL	ADRIAN	0008387748	26-Apr-18 13:30:00	26-Apr-18 14:00:00	LEG	INV	CAMPBELL	SKYE	



## EXHIBIT C



[HOME \(/AOC/\)](#) [HOW DO I?](#) [ADMINISTRATION](#) [PROGRAMS & PROJECTS](#) [RESOURCES](#) [FORMS & PUBLICATIONS](#)

## Commission on Indigent Defense Overview

In 2007, the Nevada Supreme Court convened the Indigent Defense Commission (IDC) under the Chairmanship of Justice Michael Cherry to examine and make recommendations regarding the delivery of indigent defense services in Nevada.

The Commission filed its initial report with the Court in November of 2007.

On January 4, 2008, the Court issued its first ADKT 411 Order which contained performance standards, a requirement to remove judges from the appointment of counsel process, and also recommended that all rural counties use the State Public Defender's Office. Additionally, the Order required all jurisdictions to file a plan for the appointment of counsel and made real the voluntary request from Clark and Washoe Counties to conduct weighted caseload studies in order to determine appropriate public defender caseloads. The Order also established a definition of 'indigent' to be used when appointing counsel.

In response to this initial Order, several groups including the district attorneys, rural judges, and counties, filed objections with the Court; a hearing was held in March 2008 and resulted in an Order on March 21, 2008. This Order required that new members be added to the IDC, the performance standards be reconsidered, and the Rural Subcommittee be reconstituted to re-examine the issues in Rural Nevada.

During this interim period, the District Attorneys and Defense Bar worked with the IDC to revise the performance standards, and the Rural Subcommittee reconvened and developed new, refined recommendations. Clark and Washoe Counties, together with cities in urban jurisdictions, formulated and began to implement plans to remove judges from the process of appointment for conflict counsel, and reformed their contract attorney systems.

In 2014, the Indigent Defense Commission's Rural Subcommittee completed its tasks of gathering and analyzing data pertaining to the number and scope of public defender appointments across the State. Early in the winter of 2014, the Rural Subcommittee used this data to present its "Rural Subcommittee Report on the Status of Indigent Defense in the 15 Rural Counties and Recommendations to Improve Service to Indigent Defendants" to the Nevada Supreme Court.

On July 23, 2015, history was made when the Nevada Supreme Court signed ADKT 0411 and adopted and/or endorsed 4 of the Rural Subcommittee's recommendations. This banned the use of strictly flat fee contracts in the delivery of indigent defense services, placed rural death penalty cases and appeals in the hands of the State Public Defender's Office, and encouraged the implementation of an Indigent Defense Board.

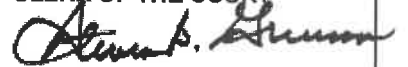
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1 **OPPS**  
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4 Nevada Bar #001565  
5 JOHN GIORDANI  
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11 Attorney for Plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,  
10 Plaintiff,

11 -vs-

12 LARENZO PINKEY, aka,  
13 Lorenzo Pinkney, #8295438

14 Defendant.

CASE NO: C-17-327767-1

DEPT NO: XXVIII

15 **STATE'S OPPOSITION TO DEFENDANT'S MOTION**  
16 **TO WITHDRAW GUILTY PLEA**

17 DATE OF HEARING: 2/25/2019  
18 TIME OF HEARING: 9:00 AM

19 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
20 District Attorney, through JOHN GIORDANI, Chief Deputy District Attorney, and hereby  
21 submits the attached Points and Authorities in Opposition to Defendant's Motion To Withdraw  
22 Guilty Plea.

23 This Opposition is made and based upon all the papers and pleadings on file herein, the  
24 attached points and authorities in support hereof, and oral argument at the time of hearing, if  
25 deemed necessary by this Honorable Court.

26 //

27 //

28 //

//

1 **PROCEDURAL HISTORY**

2 On November 8, 2017, Indictment returned in the District Court charging Defendants  
3 Lorenzo Pinkey aka, Lorenzo Pinkney, and Adrian Powell with two (2) counts of Conspiracy  
4 To Commit Robbery (Category B Felony - NRS 200.380, 199.480), two (2) counts of Burglary  
5 While In Possession Of A Deadly Weapon (Category B Felony - NRS 205.060), three (3)  
6 counts of First Degree Kidnapping With Use Of A Deadly Weapon (Category A Felony - NRS  
7 200.310, 200.320, 193.165), seven (7) counts of Robbery With Use Of A Deadly Weapon  
8 (Category B Felony - NRS 200.380, 193.165) and one (1) count of Unlawful Taking Of  
9 Vehicle (Gross Misdemeanor - NRS 205.2715). All charges stemmed from robberies that  
10 occurred at a Pepe's Tacos restaurant and a Walgreens store in Las Vegas, Nevada on  
11 September 28, 2017.

12 On November 13, 2017, Defendants Pinkney and Powell were arraigned on the  
13 aforementioned charges in the District Court. The case ultimately proceeded to jury trial on  
14 July 30, 2018. Voir Dire commenced On Monday, July 30, 2018. Court concluded for the day,  
15 and the parties returned the following day to resume jury selection. That morning, the parties  
16 negotiated for hours, and the State ultimately agreed to allow the Defendants to plead guilty  
17 pursuant to the Guilty Plea Agreement discussed below. The Defendants pled guilty, the jury  
18 was discharged, and a sentencing date was set for September 12, 2018. Prior to sentencing,  
19 the Defendants filed Motions to withdraw their guilty pleas. The State opposes as follows.

20 **FACTUAL BACKGROUND**

21 The evidence in this case was overwhelming. The following is a summary of the  
22 victims' testimony from the Grand Jury presentation, as well as a summary of the forensic  
23 evidence (DNA AND FINGERPRINTS) and the circumstantial evidence that would have been  
24 presented at trial.

25 **A. Testimony of Jose Chavarria**

26 Jose Alfredo Chavarria Valenzuela was working as a cook at Pepe's Tacos located at  
27 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. (RT1 at 32-33). At  
28 approximately 2:40 AM, Chavarria was in kitchen area when two gunmen entered the

1 restaurant. (RT1 at 35). Chavarria ran toward the back refrigerator where his co-worker was  
2 located, when one of the gunman jumped the counter, followed Chavarria and pointed a gun  
3 at him. (RT1 at 35). The gunman told Chavarria to get on the ground and that he “wanted the  
4 money.” Id. The gunman then forced Chavarria at gunpoint from the back of the store to the  
5 front cash registers. (RT1 35-36). At the cash registers, the gunman began jabbing Chavarria  
6 in his side, but Chavarria was unable to open the till because he did not have the correct  
7 passcode. (RT1 at 36). The second gunman then retrieved Chavarria’s coworker from the  
8 back of the store and forced her to open the cash registers at the front of the store. (RT1 at  
9 37). One of the gunmen then took Chavarria to the second cash register, threw him on the  
10 ground, and pointed a gun to Chavarria’s head. Id. The gunmen took the money from the  
11 cash registers, but did not take any property from Chavarria. (RT1 at 37-38).

#### 12 **B. Testimony of Yenir Hessing**

13 Yenir Hessing works as the shift lead at the Walgreens located at 4470 East  
14 Bonanza, Las Vegas, Nevada. (RT1 at 7). On September 28, 2017, Hessing was working the  
15 graveyard shift with four other Walgreens employees when, at approximately 4:05 AM, two  
16 masked gunmen entered the store. (RT1 at 8-10).

17 Hessing was stocking the shelves in the food aisle when one of the gunmen pointed a  
18 gun to her stomach, demanded she move to the front of the store. (RT1 at 10). The food aisle  
19 is located near the store’s photo section, away from the registers and store entrance. (RT1 at  
20 14:2-6). While pushing her to the front of the store, the gunman told Hessing to go to the cash  
21 registers in the front of the store, passing the cash register in the photo section. (RT 14:4-6).  
22 As gunman pushed Hessing, he told her this is “not a game and I’m going to kill you.” (RT1  
23 at 10).

24 At the front of the store, the gunman told her to open the three cash registers, which  
25 Hessing did. Id. At that moment, another Walgreens employee, Tifnie Bobbitt was returning  
26 from lunch and, upon seeing Bobbitt, the gunman ordered her the front of the store too. Id.  
27 Hessing testified that the gunman was “swearing and saying like really bad things ... grabbed  
28 both of us and he asked me where is the big money, where is the safe, and I tell him it was in

1 the office.” (RT1 at 10:12-15). The gunman then used the gun to again push Hessing, this  
2 time toward the office located at the back of the store. (RT1 at 10).

3 While the gunman pushed Hessing toward the back of the store, Hessing saw down an  
4 aisle that the Walgreen’s pharmacist, Darlene Orat, was being held up by another gunman in  
5 the pharmacy. (RT at 9, 12). As the gunman pushed Hessing toward the back office at  
6 gunpoint, he told Hessing “I’m going to kill you.” (RT1 at 14:15). Hessing responded to the  
7 gunman, telling him “please don’t hurt me, I’m nine weeks pregnant, don’t do anything to me.”  
8 (RT1 at 15-17). To which the gunman responded “I don’t give a [fuck] I’m going to kill you  
9 if you do the wrong code or ... try to call [police].” (RT1 at 14:17-19).

10 Upon reaching the back office, which is behind two doors that each have a different pin  
11 code, Hessing entered the code and the gunman forced Hessing and Bobbitt into the office.  
12 (RT1 at 15-16). The door to the office closed behind them, leaving Hessing, Bobbitt and the  
13 gunman isolated from the rest of the store. (RT1 at 17-18). In the office, the gunman began  
14 hitting Hessing in the ribs with the gun and demanding that she open the safe. (RT at 17).  
15 Hessing opened the first of two safes and the gunman grabbed everything. Id. The gunman  
16 then demanded Hessing open the second safe, which she did. The gunman grabbed the  
17 contents from the second safe and fled from the office. Id.

### 18 **C. Testimony of Tifnie Bobbitt.**

19 Tifnie Bobbit was working as a cashier at the Walgreens located at 4470 East Bonanza,  
20 Las Vegas, Nevada, on September 28, 2017. (RT2 at 8). Around 4:00 AM, Bobbitt was  
21 headed to breakroom to take her lunch break when she heard a man “say the F word.” (RT2  
22 9-10:1). Bobbitt looked over to see the man crouching and walking behind Tenir Hessing.  
23 (RT2 at 10). Bobbitt entered the code to the breakroom, entered the room and approached the  
24 seconded code-locked door to the office, which she knocked on to alert the Walgreen’s  
25 manager. (RT2 10-11). Bobbitt’s manager left and did not return, so Bobbitt, thinking the  
26 situation was taken care of, walked out of the breakroom into the store. (RT2at 11). At that  
27 moment, the gunman saw her and yelled at her “Where the fuck do you think you’re going,  
28 bitch?” ((RT2 at 11:21-24). The gunman then ordered Bobbitt to the front of the store where

1 Hessing was opening the cash registers for the gunman. (RT2 at 13). From there, the gunman  
2 forced Bobbit and Hessing from the front of the store to the back office, pushing Bobbitt while  
3 telling the women they were walking too slowly. (RT2 at 13-14). At the breakroom door,  
4 they enter the code and enter the breakroom. (RT2 at 14). From there, Hessing entered the  
5 code to the office door and the gunman forced the women into the office. (RT2 at 14-15). In  
6 the office, the gunman “kept jabbing the gun” into Hessing’s side as he was forcing her to  
7 open the safes. (RT2 at 15). Once the safes were open, the gunman took the money from the  
8 safes and fled. Id.

9 **D. Evidence in addition to Grand Jury Testimony**

10 Both of these armed robberies were captured on video surveillance. In addition, the  
11 Defendants used Mr. Pinkey’s girlfriend’s vehicle. After the Walgreen’s event, they crashed  
12 the vehicle while fleeing. Defendant’s Pinkney and Powell fled the wrecked vehicle on foot,  
13 leaving a trail of US Currency, a mask, and the proceeds of the robberies in their wake. Mr.  
14 Powell’s DNA was on the red mask that he dropped when fleeing from Walgreen’s, and Mr.  
15 Pinkney’s fingerprints were on the prescription bottles from the Walgreen’s robbery. They  
16 were apprehended a short time later wearing the same clothing they wore during the robberies.

17 **ARGUMENT**

18 **I. DEFENDANT’S PLEA WAS KNOWINGLY AND VOLUNTARILY**  
19 **ENTERED AND HE HAS NOT ESTABLISHED A SUBSTANTIAL REASON**  
20 **WARRANTING WITHDRAWAL OF HIS PLEA.**

21 **A. THERE IS NOT A SUBSTANTIAL, FAIR, AND JUST REASON TO**  
22 **ALLOW DEFENDANT TO WITHDRAW HIS GUILTY PLEA**

23 “[A] motion to withdraw a plea of guilty...may be made only before sentence is  
24 imposed or imposition of sentence is suspended” unless it is necessary “to correct manifest  
25 injustice.” N.R.S. 176.165; Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The  
26 district court may grant a motion made prior to sentencing or adjudication of guilty for any  
27 substantial reason that is fair and just. State v. District Court, 85 Nev. 381, 385, 455 P.2d 923,  
28 926 (1969).

1           However, in determining whether a Defendant has “advanced a substantial, fair, and  
2 just reason to withdraw a [guilty] plea, the District Court must consider the totality of the  
3 circumstances to determine whether the defendant entered the plea voluntarily, knowingly,  
4 and intelligently.” Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1125-26 (2001). A  
5 Court “has a duty to review the entire record to determine whether the plea was valid ... [and]  
6 may not simply review the plea canvass in a vacuum.” Mitchell v. State, 109 Nev. 137, 141,  
7 848 P.2d 1060, 1062 (1993). Nonetheless, a defendant has no right to withdraw his plea simply  
8 because he makes his motion prior to sentencing or because the State failed to establish actual  
9 prejudice. See, Hubbard v. State, 110 Nev. 671, 675-76, 877 P.2d 519, 521 (1994).

10           In determining whether a guilty plea was knowingly and voluntarily entered, the Court  
11 reviews the totality of the circumstances surrounding the plea. Bryant v. State, 102 Nev. 268,  
12 271, 721 P.2d 364, 367 (1986)(*superseded by statute*). However, a guilty plea is  
13 presumptively valid. Wilson v. State, 99 Nev. 362, 373, 664 P.2d 328, 334 (1983). In  
14 addition, when a guilty plea is accepted by the trial court after proper canvassing as to whether  
15 the defendant knowingly and intelligently entered his plea, such plea will be deemed properly  
16 accepted. Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990).

17           If a proper canvass is conducted, the record will reflect the following: “(1) the defendant  
18 knowingly waived his privilege against self-incrimination, the right to trial by jury, and the  
19 right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the  
20 result of a promise of leniency; (3) the defendant understood the consequences of his plea and  
21 the range of punishment; and (4) the defendant understood the nature of the charge, i.e., the  
22 elements of the crime.” Wilson v. State, 99 Nev. 362, 366, 664 P.2d 328, 330 (1983).  
23 However, the failure to conduct a ritualistic oral canvass does not require that the plea be  
24 invalidated. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000).

25           To the extent that a motion to withdraw plea is premised upon an allegation of  
26 ineffective assistance of counsel, to succeed a Defendant must establish that: (1) counsel's  
27 performance was deficient because it fell below an objective standard of reasonableness  
28 measured by prevailing professional norms; and, (2) counsel's deficient performance



1 prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Riley v.  
2 State, 110 Nev. 638, 646, 878 P.2d 272, 277-78 (1995). The Court may consider both prongs  
3 in any order and need not consider them both when a defendant's showing on either prong is  
4 insufficient. Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996). A defendant  
5 demonstrates that Counsel's performance was deficient when he can establish that counsel  
6 made errors so grave that counsel was not functioning as the counsel guaranteed by the Sixth  
7 Amendment. Strickland v. Washington, *supra*, 466 U.S. at 687. To satisfy the prejudice prong  
8 of the Strickland standard, Defendant must establish a reasonable probability that but for  
9 counsel's errors, the defendant would not have pleaded guilty and would have insisted on  
10 going to trial. Reeves v. State, 113 Nev. 959, 960, 944 P.2d 795, 796 (1997). A reasonable  
11 probability means a probability sufficient to undermine confidence in the outcome of the  
12 proceeding. Kirksey v. State, *supra*, 112 Nev. at 988.

13 "A fair assessment of attorney performance requires that every effort be made to  
14 eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's  
15 challenged conduct, and to evaluate the conduct from counsel's perspective at the time."  
16 Kirksey v. State, *supra*, 112 Nev. at 987-988 (citing Strickland v. Washington, *supra*, 466 U.S.  
17 at 689). Moreover, "[t]he role of a court presented with allegations of ineffective counsel 'is  
18 not to pass upon the merits of the action not taken but to determine whether, under the  
19 particular facts and circumstances of the case, trial counsel failed to render reasonably  
20 effective assistance...' " Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978)(citing  
21 Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). Trial counsel is not obligated not  
22 make every conceivable motion regardless of the possibility of success in order to protect  
23 himself from claims of ineffectiveness. *Id.* Thus, the Court starts with a presumption that  
24 counsel offered effective assistance of counsel and then evaluates whether Defendant  
25 demonstrated that counsel was ineffective. *See*, Means v. State, 120 Nev. 1001, 1012, 103  
26 P.3d 25, 33 (2004). Counsel's strategy decisions are "tactical" decisions and will be "virtually  
27 unchallengeable absent extraordinary circumstances." Doleman v. State, *supra*, 112 Nev. at  
28 846; *see also*, Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); State v. Meeker,

1 693 P.2d 911, 917 (Ariz. 1984). “[W]hile the client may make decisions regarding the ultimate  
2 objectives of representation, the trial lawyer alone is entrusted with decisions regarding legal  
3 tactics... He, not the client, has the immediate-and ultimate-responsibility of deciding if and  
4 when to object, which witnesses, if any, to call, and what defenses to develop.” Rhyne v. State,  
5 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

6 In the instant case, Defendant signed a written Guilty Plea Agreement, wherein he  
7 acknowledged that he fully understood the entirety of the agreement, had all of his questions  
8 answered, and was knowingly and voluntarily entering his guilty pleas. Defendant further  
9 acknowledged in his signed Guilty Plea Agreement all of the rights he was giving up by  
10 entering the agreement:

11 I understand that I am waiving and **forever giving up** the following rights and  
12 privileges: 1. The constitutional privilege against self-incrimination...2. The  
13 constitutional right to a speedy and public trial by an impartial jury...3. The  
14 constitutional right to confront and cross-examine any witnesses who would  
15 testify against me...I have discussed the elements of the original charge(s)  
16 against me with my attorney and I understand the nature of the charge(s) against  
17 me.... I have discussed with my attorney any possible defenses, defense  
18 strategies and circumstances which might be in my favor... All of the foregoing  
19 elements, consequences, rights, and waiver of rights have been thoroughly  
20 explained to me by my attorney. I believe that pleading guilty and accepting  
21 this plea bargain is in my best interest, and that trial would be contrary to my  
22 best interest. I am signing this agreement voluntarily...and I am not acting under  
23 duress or coercion or by virtue of any promise of leniency, except for those set  
24 forth in this agreement...My attorney has answered all my questions regarding  
25 this guilty plea agreement and its consequences to my satisfaction and I am  
26 satisfied with the services provided by my attorney (GPA pp. 5-6).

27 In addition to the actual GPA, the Court discussed the terms of the agreement with both  
28 Defendants extensively on the second day of trial. Specifically, on Monday, July 30, 2018, the

1 Court and the State began the voir dire process. The following morning on Tuesday, July 31,  
2 2018, the State and defense attorneys negotiated the case before voir dire resumed. Pursuant  
3 to the guilty plea agreements, both Defendants essentially “pled to the sheet,” and in exchange,  
4 the State agreed to not seek Life in prison, and agreed to not file charges on ten (10) additional  
5 robbery events. Because the jury trial had already commenced, the Court conducted an  
6 extremely thorough plea canvass on both Defendants, and ultimately accepted their guilty  
7 pleas as freely, knowingly, and voluntarily entered. See Recorder’s Transcript of Plea Canvass  
8 of Pinkney and Powell attached hereto as Exhibit 1.

9 After Mr. Durham placed the negotiations on the record, the Court’s plea  
10 canvass began with Defendant Pinkney:

11 THE COURT: Okay. I’m going to do these one at a time and very, hopefully, carefully.  
12 Let’s start off, Mr. Pinkney –

13 ...

14 DEFENDANT PINKNEY: [Defendant spells True Name]

15 THE COURT: And how old are you?

16 DEFENDANT PINKNEY: I’m 22, Your Honor.

17 THE COURT: How far did you go in school?

18 DEFENDANT PINKNEY: I never got my high school diploma or I never got a GED,  
19 but I’m planning on getting that.

20 THE COURT: Do you have any sort of learning disability of any kind?

21 DEFENDANT PINKNEY: Yes, I grew up with a learning disability. I had an IEP, and  
22 I grew up with a lot like behavior, my behavior. I got the information on that too.  
23 Benjamin, he got status on the stuff, stating that type of stuff.

24 THE COURT: Okay, do you read, write and understand the English language?

25 DEFENDANT PINKNEY: Yes.

26 THE COURT: And is English your primary language?

27 DEFENDANT PINKNEY: Yes, sir.  
28

1 THE COURT: Have you been treated recently for any mental illness or addiction of  
2 any kind?

3 DEFENDANT PINKNEY: I have in the past, but not recently.

4 THE COURT: Okay. Has anyone ever suggested to you that you be treated for mental  
5 illness or an emotional condition?

6 DEFENDANT PINKNEY: Well, yeah, but – and no. I say yeah and no. It's a yeah on  
7 the mental affect, it has been where they wanted me to get treated, but I just hadn't.

8 THE COURT: Okay. Are you currently under the influence of any drug, medication,  
9 or alcoholic beverage?

10 DEFENDANT PINKNEY: No, sir.

11 THE COURT: Have you been on any medication during your time in jail?

12 DEFENDANT PINKNEY: No, sir.

13 THE COURT: Have you received a copy of the indictment – or the guilty plea  
14 agreement?

15 DEFENDANT PINKNEY: Yes, I have.

16 THE COURT: Have you discussed this case with your attorney?

17 DEFENDANT PINKNEY: Yes.

18 **THE COURT: Are you satisfied with his representation and the advice given to**  
19 **you by your attorney?**

20 **DEFENDANT PINKNEY: Yes I have. Or, yes, I am. Sorry.**

21 **THE COURT: Okay. And as to the guilty plea agreement, are you pleading guilty**  
22 **to Counts ... [Court lists counts in the Indictment]**

23 **DEFENDANT PINKNEY: Yes, I do.**

24 **THE COURT: And do you understand all the – have you read a copy of the guilty**  
25 **plea agreement?**

26 **DEFENDANT PINKNEY: Yes, I read it over, sir.**

27 **THE COURT: And do you understand everything contained in the guilty plea**  
28 **agreement?**

1           **DEFENDANT PINKNEY: Yes.**

2           **THE COURT: And have you had an opportunity to discuss this with your**  
3           **attorney?**

4           **DEFENDANT PINKNEY: Yes.**

5           **THE COURT: And if you had any questions, did he answer your questions?**

6           **DEFENDANT PINKNEY: Yes, he did.**

7           **THE COURT: Do you have any questions of me regarding that at this time?**

8           **DEFENDANT PINKNEY: No, Your Honor.**

9           **THE COURT: And as to the charges in the guilty plea agreement that I just**  
10          **discussed, how are you pleading?**

11          **DEFENDANT PINKNEY: Pleading guilty.**

12          **THE COURT: And is it because in truth and in fact you committed the charges**  
13          **listed in the guilty plea agreement?**

14          **DEFENDANT PINKNEY: Yes.**

15          **THE COURT: Are you making this plea freely and voluntarily?**

16          **DEFENDANT PINKNEY: Yes, I am, sir.**

17          **THE COURT: Has anyone forced or threatened you or anyone close to you to get**  
18          **you to enter this plea?**

19          **DEFENDANT PINKNEY: No, sir.**

20          **THE COURT: Has anyone made any promises other than what's stated in the**  
21          **guilty plea agreement to get you to enter this guilty plea agreement?**

22          **DEFENDANT PINKNEY: No.**

23          **THE COURT: And do you understand that as part of the guilty plea agreement,**  
24          **although you are not admitting to these crimes, that the State will be allowed to argue these**  
25          **crimes as I'm about to list for you at the time of sentencing? ... [Court then lists ten armed**  
26          **robbery dates, locations, and event numbers, which are also contained on page 2 of the guilty**  
27          **plea agreement].**

28          **DEFENDANT PINKNEY: Yes.**

1 THE COURT: And you're agreeable to the same? You're agreeable to that?

2 DEFENDANT PINKNEY: Yes, I am.

3 ... [Court showed Defendant his signature on the guilty plea agreement]

4 THE COURT: Okay. Before you signed it, again, did you read and discuss it with

5 your attorney?

6 DEFENDANT PINKNEY: Yes.

7 THE COURT: And again, just to be clear, did you understand everything

8 contained in the guilty plea agreement?

9 DEFENDANT PINKNEY: Yes, I did, sir.

10 THE COURT: Do you understand the constitutional rights you're giving up by []

11 entering a guilty plea agreement?

12 DEFENDANT PINKNEY: Yes, sir.

13 THE COURT: And do you understand that you have a right to appeal on reasonable

14 constitutional, jurisdictional or other grounds that challenge the legality of the

15 proceedings?

16 DEFENDANT PINKNEY: Yes, sir.

17 ... [Parties recite the range of punishment for each and every count to which

18 Defendant pled]

19 THE COURT: Do you understand the range of punishment?

20 DEFENDANT PINKNEY: Yes, sir.

21 ... [Colloquy regarding the maximum punishment for all counts]

22 MR. GIORDANI: As long as both Mr. Pinkney and Mr. Powell understand the range

23 for each count...[a]nd then also they understand sentencing is completely up to the

24 Court, and if the Court can either run the counts concurrent or run the counts

25 consecutive.

26 THE COURT: Okay. ... So you understand the individual range of punishments on

27 each of the counts?

28 ...

1 DEFENDANT PINKNEY: Yes, sir.

2 **THE COURT: I can – it's at my discretion. And do you understand that the counts**

3 **can be run consecutively or concurrently? Once again, that's up to me.**

4 **DEFENDANT PINKNEY: Yes, sir.**

5 THE COURT: And no one is in a position to promise you probation, leniency, or any

6 special treatment; do you understand that?

7 DEFENDANT PINKNEY: Oh, yeah, I understand that, sir.

8 ...

9 THE COURT: Thank you. What is it that you did to cause you to plead guilty?

10 DEFENDANT PINKNEY: I committed – I went to an establishment, and I committed

11 two robberis – two more robberies – sir.

12 **THE COURT: What were the establishments?**

13 **DEFENDANT PINKNEY: It was a Pepe's, and another one was Walgreen's, sir.**

14 THE COURT: All right. Do you have any questions you'd like to ask me or your

15 attorney before I accept this plea?

16 DEFENDANT PINKNEY: No, sir. Not questions, sir, no.

17 THE COURT: The Court finds the Defendant's plea of guilty is freely and voluntarily

18 made, and the Defendant understands the nature of the offenses and consequences of

19 his plea, and therefore, accepts the guilty plea. The matter is referred to Parole &

20 Probation for a PSI report.

21 **MR. GIORDANI: Your Honor, before you move on, can I ask one more thing of**

22 **the Court?**

23 **THE COURT: Sure.**

24 **MR. GIORDANI: Just with regard to your first few questions of Mr. Pinkney**

25 **where he indicated he had an IEP, a learning program, learning disabilities**

26 **growing up, can we just be clear on the record that Mr. Pinkney had sufficient**

27 **time with his attorney – it's been a couple hours, I think, since we broke and**

28

1 started really getting into the meat of this – understood fully both the written  
2 words and, you know, the conversations that he had with his attorney.

3 MR. DURHAM: Your Honor, I signed the certificate of counsel, which indicates  
4 that I believe he's fully competent to enter the plea; that I went over it with him.

5 THE COURT: Okay.

6 MR. DURHAM: And so I would just ask the Court to adopt that as part of the  
7 plea agreement.

8 THE COURT: That's fine, and I certainly think I've asked him three times at least  
9 now if he had any questions regarding this, and he's advised me that he does not.  
10 And you had plenty of time, for the record, to go over this with your attorney since  
11 it's now 1:30 and you first met with him at approximately 11:00 a.m., correct?

12 DEFENDANT PINKNEY: Yes.

13 THE COURT: And once again, you have no questions regarding the agreement?

14 DEFENDANT PINKNEY: No, sir.

15 THE COURT: All right. Thank you.

16 MR. DURHAM: Thank you.

17 THE COURT: I find it's freely and voluntarily entered into. The Defendant is  
18 remanded.

19 Reporter's Transcript, pp. 3-12.

20 Defendant has not set forth any valid basis whatsoever to withdraw his plea.  
21 Defendant's Motion rests upon three general claims: 1) his mental health issues caused him to  
22 not understand the nature and consequences of the agreement, 2) his attorney and co-defendant  
23 pressure him into taking a deal and told him he would do Life if he did not take the deal, and  
24 3) trial counsel was ineffective in advising Defendant to take the plea. *See* Defendant's Motion  
25 to Withdraw Guilty Plea, pp. 7-10. Clearly, these claims do not provide a **substantial reason**  
26 **that is both fair and just** warranting withdrawal of a guilty plea – for several reasons. First,  
27 the State notes that the ineffective assistance of counsel claim will be addressed in section B,  
28



1 *infra*. As to the first two claims – that he did not understand the negotiations and was pressured  
2 into taking them – those claims are entirely belied by the record.

3 As to Defendant’s claim that his mental health history caused him to not understand the  
4 nature of the deal, that claim is simply not true. The Court went to great lengths to canvass  
5 Defendant and make sure he understood the agreement, and did so for this exact reason – in  
6 case he tried to withdraw his plea once the jury was discharged and the state released it’s 40  
7 or so witnesses from subpoena. In fact, after the Court completed its canvass, the State asked  
8 the Court to again visit the mental health aspect of the canvass out of an abundance of caution.  
9 The Court did so, and trial counsel asked the Court to adopt his signed certificate of counsel.  
10 That certificate reads as follows:

11 I, the undersigned, as the attorney for the Defendant named herein and **as an officer of**  
12 **the court** hereby certify that:

13 1. **I have fully explained to the Defendant the allegations contained in the**  
14 **charge(s) to which guilty pleas are being entered.**

15 2. I have advised the Defendant of the penalties for each charge and the restitution  
16 that the Defendant may be ordered to pay.

17 3. I have inquired of Defendant facts concerning Defendant’s immigration status  
18 and explained to Defendant that if Defendant is not a United States citizen any criminal  
19 conviction will most likely result in serious negative immigration consequences

20 ...

21 4. **All pleas of guilty offered by the Defendant pursuant to this agreement are**  
22 **consistent with the facts known to me and are made with my advice to the**  
23 **Defendant.**

24 5. To the best of my knowledge and belief, the Defendant:

25 a. **Is competent and understands the charges and the consequences of pleading**  
26 **guilty as provided in this agreement,**

27 b. **Executed this agreement and will enter all guilty pleas pursuant hereto**  
28 **voluntarily, and**

1 c. Was not under the influence of intoxicating liquor, a controlled substance or  
2 other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2  
3 above.

4 (GPA, p. 8). Trial counsel, as an officer of the Court, signed the acknowledgment,  
5 which clearly states that he explained everything to Mr. Pinkney, advised him of the  
6 ramifications, and believed Mr. Pinkney was competent and entering the agreement  
7 voluntarily. Current counsel is essentially asking this Court to find that trial counsel was either  
8 lying, or incompetent. That is both inappropriate and false. Trial counsel was the one who took  
9 the time to prepare the case for trial. Trial counsel was in the room during jury selection. Trial  
10 counsel was the one discussing the damning evidence with Mr. Pinkney. Trial counsel was the  
11 one who knew that Mr. Pinkney was going to be convicted at trial. And trial counsel was the  
12 one who was in the best position to understand Mr. Pinkney's mental state at the time of the  
13 plea, as well as the overwhelming evidence he was facing if he did not take a plea. Trial  
14 counsel signed the above declaration, and current counsel is simply guessing at what Mr.  
15 Pinkney's mental state was at the time he entered the plea. The record clearly reflects Mr.  
16 Pinkney understood the agreement and entered it knowingly and voluntarily.

17 To the extent Defendant claimed he was "pressured" by his co-defendant and his  
18 attorney because they told him he would "do Life" if he did not take the deal, that claim is  
19 nonsensical for one simple reason. First, if in fact they told him that, they were telling the  
20 truth.

21 As this Court can see, there is absolutely no basis to allow Defendant to withdraw this  
22 guilty plea. The Court conducted an extremely thorough plea canvass of Mr. Pinkney, and he  
23 responded appropriately throughout. Mr. Pinkney was repeatedly asked, out of an abundance  
24 of caution, whether he understood the deal, whether he had enough time to talk to his lawyer,  
25 and whether he had any questions. Never once did he respond inappropriately to a question,  
26 or raise any concerns. Mr. Pinkney was eager to accept the negotiation. That's because he  
27 knew he was getting a beneficial deal when he avoided ten additional robbery cases for  
28 pleading guilty to the charges he would have been convicted of by a jury anyway.

1 At the time these deals were entered into, a jury was in the hallway, and the State was  
2 entirely prepared to go complete the trial. In fact, the trial had already begun, as the pleas were  
3 entered on the second day of jury selection. These Defendants begged for negotiations, and,  
4 notwithstanding the fact that the State was confident in the outcome if the case proceeded to  
5 trial, the State entered into the deals. The Defendants received a large benefit that incentivized  
6 them to take the deals. Specifically, they avoided Life in prison on the instant charges and they  
7 avoided being charged with dozens of additional counts – many of which included potential  
8 Life sentences. Those charges were discussed in detail, and neither Defendant ever once raised  
9 a concern or objection to those charges being referenced. The reason for that is simple. **The**  
10 **Defendants themselves knew they committed the crimes, understood their exposure, and**  
11 **chose to avoid it.** Now, after the jury was discharged, the State released all its witnesses from  
12 subpoena, halted any investigation into the additional offenses, and sent the files to P&P for  
13 PSI's to be completed, the Defendants claim that their pleas were not knowingly and  
14 voluntarily entered. The record completely contradicts their claims, and the Motion should be  
15 denied.

16 While the State need not set forth actual prejudice, Hubbard, 110 Nev. at 675-76, 877  
17 P.2d at 521, the State would take this opportunity to address the broader implications of  
18 allowing a defendant such as this to withdraw his plea based on nothing more than a whim.  
19 As this Court can see, there are no issues with the Guilty Plea Agreement, no issues with the  
20 plea canvass, and absolutely no reason to believe that anything else was going on behind the  
21 scenes that may render this guilty plea questionable. As such, allowing this Defendant to  
22 withdraw his plea would render plea agreements and plea canvasses meaningless. If those  
23 things are done perfectly, and there is nothing outside those records that creates a question as  
24 to the voluntary and knowing nature of the guilty plea, why would any party – State or Defense  
25 – ever enter into a guilty plea, knowing it can be withdrawn for no good reason? When the  
26 guilty pleas were entered in this case, the Court discharged the jury, the State released dozens  
27 of witnesses from subpoena, did not file additional charges related to the ten robbery events  
28 (per the agreement), and sent its file to Parole & Probation for a PSI. In a perfect world with

1 unlimited prosecutorial resources, the State would continue to investigate and build the  
2 strength of their case up until the moment the defendant is sentenced, but as this Court is  
3 aware, that is simply not possible in the real world. Allowing Defendant's to withdraw their  
4 pleas on a whim would change the entire fabric of the justice system. That is why the law  
5 requires a **substantial reason that is both fair and just** before a Defendant is allowed to  
6 withdraw his plea. No such reason was given here.

7 As to Defendant's claim that they had not received discovery on the ten additional  
8 cases, that claim fails as well. Most importantly, there is no right to pre-indictment discovery,  
9 so there was no "discovery" to begin with. In addition, as outlined thoroughly above, the  
10 Defendants themselves knew whether they committed the ten additional events, and the  
11 strength of the evidence in those cases is irrelevant. They chose to take the deal that ensured  
12 them the least exposure, and they did so. While the new attorney may personally believe that  
13 the evidence in the additional cases was not as strong as the evidence in the instant case, that  
14 is not a basis to allow them to withdraw their guilty pleas. They pled guilty to the charges in  
15 the instant case, not the ten additional cases. Again, this is not a substantial reason that is both  
16 fair and just. Allowing the Defendants to withdraw their pleas would be unfair and unjust.

17 Finally, trial counsel's performance was not deficient, nor did it prejudice Defendant  
18 in any way. While the new attorney on the case, may have done things differently, or sought  
19 a different outcome, the reality of the situation was simple – trial counsel knew his client was  
20 going to be convicted if the trial was completed, knew there were ten additional events that  
21 could be filed thereafter, and he sought a negotiation at Defendant's request. The State was  
22 inclined to finish the trial, but relented and agreed to the negotiation. Trial counsel's  
23 performance was entirely reasonable. Indeed, "[a] fair assessment of attorney performance  
24 requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct  
25 the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's  
26 perspective at the time." Kirksey v. State, *supra*, 112 Nev. at 987-988 (citing Strickland v.  
27 Washington, *supra*, 466 U.S. at 689). In fact, the alternative would have been to proceed to  
28 verdict on the instant charges, and take their chances with the dozens of additional charges.

1 Out of those two options, any reasonable attorney would have advised their client to limit their  
2 exposure, as trial counsel did here. As to the prejudice prong of the Strickland analysis, the  
3 same reasoning applies. Defendant did not suffer any prejudice based upon his counsel's  
4 performance, he simply had two options, and took the better of the two.

5 Everyone in the room knew that those charges had not been filed, but that they could  
6 have been filed after the jury's verdict on the instant charges. That was the entire nature of the  
7 agreement. Trial counsel could not have known whether the Defendants committed those ten  
8 additional events – only the Defendants themselves knew whether they did. And obviously,  
9 since they took the instant plea deal – they did commit those offenses and sought to limit their  
10 liability. The alternative for them would have been to complete the trial, run the risk of getting  
11 convicted of all counts in the instant case anyway, and then have more exposure on the back  
12 end when the State proceeded on the ten additional events. Clearly, they wanted to limit their  
13 exposure, as they knew they were going to be convicted on the instant charges, and chose to  
14 avoid the chance of being convicted on dozens of additional charges. Again, the trial was  
15 already underway. Had the Defendants believed that they were innocent of the ten additional  
16 events – they could have finished the trial on the instant charges, and took their chances on the  
17 additional charges. They chose not to do so. And, based upon the plea canvass and the GPA  
18 itself, they chose to do so strategically. They cannot now withdraw their pleas on a whim. Nor  
19 can they withdraw their pleas based on a second opinion from a different attorney, or even  
20 cold feet. The legal standard for withdrawal of a guilty plea is a **“substantial reason that is  
21 both fair and just”** – not “cold feet” or “a second opinion.”

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**CONCLUSION**

In light of the foregoing, the State respectfully requests that this Honorable Court  
DENY Defendant's Motion to Withdraw Guilty Plea.

DATED this 12th day of February, 2019.

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

BY /s// JOHN GIORDANI  
JOHN GIORDANI  
Chief Deputy District Attorney  
Nevada Bar #012381

**CERTIFICATE OF ELECTRONIC TRANSMISSION**

I hereby certify that service of the above and foregoing was made this 12th day of  
February, 2019, by electronic transmission to:

LUCAS GAFFNEY  
lucas@gaffneylawlv.com

BY /s// E. DEL PADRE  
E. DEL PADRE  
Secretary for the District Attorney's Office

JG/ed/GCU

**DISTRICT COURT  
CLARK COUNTY, NEVADA****Felony/Gross Misdemeanor****COURT MINUTES****February 27, 2019**

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C-17-327767-2      State of Nevada  
                                 vs  
                                 Adrian Powell

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**February 27, 2019      09:00 AM      Hearing Re: Withdrawal of Plea**

**HEARD BY:**      Israel, Ronald J.      **COURTROOM:** RJC Courtroom 15C

**COURT CLERK:** Thomas, Kathy

**RECORDER:**      Chappell, Judy

**REPORTER:**

**PARTIES PRESENT:**

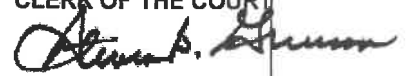
<b>Adrian Powell</b>	<b>Defendant</b>
<b>John Giordani</b>	<b>Attorney for Defendant, Plaintiff</b>
<b>Monique A. McNeill</b>	<b>Attorney for Defendant</b>
<b>State of Nevada</b>	<b>Plaintiff</b>

**JOURNAL ENTRIES**

Deft. POWELL present, in custody. Court noted the Court read all the pleadings. Ms. McNeill argued and requested an evidentiary hearing with prior counsel. State argued and briefed the Court of the Deft's canvaass and plea with the transcript. Court finds no grounds under Strikland v. Washington to substantiate in-effective assistance, Deft. knowingly and voluntarily accepted the plea and over the all the circumstances, COURT ORDERED, Motion to withdrawal of Plea, DENIED. Court directed the State to prepare the order. At the request of Counsel, COURT ORDERED, a Status Check be set regarding the outcome of the Co-Deft's Motion to Withdraw Plea.

**CUSTODY**

04/08/19 9:00 AM STATUS CHECK: OUTCOME OF CO-DEFT'S EVIDENTIARY HEARING



1 RTRAN

2  
3  
4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 STATE OF NEVADA,

CASE#: C-17-327767-1

9 Plaintiff,

DEPT. XXVIII

10 vs.

11 LARENZO PINKEY,

12 Defendant.

13  
14 BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

15 WEDNESDAY, APRIL 24, 2019

16 **RECORDER'S TRANSCRIPT OF HEARING**  
17 **EVIDENTIARY HEARING RE: MOTION TO**  
18 **WITHDRAW GUILTY PLEA**  
19 **DEFT. LARENZO PINKEY'S MOTION TO**  
20 **WITHDRAW GUILTY PLEA**

21 APPEARANCES:

22 For the State:

JOHN L. GIORDANI III, ESQ.  
Chief Deputy District Attorney

23  
24 For the Defendant:

LUCAS J. GAFFNEY, ESQ.

25 RECORDED BY: JUDY CHAPPELL, COURT RECORDER



1 Las Vegas, Nevada, Wednesday, April 24, 2019

2  
3 [Case called at 10:37 a.m.]

4  
5 THE COURT: 327767, Pinkey.

6 Counsel, state your appearance.

7 MR. GIORDANI: John Giordani on behalf of the State.

8 MR. GAFFNEY: Good morning, Your Honor. Lucas Gaffney  
9 on behalf of Lorenzo Pinkney. He's present and in custody.

10 THE COURT: Thank you. This is on for Defendant's Motion  
11 to Withdraw his Guilty Plea. Go ahead.

12 MR. GAFFNEY: Your Honor, first of all, just for the record,  
13 I've spoken to Mr. Pinkney about waiving his attorney-client privilege just  
14 for the purposes of this hearing. So we have his previous attorney,  
15 Ben Durham, here. He's going to testify regarding conversations they  
16 had pertaining to his mental health and the plea agreement.

17 THE COURT: Okay.

18 MR. GAFFNEY: Mr. Pinkney understands that he's waiving  
19 his attorney-client privilege as to those issues for the purpose of today's  
20 hearing.

21 THE COURT: All right, Mr. Pinkey or Pin --

22 THE DEFENDANT: Like pink knee, like pink then knee.

23 THE COURT: Okay, Mr. Pinkey [sic]. Do you understand that  
24 you're waiving your attorney-client privilege, that your former attorney is  
25 going to be talking about things that would normally be confidential?

1 THE DEFENDANT: Yes.

2 THE COURT: And your attorney has explained, ow, explained  
3 everything -- paper cut, explained everything to you regarding your  
4 waiver?

5 THE DEFENDANT: Yes.

6 THE COURT: And he's answered any questions you may  
7 have had regarding your attorney-client privilege?

8 THE DEFENDANT: Yes.

9 THE COURT: And you don't have questions regarding your  
10 waiver of the attorney-client privilege for me or your attorney?

11 THE DEFENDANT: What all -- what all is going to be said  
12 basically? Like --

13 THE COURT: Well, I can't predict and I don't think your  
14 attorney can predict everything that's going to be said, but the State is  
15 going to cross-examine your attorney also regarding conversations that  
16 you had with your attorney. Now I don't know if I can even speculate as  
17 to whether that will -- how far that will get into, but it is --

18 THE DEFENDANT: Sir, sir -- is it just with my mental issue?  
19 That's what just being stated?

20 THE COURT: Well, that's the focus of it, yes.

21 MR. GAFFNEY: And, Your Honor, my intent is the scope of  
22 my questions will cover the plea agreement, discussions they had about  
23 the plea agreement, and about the mental health issues. That's as far as  
24 I'm intending to go today.

25 THE COURT: Okay. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: And you -- you're not under any sort of mental  
3 problem or psychological where you don't understand everything that's  
4 going on here today?

5 THE DEFENDANT: No, I understand.

6 THE COURT: Okay. I think that covers it.

7 Go ahead.

8 MR. GAFFNEY: Okay. Your Honor, the defense would call  
9 Ben Durham.

10 THE MARSHAL: Mr. Pinkney, you can sit down, sir.

11 **BENJAMIN DURHAM**

12 [having been called as a witness and being first duly affirmed,  
13 testified as follows:]

14 THE CLERK: Please be seated. Please state your name and  
15 spell it for the record.

16 THE WITNESS: Benjamin Durham. Last name is  
17 D-U-R-H-A-M.

18 THE CLERK: Thank you.

19 THE COURT: Go ahead.

20 MR. GAFFNEY: Thank you, Judge.

21 **DIRECT EXAMINATION**

22 BY MR. GAFFNEY:

23 Q Mr. Durham, how are you currently employed?

24 A I'm self-employed.

25 Q And are you self-employed as an attorney?

1 A Yes.

2 Q Do you practice criminal defense?

3 A Yes.

4 Q Here in Clark County?

5 A Yes.

6 Q And how long have you been doing that?

7 A Since 2001.

8 Q And can you give us just a rough estimate as to how many  
9 criminal cases you resolved by way of plea agreement? Hundreds?  
10 Thousands?

11 A At least, yeah.

12 Q Hundreds, fair to say.

13 A I would, yeah, I don't -- yeah, I don't know. It's a lot.

14 Q So fair to say that you're accustomed to resolving cases by  
15 way of plea agreement?

16 A Yes.

17 Q And on this case, were you appointed or retained?

18 A Appointed.

19 Q And did you represent Mr. Pinkney throughout the majority of  
20 the proceedings in this case?

21 A Yes.

22 Q And after you were appointed, did there come a time when  
23 you learned that Mr. Pinkney had some mental health issues?

24 A Yes.

25 Q And do you remember how you became aware of that?

1           A     In speaking with him and speaking with his mother.

2           Q     And was that early on in the case? When can you estimate  
3 when you learned about those mental health issues?

4           A     Yeah, it was fairly early on. I believe that I was appointed -- I  
5 believe there was another attorney appointed before me and I think that  
6 the documents they turned over to me included some mental health  
7 records.

8           Q     Okay. So early on in the case when you received the case file  
9 from the previous attorney, there were indications in that case file that  
10 Mr. Pinkney suffered from mental health issues?

11          A     Right.

12          Q     Were you aware that one of mental health issues he suffered  
13 from was post-traumatic stress disorder?

14          A     Yes.

15          Q     Were you aware that Mr. Pinkney had a significant learning  
16 disability?

17          A     Yes.

18          Q     Were you aware that he had been previously diagnosed with  
19 attention deficit hyperactivity disorder?

20          A     Yes, I remember that.

21          Q     And were you aware that he had been suffering from those  
22 ailments for the majority of his life?

23          A     Right.

24          Q     And based on that, were you aware that Mr. Pinkney had  
25 problems, difficulties processing information due to those mental health

1 issues?

2 A Yes.

3 Q Were you aware that he had difficulty with reading  
4 comprehension?

5 A Yes.

6 Q Were you aware that he had difficulty keeping his --  
7 maintaining focus?

8 A Yes.

9 Q Were you aware that he had difficulty with short-term memory  
10 issues?

11 A I don't remember that specifically, but.

12 Q At some point during this case, did Mr. Pinkney request that  
13 you obtain mental health records from the Social Security Administration?

14 A Yes.

15 Q And did you do that?

16 A I believe we did.

17 Q Do you remember -- did you review those records?

18 A Yeah, if we -- I mean, if I obtained them, I reviewed them. I  
19 can't remember if we obtained them directly or if his mother obtained  
20 them for us.

21 Q Okay.

22 A But, yeah, I think we had them.

23 Q Would they -- so I took over representation of Mr. Pinkney  
24 after you. If you would have obtained those records, would they have  
25 been in a case file that Mr. -- that you would have transmitted to my

1 office?

2 A Yes.

3 Q Now were you aware that previous psychiatrists had  
4 recommended Mr. Pinkney receive mental health treatment, like  
5 counseling or therapy?

6 A Yes.

7 Q And were you aware that prior to his arrest and throughout the  
8 proceedings in this case, he had not undergone any kind of therapy, any  
9 kind of mental health counseling or therapy?

10 A Yeah, as far as I know he didn't have any counseling done.

11 Q Were you aware that previous psychiatrists had recommended  
12 Mr. Pinkney take medication to treat his mental health issues?

13 A Yes.

14 Q Were you aware that prior to his arrest and throughout the  
15 proceedings in this case, he had not been taking any medication to treat  
16 his mental health issues?

17 A That was my understanding.

18 Q Now this was a case that resolved in the middle of trial, is that  
19 fair to say?

20 A It was during jury selection, yeah.

21 Q Now on the date that Mr. Pinkney's change of plea occurred,  
22 did you have a conversation with him regarding the kinds of sentences  
23 he'd be facing if you were found guilty of all the charges at trial?

24 A Yes.

25 Q And did you tell them that you believe he could receive a life

1 sentence?

2 A I don't recall. I think that I believe that some of the charges  
3 carried potentially life tail --

4 Q Okay.

5 A -- on them.

6 Q And did you talk to him about the charges that carried a life  
7 tail?

8 A Yes, they were the kidnapping charges, I think.

9 Q Did you ever tell Mr. Pinkney that even if he received a life  
10 sentence, he would still -- he could still be eligible for parole?

11 A I would have told him what the minimum and maximum  
12 potential sentence was.

13 Q But did you have a specific conversation with him where you  
14 said, look, if you are convicted of this kidnapping charge and the Court  
15 imposes a life sentence, at some point you'd still be eligible for parole?

16 A I can't tell you exactly if I would have said that to him or not.

17 Q Did you have a discussion with him about the minimum  
18 sentence he could receive?

19 A Yeah, although it was a little complicated given the amount of  
20 charges that were involved, as well as the enhancements.

21 Q Did you, in talking to him, express your belief that he may or  
22 may not receive the minimum sentence?

23 A I don't have a specific recollection, but generally I would give  
24 him my opinion to a certain extent.

25 Q Now knowing about Mr. Pinkney's mental health issues and



1 the fact that he wasn't receiving any kind of treatment or medication, did  
2 that give you any cause to be concerned about Mr. Pinkney's ability to  
3 understand the terms of the plea agreement?

4 A To a certain extent, I guess. Yeah, I just meant that I had to  
5 make sure I reviewed it carefully with him and went over everything with  
6 him.

7 Q Okay. And so on the day that he changed his plea, did you  
8 receive a written plea agreement that day?

9 A Yes.

10 Q And was that the first time you had received a written plea  
11 agreement in this case?

12 A I believe so.

13 Q And did you go over -- did you have an opportunity to go over  
14 the plea agreement with him?

15 A Yes, in the holding area.

16 Q Okay. So that would have been here in the courthouse.

17 A Right.

18 Q But back in the holding area of the courtroom.

19 A That's what I remember.

20 Q And was it just the two of you in there? Is there anybody who  
21 would have been privy to that conversation?

22 A I remember having conversations, just me and him. And I also  
23 remember having conversations as a group with the other defense lawyer  
24 and the other co-defendant because I seem to recall the deals were  
25 contingent.

1 Q And did you read through the entire plea agreement with  
2 Mr. Pinkney? Or did you --

3 A Yes.

4 Q Okay. And is that page by page, line by line, word by word?

5 A Yeah.

6 Q And so you read the plea agreement to him?

7 A Right.

8 Q How much time do you think you spent talking to Mr. Pinkney  
9 about the plea agreement?

10 A I don't remember.

11 Q Was it, I mean, was it -- can you estimate was it half hour, less  
12 than half hour, more than a half hour.

13 A I don't remember. I just remember there was kind of a lot of  
14 like back and forth. Like we'd talk and then I'd leave, talk to the DA or  
15 whatever, and then go back and talk to him. But I couldn't tell you the  
16 total amount of time.

17 Q Before he entered his plea, did you discuss with Mr. Pinkney  
18 the sentencing structure outlined in the plea agreement?

19 A Yes, we discussed the potential sentences for the charges.

20 Q Did you discuss with him how imposing or applying -- well,  
21 imposing consecutive sentences would affect his overall sentence?

22 A Yes.

23 Q And did you discuss with him how concurrent sentences  
24 worked?

25 A Yes.

1 Q Did he express any confusion about the sentencing structure  
2 during your conversation with him?

3 A Little bit.

4 Q And do you recall what it was about -- what he was confused  
5 about?

6 A I mean, just given the number of charges, it was, I mean, we  
7 had to some math to just calculate potential sentences.

8 Q Uh-huh.

9 A And I don't remember off the top of my head what the  
10 minimum would have been, but, yeah, I mean, there were so many  
11 different sentences and enhancements involved that it got a little  
12 complicated.

13 Q Okay. So it was a fairly complex sentencing structure.

14 A Yes, potentially, yeah.

15 Q And it could result in a lot of different potential outcomes --

16 A Yes.

17 Q -- at sentencing. And that's because -- was it fair to say that's  
18 because the Judge ultimately would decide what sentence to impose and  
19 what those ranges were at, sometimes that can be a complex exercise.

20 A Yeah, exactly. I mean, there was -- a lot of the charges  
21 carried a fairly broad range of a potential sentence.

22 Q Do you have any formal training in psychology or psychiatry?  
23 Anything --

24 A No.

25 Q -- like that? Is it fair to say that you're not able to look at

1 somebody and determine whether or not they're competent or  
2 incompetent?

3 A That's true.

4 MR. GAFFNEY: I'll pass the witness, Judge.

5 THE COURT: State.

6 **CROSS-EXAMINATION**

7 BY MR. GIORDANI:

8 Q Good morning, Mr. Durham.

9 A Good morning.

10 Q I want to just kind of set the scene here and step back a  
11 moment. When you recall a prior attorney being on the case, was it the  
12 public defender before you were appointed to the case?

13 A I think so. I'm not positive.

14 Q Okay. And do you recall a series of status checks and  
15 calendar calls or court dates where we, the parties, went back and forth  
16 about readiness and that the defendants indicated they wanted to go to  
17 trial at some point and were kind of forcing the issue. Do you recall that?

18 A I -- I don't. I mean, if you can give me kind of a better  
19 timeframe. I think that we had at least like two calendar calls maybe.

20 Q Okay. I'll just move on from that. If you don't --

21 A Okay.

22 Q -- recall, that's fine. You indicated during your direct  
23 examination that you had conversations with Mr. Pinkney and with his  
24 mom about mental health issues, correct?

25 A Right.

1 Q And do you recall seeing documentation to that effect?

2 A Yes.

3 Q Okay. So you were aware of that leading up to trial up until  
4 the day we started trial and the next day we were in jury selection. Is --

5 A Yes.

6 Q -- that right?

7 A Yes.

8 Q You indicated you don't have any formal training in psychiatry,  
9 but at the time both the parties were here for calendar call, announced  
10 ready for trial up until the day we appeared for trial, was it your belief in  
11 interacting with Mr. Pinkney that he wasn't undergoing some form of  
12 psychosis?

13 A Could you -- could you repeat that question?

14 Q Sure. I'm sorry, that was a long question. Leading up to the  
15 trial and up until the day we were present in court for Day 1 and Day 2 of  
16 trial, in your interactions with Mr. Pinkney, were you under the impression  
17 that he was of sound mind?

18 A That's kind of a hard question to answer. I mean, --

19 Q Okay.

20 A -- it's kind of broad. I --

21 Q Fair enough. Is this the first time you've represented someone  
22 with PTSD, ADHD, or a learning disability?

23 A No.

24 Q In fact, are learning disabilities and I guess mental health  
25 issues somewhat common now-a-days in criminal cases?

1           A     They're fairly common.

2           Q     With defendants?

3           A     Yes.

4           Q     Had you believed at the time he entered his plea that he was  
5 not understanding something, would you have attempted to explain it  
6 further to him?

7           A     That would be my general practice, yeah.

8           Q     Okay. Do you recall in this case if when he indicated, you said  
9 there was some confusion about just the sheer amount of charges, right?

10          A     The potential sentence, yeah.

11          Q     And in this particular case, do you actually recall after that  
12 confusion then explaining it to him further?

13          A     I mean, like I said, we had multiple conversations. I don't  
14 remember exactly the sequence or exactly what I said.

15          Q     I want to go briefly into the evidence that you are aware of  
16 once we started the trial essentially. Do you recall there being a series of  
17 multiple victims -- or multiple victims per event in this case?

18          A     Yes.

19          Q     Meaning several people at the Walgreen's and then several  
20 people at the Pepe's Tacos that were robbed?

21          A     Right.

22          Q     And do you recall there being DNA evidence and fingerprints  
23 implicating both Mr. Pinkney and Mr. Powell in this case?

24          A     Yes.

25          Q     Did that type of evidence and the other evidence that you're

1 aware of factor into your determination on to advising whether to take a  
2 plea or not to take a plea?

3 A It wasn't just that. It was also the fact that they were  
4 apparently under other events under investigation.

5 Q Understood. With regard to these charges that are just for  
6 now, --

7 A Uh-huh.

8 Q -- when you -- when you come in to start a trial day of, you're  
9 aware of the evidence in the case, is what I'm asking.

10 A Yes.

11 Q And based upon the evidence, if the evidence is strong  
12 against him, you might advise someone to take a plea. Is that fair?

13 A That's fair.

14 Q And in this case, do you recall, as Mr. Dickerson and I started  
15 talking to the jury, either yourself or one of the Defense Counsel for  
16 Mr. Powell approaching us regarding potential negotiations?

17 A Yeah, I think Mr. Nelson did.

18 Q Right. Okay, Mr. Nelson was doing the trial with Mr. Kane,  
19 correct?

20 A Right.

21 Q And do you recall the State, or Mr. Dickerson and I, being  
22 reluctant to plead the case out during the trial?

23 A To a certain extent, yeah.

24 Q Okay.

25 A I mean, you guys weren't very flexible, I guess you'd say, as

1 far as what a plea offer would be.

2 Q Fair enough. But we had, we all a lengthy conversation in the  
3 hallway on Day 2 of trial. Do you remember that?

4 A Yes.

5 Q In the ante room?

6 A Yes.

7 Q And we went back and forth and then do you recall you,  
8 Mr. Nelson, and Mr. Kane then going back to talk to your clients.

9 A Yes.

10 Q And there was, if you recall, was there approximately a  
11 two-hour back and forth while the jury was sent out in the hallway or was  
12 waiting to be called in on that Day 2 of trial?

13 A I think I remember that you guys had to go prepare a plea  
14 agreement.

15 Q Right. Okay. And then there was multiple discussions  
16 between you and your client and then you guys would come back out,  
17 talk to us, and there was some back and forth there.

18 A Right.

19 Q Is that fair?

20 A Right.

21 Q During the course of those negotiations between the parties,  
22 were you under the impression that the deal, the final deal that was made  
23 or offered to Mr. Pinkney, was the only option? Meaning either that or go  
24 to trial.

25 A You mean the final offer that they ended up signing?



1 Q The final offer that was made by us, that, yes, --

2 A Yeah.

3 Q -- they ultimately took. I mean, the two options were finish the  
4 trial or --

5 A Right.

6 Q -- take that deal, correct?

7 A Right.

8 Q And did you explain that to Mr. Pinkney?

9 A I mean, I explained to him that that was your -- that was your  
10 offer. You weren't going to budge from that.

11 Q Okay. During the course of explaining it to Mr. Pinkney, is it  
12 your practice -- well, in this case, did you go through the Guilty Plea  
13 Agreement with him and explain all the rights he'd be giving up if he  
14 pled?

15 A Yeah, I went through it with him.

16 Q Okay. Did you explain to him the potential range for each  
17 specific count?

18 A Yes.

19 Q Okay. There were a number of duplicate counts, meaning  
20 multiple first-degree kidnappings, multiple robberies, et cetera, correct?

21 A Right.

22 Q And when you were testifying on direct, my understanding  
23 what you said was that you went back and forth explained to Mr. Pinkney  
24 the range on each count, meaning the absolute minimum and the  
25 maximum sentences, is that correct?

1           A     I think I meant back and forth as far as like talking to you,  
2 going back, that kind of thing.

3           Q     Okay.

4           A     But I do remember speaking with him on, you know, more  
5 than one occasion. Part of it might have been hashing out the deal and  
6 then part of it would have been explaining the potential sentences.

7           Q     Okay. And with specific regard to this case and these  
8 conversations you had, --

9           A     Uh-huh.

10          Q     -- is it your belief as you sit here, you explained the range for  
11 each count to Mr. Pinkney?

12          A     Yes, --

13          Q     Okay.

14          A     -- that's my recollection.

15          Q     Okay. In explaining the GPA, you indicated you read it page  
16 by page, word by word, to him. Is that right?

17          A     Yeah, I read it to him and then I believe that I left -- he was  
18 back there with a copy of it. I can't tell you if you read it or not himself  
19 though.

20          Q     Okay. Now after your conversations in the back, do you recall  
21 coming out, all the parties were here and the defendants and then the  
22 Court started to conduct the plea canvass?

23          A     Right.

24          Q     And you've been through probably thousands of those, is that  
25 fair?

1           A     Yeah.

2           Q     Have you -- is this the first time that you negotiated a case  
3 while you were in a trial?

4           A     No, I don't think so.

5           Q     Okay. When the canvass was going on, do you recall the  
6 Judge asking Mr. Pinkney the typical plea canvass questions, do you  
7 understand the agreement, or do you have any questions, et cetera?

8           A     Right.

9           Q     And did he -- do you recall him ever wavering or indicating to  
10 the Court that he had issues or didn't understand or anything of that  
11 nature?

12          A     I don't remember.

13          Q     Okay. Well, let me ask you this way. Had he indicated that,  
14 would you have offered further counsel or advice if he didn't understand  
15 what was going on?

16          A     Yeah.

17          Q     When the plea canvass was being conducted, do you recall  
18 the idea this mental health issue coming up at some point?

19          A     I don't remember.

20          Q     Okay. If I were to represent to you that at the end of the plea  
21 canvass, towards the end of the plea canvass, I jumped in and indicated  
22 to the Court the following: just with regard to your first few questions with  
23 Mr. Pinkney -- and this is me speaking to the Judge -- where he indicated  
24 he had an IEP or a learning program, learning disabilities growing, can  
25 we just be clear on the record that Mr. Pinkney had sufficient time with

1 his attorney. It's been a couple of hours, I think, since we broke and  
2 started really getting into the meat of this, but they understood fully -- or  
3 understood fully both the written words and, you know, the conversations  
4 that he had with his attorney.

5 Do you recall that?

6 A No, but if it's in a transcript, then I --

7 Q Okay.

8 A -- I won't dispute it.

9 Q And then I'll go on. The transcript indicates and I'm sure,  
10 Mr. Gaffney, correct me if I'm wrong, indicates you jumped in and said:  
11 Your Honor, I signed the Certificate of Counsel which indicates that I  
12 believe he's fully competent to enter the plea. That I went over it with  
13 him.

14 The Court said: Okay.

15 Then you said: And so I would just ask that the Court to adopt  
16 that as part of the plea agreement.

17 And the Court indicated that was fine and went on.

18 A Okay.

19 Q Okay. So maybe you don't have an independent recollection  
20 of that now, but you wouldn't dispute that being true.

21 A No.

22 Q When you -- when, assuming that is true, what would you  
23 mean by I've signed the Certificate of Counsel and I'd ask that you  
24 incorporate that. What's the purpose of stating that?

25 A Well the Certificate of Counsel is included in the plea

1 agreement, I believe. And it's just me signing off saying I went through it  
2 and explained it to him.

3 Q Okay. And can I assume that if you signed a Certificate of  
4 Counsel, that what you signed is accurate or the truth.

5 A Yes.

6 Q And based upon, well, let me ask you this way. When you  
7 sign a Certificate of Counsel, are you affirmatively telling the Court that  
8 based upon your interactions with the client at the time, you believe he's  
9 competent to enter the deal. He understands. You explained it fully,  
10 et cetera.

11 A Right. I believe that in the certificate it says the defendant's  
12 competent.

13 Q Okay.

14 A I guess that could have different meanings, but.

15 Q Fair enough.

16 MR. GIORDANI: Let me have the Court's brief indulgence  
17 here.

18 THE COURT: Sure.

19 BY MR. GIORDANI:

20 Q Mr. Durham, do you recall during the plea canvass, the Court  
21 asking the defendant: Do you understand the range of punishment?

22 A No. But that's a standard question.

23 Q Okay. Well, then I'll move on from there. All right. So finally,  
24 you indicated previously that you were aware of mental health issues,  
25 that you had reviewed some kind of documentation and had

1 conversations with them at that time about that.

2 A Yes.

3 Q At the time of the trial going into the plea, do you specifically  
4 recall any indication that Mr. Pinkney was in some kind of episode with  
5 regard to his PTSD or having any psychotic break or anything of that  
6 nature at that time?

7 A I mean, assuming I'd be able to identify something like that, --

8 Q Fair.

9 A -- but I didn't see anything out of the ordinary.

10 Q Okay. So nothing out of the ordinary to indicate to you that he  
11 was not in the right state of mind?

12 A No.

13 MR. GIORDANI: I'll pass the witness, Your Honor.

14 THE COURT: Redirect.

15 **REDIRECT EXAMINATION**

16 BY MR. GAFFNEY:

17 Q So, Mr. Durham, based on what you learned about  
18 Mr. Pinkney's mental health issues, did you take any steps to -- to  
19 address those mental health issues he has, such as referring to  
20 competency court or have him evaluated by a mental health  
21 professional?

22 A I did after the plea. In hindsight, I probably should have done  
23 that before the plea.

24 Q Okay. And just to be clear, that's -- which one of those,  
25 competent. Did you refer him to competency court or did you have --

1           A     I referred him for a psychology evaluation.

2           Q     Okay. And you did that based on concerns you had regarding  
3 his mental health issues?

4           A     Yes.

5           Q     And on cross-examination, the State had asked you about the  
6 evidence in this case --

7           A     Uh-huh.

8           Q     -- and whether that played a factor in your advising  
9 Mr. Pinkney to accept the plea agreement. And just to be clear, did it?  
10 Was the evidence in this case one of things you considered when  
11 advising Mr. Pinkney to accept the plea agreement?

12          A     It was one of several things.

13          Q     Okay. What were the other things that played into your advice  
14 to Mr. Pinkney to accept a plea agreement?

15          A     One of the primary factors was that the State had proffered to  
16 us that there were I think ten other different events that were under  
17 investigation that may have implicated Mr. Pinkney in other robberies.  
18 And for me that was a big factor because those, the State agreed not to  
19 proceed or file charges on any of those events.

20          Q     So those were concerning to you?

21          A     Right.

22          Q     The ten different robberies.

23          A     Because the playground in itself there wasn't a whole lot of  
24 other benefit as far as the exposure went, --

25          Q     Uh-huh.

1           A     -- as far as I recall, --

2           Q     Okay.

3           A     -- versus trial versus accepting the plea.

4           Q     Okay. So one of the primary benefits would have been the  
5 dismissal of these other events.

6           A     Right.

7           Q     Did Mr. Pinkney express any reluctance to you to accept the  
8 plea agreement?

9           A     Yes.

10          Q     And was that on the day of the -- that the plea occurred? Or  
11 were there other, I guess, conversations you had prior?

12          A     Prior to the day in question, we didn't really have a whole lot of  
13 substance to discussions about a plea agreement. I recall that at  
14 calendar call I believe that everybody sort of agreed we were going to  
15 continue it because I wanted to do some forensic testing on the evidence.  
16 And then when we showed up for calendar call, I don't remember if it was  
17 Mr. Pinkney or his co-defendant that indicated they wanted to just go to  
18 trial.

19          Q     Okay.

20          A     So I think there was other work that could have been done  
21 that would have included possibly getting him evaluated prior to the trial.

22          Q     Fair to say that you were not prepared to go to trial. You were  
23 hoping the case would be continued so you can continue to investigate  
24 and maybe get the testing, the results from the forensic testing?

25          A     I could have been more prepared, yeah.



1 Q Okay. And on cross-examination, you testified about not  
2 being to detect any kind of -- Mr. Pinkney's suffering from some sort of  
3 mental health impairment. I mean, and just to be clear, do you have a  
4 way to confirm that Mr. Pinkney understood all of the terms of his plea  
5 agreement?

6 A Not independently. I mean, obviously I'm basing it off of what  
7 he tells me in my prior conversations with him.

8 Q And your observations of him. Is that --

9 A Right.

10 Q -- is that fair? Okay. And in the Certificate of Counsel where it  
11 indicates that you believe he's competent, he understands the charges  
12 and the consequences, it also qualifies that by saying to the best of your  
13 knowledge and belief.

14 A Correct.

15 Q Okay.

16 MR. GAFFNEY: Okay, I'll pass the witness, Judge.

17 MR. GIORDANI: Briefly, Your Honor.

18 THE COURT: Go ahead.

19 **RECROSS EXAMINATION**

20 BY MR. GIORDANI:

21 Q Mr. Durham, were you aware that Mr. Pinkney was in fact  
22 found competent by two different doctors after the plea was entered?

23 A No.

24 Q Okay. There was a little discussion just now about these other  
25 charges that were hanging out there.

1           A     Right.

2           Q     And I want to -- I'm going to, I'm going to ask you some  
3 questions and try to refresh your recollection. Correct me, if you don't  
4 recall any of this.

5           A     Okay.

6           Q     Do you recall there being discussions leading up to the trial  
7 that these were potentially -- these extra charges were coming down the  
8 pipe and that's kind of the reason we couldn't get a deal down before  
9 trial. Do you remember that?

10          A     Yes.

11          Q     Okay.

12          A     I remember you mentioning other events I believe as soon as I  
13 took over the case.

14          Q     Okay. And then as we got closer to trial and up until the day  
15 of trial, do you recall conversations in which we, the State, indicated to  
16 you we need to go trial. We can't really deal this out until we figure out  
17 what's going on with the new charges.

18          A     I don't remember specifically. I do remember that that was  
19 one of the reasons we had all agreed to continue the trial --

20          Q     Right.

21          A     -- was because we wanted to sort of package everything up  
22 together.

23          Q     Right. And so at the time of trial, fair to say that there was a  
24 little uncertainty from both sides as to what was going to end up  
25 happening with those additional charges.

1           A       I mean, I can't speak from your side. You had those charges  
2 for a while so I had no specific knowledge. I hadn't seen any discovery  
3 on those charges or any reports prior to the day that we entered the plea.

4           Q       Fair enough. What I'm getting at, trying to ask is, when the  
5 conversations were had between you and your client on Day 2 of trial  
6 about the deal, --

7           A       Uh-huh.

8           Q       -- you were fully aware that there were potential of dozens of  
9 other charges coming down the pipe.

10          A       Yes.

11          Q       You said that was one of the factors you considered in  
12 whether recommending the deal to your client or not.

13          A       That was -- in hindsight, that was the primary factor.

14          Q       Okay. And so having been the primary factor, was that  
15 something that you discussed with your client?

16          A       Yes.

17          Q       Okay. Something that he would have had to make a call on  
18 whether he thought that was a big deal or not.

19          A       To a certain extent, yeah.

20          Q       Okay. So this idea that there were other charges hanging out  
21 there played a big -- big role in your head as a lawyer whether to take the  
22 deal or not. Fair?

23          A       Yes.

24          Q       But that -- that idea itself that were other charges hanging out  
25 there was communicated to Mr. Pinkney.

1           A     He was aware.

2           Q     He was aware of that at the time he told the Court he wanted  
3 the deal and pled guilty, correct?

4           A     Yes.

5           MR. GIORDANI: Okay. I'll pass the witness, Your Honor.

6           THE COURT: Anything else?

7           MR. GAFFNEY: Just, yeah, very briefly.

8                               **REDIRECT EXAMINATION**

9           MR. GAFFNEY:

10          Q     Mr. Durham, I think I believe I heard you say that you hadn't  
11 received any discovery on these extra events prior to Mr. Pinkney's guilty  
12 plea.

13          A     Right. I remember receiving them after the plea.

14          Q     So you weren't able to conduct any independent investigation  
15 into those events?

16          A     No.

17          Q     Okay.

18          MR. GAFFNEY: Pass the witness, Judge.

19          MR. GIORDANI: No further questions, Your Honor.

20          THE COURT: Thank you. You may step down.

21          THE WITNESS: Thank you.

22          MR. GAFFNEY: Your Honor, may I have just a moment --

23          THE COURT: Go ahead.

24          MR. GAFFNEY: -- with Mr. Pinkney.

25          Your Honor, I've spoken with Mr. Pinkney about his -- he's

1 entitled to testify at this hearing. He's choosing not to testify.

2 THE COURT: Okay. Mr. -- I guess, Mr. Pinkey [sic], you  
3 could testify on your own behalf, but you're choosing not to, correct?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: And your attorney has discussed this with you  
6 and you understand that?

7 THE DEFENDANT: Yes, for the most part, sure.

8 THE COURT: Well, what don't you understand? Do you want  
9 to discuss it further with your attorney or do you want to ask me any  
10 questions?

11 THE DEFENDANT: No, sir.

12 THE COURT: You don't want to discuss it further with your  
13 attorney?

14 THE DEFENDANT: We discussed it.

15 THE COURT: Okay.

16 MR. GAFFNEY: Thank you, Judge.

17 Your Honor, I've spoken with Mr. Pinkney. He's maintaining  
18 he does not want to testify.

19 THE COURT: That's fine. Nobody's suggesting that you  
20 should. It's just I want on the record that you -- and Counsel, since I  
21 guess, well, and I don't guess. This is a issue that you're going to be  
22 making is Mr. Pinkey [sic] understand, in your mind, understand  
23 everything that's going on today.

24 MR. GAFFNEY: It's hard to say, Your Honor. In my  
25 conversations and my interactions with him --

1 THE COURT: He's been determined to be competent,  
2 correct?

3 MR. GAFFNEY: He has been, yes. When I was first  
4 appointed to represent him, one of the very first things I did was to have  
5 him sent to competency court so they could evaluate him. And he  
6 did -- he was seen by two separate psychologists or psychiatrists. They  
7 determined he was competent. However, I think that they're using a  
8 very -- they're using a different standard. They're using the Dusky  
9 standard and that's whether he can assist in his own defense, whether he  
10 understands the proceedings. And to me that's a very low bar. I think  
11 that the plea agreement in this case was complex and especially in terms  
12 of how the sentencing structured with all the different offenses and so I  
13 think it's entirely possible that his mental health issues would affect his  
14 ability to fully understand a plea agreement while he's still competent to  
15 proceed to trial. Those are two separate standards and --

16 THE COURT: All right. I'll let you make that argument, but do  
17 you have any case law that there's some other standard regarding having  
18 a hearing such as we are today?

19 MR. GAFFNEY: In terms of what the Court would need to find  
20 in --

21 THE COURT: That you're arguing that there's a higher  
22 standard to be followed other than the competency standard. Are you --  
23 do you have any cases you can --

24 MR. GAFFNEY: Oh, I see.

25 THE COURT: -- provide me with.

1 MR. GAFFNEY: I don't -- not, not with me, Your Honor. I  
2 mean, my -- basically my argument is just that he, based on his cognitive  
3 disabilities, did not understand --

4 THE COURT: Okay. And I'll --

5 MR. GAFFNEY: -- the plea agreement.

6 THE COURT: -- let you make that argument. Any further  
7 witnesses?

8 MR. GAFFNEY: No, Your Honor.

9 THE COURT: Okay. Argument. It's your motion

10 **CLOSING ARGUMENT BY THE DEFENSE**

11 BY MR. GAFFNEY:

12 Well, Your Honor, I think there hasn't been a lot that's  
13 changed between, you know, what we submitted in writing and what  
14 you've heard here today. Essentially Mr. Durham has informed the  
15 Court, I did discuss these things with him. And I didn't see any signs that  
16 he didn't understand them -- that he didn't understand it. However, as  
17 I've argued, Mr. Durham, he's not a trained psychologist. He's not a  
18 trained psychiatrist. He wouldn't be able to just look at Mr. Pinkney and  
19 make a determination as to whether or not he understood these things.  
20 Mr. Pinkney has submitted through the motion that when discussing the  
21 plea agreement with Mr. Durham and discussing his chances at trial, it  
22 was his understanding that he was going to be convicted of all the  
23 charges and he would receive a life sentence which meant spending the  
24 rest of his life in prison, not having the opportunity for parole or the  
25 opportunity to get out at some point in time. And that was one of the

1 driving motivators here for him accepting the plea agreement. He was  
2 scared. He thought if I don't accept this, I'm going to end up spending  
3 the rest of my life in prison. And so when you see the interaction  
4 between yourself and him in the plea canvass where he's saying, yes,  
5 I've read the plea agreement. Yes, I understand this. Yes, I understand  
6 that. That's being motivated by his fear. He didn't actually understand  
7 those things, but he knew that he needed to get through the plea canvass  
8 otherwise he's going to spend the rest of his life in prison.

9 And so, Your Honor, I would submit that he did not have a full  
10 understanding of the plea agreement terms based on his mental health  
11 issues. And obviously Mr. Durham was concerned enough about those  
12 mental health issues where he went and had an independent evaluation  
13 conducted. Unfortunately that took place after the plea agreement had  
14 already been entered.

15 THE COURT: But and I guess I have to and I'm sure he's  
16 going -- what's the relevance if he was determined to be competent?

17 MR. GAFFNEY: Well, and that brings us back to your first  
18 point and, I mean, I hate to keep making the same argument --

19 THE COURT: But there's a --

20 MR. GAFFNEY: -- but I think we're dealing with two --

21 THE COURT: -- different standard.

22 MR. GAFFNEY: Right. Two different standards and I think  
23 that somebody who doesn't meet the Dusky standard can still not -- can  
24 still have the, I guess, disability to enter a knowing and voluntary plea. I  
25 think that those are two separate standards. I mean the Dusky standard



1 is fairly low. I think when you get down to somebody who can't assist  
2 counsel and can't understand the proceedings, those are the kinds of  
3 people that get sent up to Lakes Crossing and don't come back until  
4 they're medicated. And I don't think that that's where Mr. Pinkney's at.  
5 But I think that his cognitive disabilities are such that even when these  
6 sort of complex concepts are being explained to him, he doesn't  
7 understand them. Or, you know, his -- he can't focus long enough to  
8 understand what's being said and be able to kind of take the big picture  
9 in as a whole as to what the probability is as to one sentence versus  
10 another.

11 And, Your Honor, I do have, you know, in my motion I made  
12 reference to the Social Security Administration records. I do have copies  
13 of those records on CD if you want to conduct an in camera review of  
14 them to get a, I guess, a better picture of Mr. Pinkney's overall psychiatric  
15 history. I'd be happy to share those with the State as well. I have two  
16 copies here if you'd like to see them.

17 THE COURT: I guess I would like to know -- and I understand  
18 the summaries you've put in there. However, those are quite old and I'm  
19 not sure how, other than it's not in dispute, that he had prior problems  
20 and that those issues, again, were known by Counsel. But I'd be glad to  
21 look them over.

22 MR. GAFFNEY: Okay.

23 THE COURT: Okay. Anything else?

24 MR. GAFFNEY: No, Your Honor.

25 THE COURT: You'll get the last word anyway.

1                   Go on.

2                   MR. GIORDANI: Thank you, Your Honor.

3                   **CLOSING ARGUMENT BY THE STATE**

4                   BY MR. GIORDANI:

5                   I want to bring it kind of back -- I think we've got a little off  
6 track, respectively. I wanted to just bring it back to what we arguing in  
7 our motion. So what Mr. Pinkney has to do is advance a substantial  
8 reason that is fair and just to withdraw his plea. And I believe we argued  
9 this before but I want to refresh the Court. When this plea went down,  
10 we're talking about July, when we were on Day 2 of trial. Mr. Durham  
11 remained on the case. Believe he submitted for a psychological  
12 evaluation pending sentencing in hopes that, you know, he would present  
13 that information the Court sentencing and potentially mitigated sentence.

14                  Now there were two settings on the sentencing. One of which  
15 was September 26, 2018. And the PSI report, I'm sure you have it, was  
16 prepared on August 20<sup>th</sup> of 2018. Mr. Pinkney did not seek to or move to  
17 withdraw this plea or indicate in any way he wanted to withdraw his plea  
18 until two months after that PSI report was prepared. After we'd been in  
19 Court once and there was a continuance request of the sentencing. Not  
20 until October 31<sup>st</sup> of this -- or of last year did he indicate he wanted to  
21 withdraw this plea. I've told this Court before and I stand by the  
22 statement that he has buyer's remorse. He saw the recommendation in  
23 the PSI and then indicated he wanted to withdraw his plea. That's why  
24 we're here today. There is no substantial reason that is fair and just.

25                  If he -- if he didn't understand this plea, he could have talked

1 to Mr. Durham when the PSI was still pending and we were here in Court.  
2 And we moved the sentencing. He didn't. And that's because he wanted  
3 to see -- wait and see what was going to happen. It wasn't until he  
4 realized, wow, Parole and Probation is recommending a lot of prison  
5 time. I might want to get out of this. And so I understand, you know,  
6 where Mr. Gaffney is going with this. It's -- on its face concerning  
7 anytime someone has mental health issues and you're having them sign  
8 up for a deal. I get that. But Mr. Durham was aware of those mental  
9 health issues at the time. To the extent that he can't diagnose someone  
10 by looking at him, that makes sense, right? But there was no indication  
11 whatsoever from the defendant at the time, neither in court or as testified  
12 to by Mr. Durham, that he had some kind of mental break or his mental  
13 health issues were effecting his ability to understand. What's before the  
14 Court is Mr. Durham's saying I explained the deal to him, I read the GPA  
15 line for line, word for word. I was aware of the mental health issues at  
16 the time. I was aware of the other charges, although I didn't have  
17 discovery I was aware of them. The defendant himself was aware of the  
18 other charges. You have the plea canvass in Court where Mr. Pinkney is  
19 telling the Court, yes, I understand. No, I don't have any further  
20 questions, et cetera.

21 For this Court to grant this motion, you would have to  
22 essentially find he was lying throughout his plea canvass. And I want to  
23 remind the Court that at the end of the plea canvass, anticipating this  
24 issue because we were ready to go to trial, I stopped and I asked the  
25 Court, I kind of jumped in and I said, just to be clear Mr. Pinkney

1 understands what's going on, the Court indicated to the State -- to the  
2 whole courtroom that I've asked him several times, I believe were your  
3 words, I've gone through this over and over, but Mr. Durham, do you  
4 believe he understands. And that's when Mr. Durham jumps in and says  
5 he signed the certificate.

6           So everything you have before you in the record, including  
7 today's testimony, does not, you know, support a substantial reason that  
8 is fair and just. There is potential mental health issues there. Well there  
9 are potential mental health issues with a lot of defendants in a lot of  
10 courtrooms every single day. What we have before us, the evidence  
11 before us indicates this was a fair and just plea, he entered it knowingly,  
12 he entered it voluntarily. And had he not wanted to enter -- if he didn't  
13 want to enter it, he could have proceeded to trial. Now we're here, we've  
14 released all our witnesses, we've moved on. Stopped investigating the  
15 case to the extent we needed to anymore, but I don't think we did. In any  
16 event, there cannot be a fair and just reason at this point when we know  
17 that the PSI was prepared on August 20<sup>th</sup>. We know Mr. Durham had it  
18 and the defendant didn't indicate for another two months that he, for the  
19 first time, that he wanted to withdraw this plea because he didn't  
20 understand it at the time.

21           So I would just -- one last thing, I'm sorry. Remind the Court  
22 he was found competent after the plea was entered. And he, according  
23 to Mr. Gaffney, he didn't get any meds or treatment between the time the  
24 plea was entered and the competency determination. So we've got two  
25 doctors saying he's competent after the plea was entered. That evidence

1 is compelling.

2           And with regard to your question to Mr. Gaffney on the Dusky  
3 standard, respectively the Dusky standard is the law. The Dusky  
4 standard is the law as to whether someone understands what's going on.  
5 He was found to understand what's going on and be capable of facing a  
6 jury and entering a plea, by two independent doctors after he entered that  
7 plea.

8           And I would submit it on that.

9           THE COURT: Thank you. I guess, my question and I'll give  
10 you the last word because it's your motion. I said I'd review it, but what  
11 relevance does records from, I believe, tell me if I'm wrong, ten years ago  
12 that he does have and he is -- what was the diagnose, the learning  
13 disability when in fact even after his plea, he was determined to be  
14 competent. How would, and I'll take, I certainly can take notice that he  
15 had those diagnoses. I don't know what reading the actual background  
16 would be relevant. I'm not a doctor and certainly you can't ask me to  
17 somehow interpret that when the doctors that did look at him subsequent  
18 to the plea have said he meets the standard. So in part of your final, give  
19 me that information.

20                           **REBUTTAL ARGUMENT BY DEFENSE**

21 BY MR. GAFFNEY:

22           So the records that I have from the Social Security  
23 Administration go all the way up until 2016. So there are more recent  
24 records. The ones that I included in my motion I thought were the best  
25 summaries of the mental health ailments he has. So I can provide those

1 to the courts so you can see that. I believe he was arrested on this case  
2 in September of 2017. And so all the way up until I think it's even  
3 October of 2016, he's still suffering from these ailments. And one of the  
4 ways that the Social Security Administration works is that when you have  
5 a disability for mental health issue, you have to go and get reevaluated  
6 for that, I think every six months, every three months, every year so they  
7 can determine whether those disabilities are still active and you should  
8 still be receiving benefits. So that's one of the, I think, the -- it would kind  
9 of put his psychiatric history into context for the Court. So you could see  
10 that from 2004 when the records begin until 2016 that these are well  
11 documented mental health ailments. And they show up in each and  
12 every one of these summaries. Some of them are more detailed than  
13 others. As so I think that's one of the benefits that you could derive.

14               Secondly, you know, some of these go into detail about his  
15 cognitive disabilities that talks about his difficulty with reading  
16 comprehension, talks about his difficulty understanding complex  
17 concepts. And, you know, mental health, it ebbs and flows. There may  
18 be days where he's lucid and he's completely competent and has no  
19 issues and there may be other days where all of his psychiatric problems  
20 are affecting him. And typically when the more pressure he's under, the  
21 more exacerbated those symptoms become. And so if you think about  
22 being in the middle of trial and then trying to find a negotiation, sort of this  
23 complex negotiation, his mental health issues were active that day. And,  
24 you know, just -- if I could just, does that answer your question, Judge,  
25 or?

1 THE COURT: Well, it might and I don't -- the problem is  
2 you're testifying as an expert that the ebb and flow, that they do this, --

3 MR. GAFFNEY: Sure.

4 THE COURT: -- they do that. I don't know. And all I can rely  
5 on and all, I think we know is, again, that he was determined to be  
6 competent. But I will take into account that he has the conditions that  
7 you put in, in the motion. But I'm not sure, and again, the Supreme Court  
8 and all the decisions talk about, and I'll, you know, whether the defendant  
9 knowingly waived, et cetera. And whether or not, under *Strickland*, the  
10 counsel was ineffective. And the burden is on you, under -- and I think  
11 you even quoted it. Yeah.

12 MR. GAFFNEY: Yeah. No I understand, Judge.

13 THE COURT: *Rubio*. So go ahead.

14 MR. GAFFNEY: Well, I mean, that's -- that's my argument as  
15 to the mental health issues and, I mean, you're right. I'm not an expert.  
16 What I'm telling the Court is based on my own experience working as a  
17 criminal defense attorney in the criminal justice system here in Clark  
18 County. Like, you know, the State had mentioned, it's very common that  
19 defendants pass some kind of mental health impairment that we have to  
20 deal with. And if --

21 THE COURT: And I'll -- for the record, unfortunately you're  
22 absolutely right.

23 MR. GAFFNEY: Sure.

24 THE COURT: And just one last thing, the State had  
25 mentioned that its belief that Mr. Pinkney received the PSI, saw the

1 sentencing recommendations and it was only then that he had brought up  
2 his issue with the plea agreement. While that may be true just by looking  
3 at the record, I think that that's actually more speculation than actual fact.  
4 We don't have any testimony that that's the actual circumstance here.  
5 And I -- I mean, --

6 THE COURT: I agree. That was --

7 MR. GAFFNEY: -- I know that's a fair argument, --

8 THE COURT: It's just his argument.

9 MR. GAFFNEY: -- but there's no evidence to -- right.

10 THE COURT: Yes.

11 MR. GAFFNEY: And just lastly, I mean, Counsel did, even  
12 though it was after the plea, obtain a psychiatric evaluation. And when I  
13 asked him about that on the stand today, he said that was because I had  
14 some concerns about his mental health issues. So even Counsel at, you  
15 know, even though it took place after the plea, even Counsel expressed  
16 that he had concerns about Mr. Pinkney's mental health issues to the  
17 point where he had to go out of point -- get an expert appointed, to have  
18 him interviewed, and then evaluated. And I'll submit it, Your Honor.

19 THE COURT: All right. Thank you. I think I've looked at  
20 everything a couple of times and certainly I was there. And there was an  
21 extended period of time where the parties were both negotiating and  
22 Mr. Durham advised that he was talking to his client. Under *Rubio*, the  
23 defendant bears the burden to prove that the plea was not entered  
24 knowingly and voluntarily. Even taking into account the PTSD, learning  
25 disability, ADHD attention deficit, and attention deficit -- what's the HD?



1 THE LAW CLERK: Hyper.

2 THE COURT: Hyperactivity disorder, the -- Mr. Durham,  
3 defense counsel, was aware of all of those prior issues before the plea  
4 and certainly I'm required to look beyond the actual canvass in order to  
5 determine whether or not the defendant knowingly and voluntarily  
6 entered into the plea. And so the -- Mr. Durham, I find his testimony to  
7 be credible. He knew about all the prior conditions before the trial and  
8 before the defendant entered the plea. He stated that he talked to the  
9 defendant about the entirety of the possibilities and there were multiple  
10 counts and it involved potential sentences on each particular event. And  
11 he did state that he gave him his opinion. He stated he reviewed  
12 everything with him. He read the entire agreement to defendant as  
13 opposed to having him read it himself. He discussed the potential  
14 charges and consecutive versus concurrent.

15 And it's important to note that I believe I said that at least twice  
16 and asked him if he understood that sentencing was entirely up to me  
17 and whether to run the sentences consecutive or concurrent was also up  
18 to me. He said he explained all the -- or explained the range of all  
19 counts. Defense counsel said that defendant understood everything. He  
20 certainly said, and I'm talking Mr. Durham, that he's not a mental health  
21 expert. I don't think in any which way either our Supreme Court or the  
22 US Supreme Court requires or would suggest that a mental health expert  
23 be present during every either canvass or acceptance. He knew that he  
24 had problems and he -- I didn't see anything out of the ordinary, I wrote  
25 down. That is Mr. Durham speaking. He discussed, and these are again

1 just quotes from my notes, they're not quotes, but he discussed several  
2 possible future charges. Those were additional robberies, my  
3 recollection, that weren't charged at the time. And just that he would be  
4 avoiding even the possibility of those charges. And I think I said that  
5 even, and I think this is paraphrasing, in the overabundance of caution  
6 Mr. Durham had him examined by doctors to see if he was competent.

7 I don't see any way that there is some sort of higher mental  
8 standard that must be achieved in order to show that it was knowingly  
9 and voluntarily made. However, in and of itself, certainly the standard  
10 that it's knowingly and voluntarily entered is the Supreme Court's  
11 standard. I find that based on Mr. Durham's testimony that the defendant  
12 did knowingly and voluntarily enter the plea. He was advised by counsel  
13 of the ramifications of entering the plea and in addition, although it's not  
14 the exclusive decision, that he was canvassed and this was a more  
15 extensive canvass since it was done after -- or at the, I guess you'd say  
16 during the trial. And clearly the State was somewhat concerned because  
17 at the end we went back -- we, I should say I, both the State and defense  
18 Counsel went back discussed that, and I don't have the quotes, but it's in  
19 the record. I asked him, I believe a third time, yeah, and once again, you  
20 have no questions regarding the agreement. No, sir. So, and I said,  
21 actually the paragraph before, I think I asked him three times at least now  
22 if he had any questions. He advised me that he doesn't and you have  
23 plenty of time, for the record, to go over this with the attorneys since it  
24 was 1:30 and we started this discussion at 11 a.m. Correct? Defendant  
25 Pinkney, yes.

1           Even knowing that he had learning disability, I -- in my, if you  
2 will, limited interactions, I've seen no sign that he doesn't understand  
3 what's going on. And once again today I suppose if there is some  
4 disability, if at least in my mind, and again I'm not a medical or  
5 psychological expert, but it doesn't seem to impair his ability to  
6 understand everything that's going on today. He certainly hasn't  
7 expressed that in the time we spent. Oh, and I might have left out in his  
8 prior diagnosis, PTSD, if I failed to mention that. Attention deficient,  
9 hyperactivity, and his learning disabilities.

10           I find no evidence under *Strickland* that Mr. Durham failed in  
11 any -- in the two prongs for *Strickland* to show that he was ineffective in  
12 any way that he failed to render a reasonable effective assistance.  
13 Mr. Durham has significant experience. I believe a total of 18 years, he  
14 didn't say how long that was doing criminal defense, but I think it was  
15 most of this time. He had significant experience, et cetera. He did say,  
16 and for the record, I'm addressing it, that he would have liked additional  
17 time to prepare for trial, but since there was no trial, I don't see the  
18 relevance of that. My recollection, again, was that the defendants were  
19 the ones who sought a deal at the last minute and initiated the entirety of  
20 the interactions regarding a resolution.

21           So based on all of that, I'm denying Defendant's Motion to  
22 Withdraw the Guilty Plea and we will set this for sentencing.

23           THE CLERK: How far would you need it?

24           MR. GIORDANI: We already have a PSI.

25           MR. GAFFNEY: Can we set it out about 30 days. I'd like

1 to -- I'm going to file a sentencing memorandum.

2 THE COURT: That's fine and I don't recall, were there any  
3 victim witnesses so --

4 MR. GIORDANI: I will --

5 THE COURT: -- we give them time to be here.

6 MR. GIORDANI: I will look into that, Your Honor.

7 THE COURT: So is 30 days enough?

8 MR. GAFFNEY: That should be sufficient for me.

9 MR. GIORDANI: Yes, Your Honor.

10 THE COURT: Okay, 30 days.

11 THE CLERK: May 22<sup>nd</sup>, 9 a.m.

12 MR. GIORDANI: And --

13 THE COURT: And --

14 MR. GIORDANI: -- just for the record, that would both  
15 defendants.

16 THE CLERK: Yes.

17 MR. GIORDANI: And I'll tell --

18 THE COURT: Yeah, and --

19 MR. GIORDANI: I'll go tell Mr. --

20 THE COURT: -- also for the record, although it was on the  
21 record prior, since the co-defendant had no interest in this proceeding,  
22 they -- we, everybody waived their presence here today since this doesn't  
23 affect the co-defendant in any way. And I believe we agreed that we  
24 would notify them of the sentencing so both could be sentenced at the  
25 same time.

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MR. GIORDANI: Yes, Your Honor.

THE COURT: Okay, thank you.

MR. GIORDANI: Thank you.

MR. GAFFNEY: Thank you, Judge.

[Hearing concluded at 11:48 a.m.]

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Judy Chappell  
Court Recorder/Transcriber



1 **MEMO**

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10 Attorney for Lorenzo Pinkney

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 THE STATE OF NEVADA,

14 Plaintiff,

15 vs.

16 LARENZO PINKNEY, aka,  
17 Lorenzo Pinkney,

18 Defendant.

CASE NO.: C-17-327767-1  
DEPT NO.: XXVIII

Date of Hearing: 5/22/2019  
Time of Hearing: 9:00 a.m.

19 **DEFENDANT LARENZO PINKNEY'S**  
20 **SENTENCING MEMORANDUM**

21 COMES NOW, Defendant LARENZO PINKNEY, by and through his attorney, LUCAS  
22 J. GAFFNEY, ESQ., and hereby submits this memorandum in aid of sentencing. This  
23 memorandum is made and based on the following Points and Authorities, the attached exhibits,  
24 all papers and pleadings on file herein, and any oral argument that may be entertained in this  
25 matter.

26 Dated this 20<sup>th</sup> day of May, 2019.

27 RESPECTFULLY SUBMITTED BY:

28 /s/ Lucas Gaffney  
LUCAS J. GAFFNEY, ESQ.  
Nevada Bar No. 12373

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- Count 4 – Robbery With Use of a Deadly Weapon.
- Count 5 – Robbery With Use of a Deadly Weapon.
- Count 6 – Robbery With Use of a Deadly Weapon.
- Count 7 – Robbery With Use of a Deadly Weapon.
- Count 8 – Conspiracy to Commit Robbery.
- Count 9 – Burglary While in Possession of a Deadly Weapon.
- Count 10 – Robbery With Use of a Deadly Weapon.
- Count 11 – Robbery With Use of a Deadly Weapon.
- Count 12 – Unlawful Taking of a Vehicle.
- Count 13 – First Degree Kidnapping With Use of a Deadly Weapon.
- Count 14 – Robbery With Use of a Deadly Weapon.

The negotiations contemplated that the State would maintain the full right to argue, including for consecutive time between the counts, but agreed not to seek a Life sentence on any count. Additionally, the State retained the full right to argue the facts and circumstances of the following Las Vegas Metropolitan Police Department (LVMPD) event numbers, but agreed not to bring charges based on the events.

1. LVMPD Event No. 170605-0220: Armed robbery at 7-Eleven located at 4800 West Washington, Las Vegas, Clark County, Nevada, on June 5, 2017.
2. LVMPD Event No. 170614-0524: Armed robbery at Roberto's/Mangos located at 6650 Vegas Drive, Las Vegas, Clark County, Nevada, on June 14, 2017.
3. LVMPD Event No. 170618-0989: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on June 18, 2017.
4. LVMPD Event No. 170701-0545: Armed robbery at Roberto's located at 2685 South Eastern Avenue, Las Vegas, Clark County, Nevada, on July 1, 2017.
5. LVMPD Event No. 170812-3809: Armed robbery at Pizza Bakery located at 6475 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 12, 2017.
6. LVMPD Event No. 170817-0241: Armed robbery at Terrible Herbst located at 63 80 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.



7. LVMPD Event No. 170817-0470: Armed robbery at Rebel located at 6400 West Lake Mead Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.

8. LVMPD Event No. 170824-0521: Armed robbery at Roberto's located at 6820 West Flamingo Road, Las Vegas, Clark County, Nevada, on August 24, 2017.

9. LVMPD Event No. 170824-0645: Armed robbery at Roberto's located at 907 North Rainbow Boulevard, Las Vegas, Clark County, Nevada, on August 24, 2017.

10. LVMPD Event No. 170825-0589: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on August 25, 2017.

The defendants agreed their respective guilty pleas were contingent on them entering into the plea agreement, and further agreed to take no position at sentencing regarding the aforementioned event numbers.

On or about August 20, 2018, the Nevada Department of Public Safety Division of Parole and Probation (P&P) issued its Presentence Investigation Report ("PSI") for Pinkney, which included the following sentencing recommendations:

Count	Offense	Recommended Sentence	Aggregate	Concurrent/ Consecutive
Count 1	Conspiracy to Commit Robbery.	12-48 months.		N/A
Count 2	Burglary While in Possession of a Deadly Weapon.	36-120 months.		Concurrent with Count 1.
Count 3	First Degree Kidnapping With Use of a Deadly Weapon.	5-15 years, plus a consecutive term of 36-96 months for use of a Deadly Weapon.	96-276 months.	Concurrent with Count 2.
Count 4	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon.	72-216 months.	Concurrent with Count 3.
Count 5	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon.	72-216 months.	Concurrent with Count 4.

Count 6	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon	72-216 months.	Concurrent with Count 5.
Count 7	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon	72-216 months.	Concurrent with Count 6.
Count 8	Conspiracy to Commit Robbery.	12-48 months.		Concurrent with Count 7.
Count 9	Burglary While in Possession of a Deadly Weapon.	36-120 months.		Concurrent with Count 8.
Count 10	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon	72-216 months.	Concurrent with Count 9.
Count 11	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon	72-216 months.	Concurrent with Count 10.
Count 12	Unlawful Taking of a Vehicle.	364 days.		Concurrent with Count 11.
Count 13	First Degree Kidnapping With Use of a Deadly Weapon.	5-15 years, plus a consecutive term of 36-96 months for use of a Deadly Weapon.	96-276 months.	<b>Consecutive</b> to 3.
Count 14	Robbery With Use of a Deadly Weapon.	36-120 months, plus a consecutive term of 36-96 months for use of a Deadly Weapon	72-216 months.	Concurrent with Count 13.

Based on the above, P&P recommended this Court impose an aggregate sentence of sixteen (16) to forty-six (46) years (192-552 months) in the Nevada Department of Corrections (NDOC).

**Pinkney respectfully requests this Honorable Court impose an aggregate sentence of six (6) to fifteen (15) years in the NDOC.** Given the number of charges that Pinkney faces, calculating his sentencing recommendation can be done in a variety of ways. To simplify the process, Pinkney requests this Court impose the following sentence:

- As to Count 3— Pinkney requests the Court impose a 5 to 12-year term of incarceration for the kidnapping, plus a consecutive sentence of 1 to 3 years for the use of a deadly weapon.
- Pinkney further requests this Court impose the minimum sentencing ranges on the remaining Counts, and run the Counts concurrent to Count 3.

## II.

## DISCUSSION

**a. Childhood.**

Pinkney grew up in a single-parent home, where his mother raised him to the best of her ability. Exhibit A at 5. Unfortunately, Pinkney did not know his father and did not have a positive male, role model growing up. Exhibit A at 5. During his childhood and as a young adult, Pinkney dealt with significant hardships and suffered from a variety of mental health issues. As noted in Pinkney's PSI, he justifiably described his childhood as "rough." *See* PSI, page 2.

In 2003, when Pinkney was just seven (7) years old, a thirteen (13) year-old friend shot him in the face with a .22 caliber firearm. *See* Exhibit A, page 2.<sup>1</sup> Pinkney’s mother believes he has “not been right since.” Exhibit A at 2. Mental health professionals tend to agree with her assessment.

Dr. Mark Pierce (Dr. Pierce), a psychologist that evaluated Pinkney in February of 2012, characterized the event as an “extreme trauma,” and noted that Pinkney “appears to suffer from

1 fairly severe, unresolved posttraumatic adjustment from having been shot at age 7.” *See* Exhibit  
2 B, Bates Number 3. In a mental health evaluation authored by John S. Pacult, LCSW, INC.,  
3 Pacult opined that the event caused Pinkney to develop Post Traumatic Stress Disorder (PTSD),  
4 which affects Pinkney’s ability to concentrate and trust others because his “brain believes the  
5 trauma is still real.” Exhibit A at 5. Dr. Pierce also noted that Pinkney reported being “jittery  
6 with noises and is always worried that something bad is going to happen.” Pacult and Dr.  
7 Pierce’s findings are consistent in that Pinkney’s PTSD results in “hypervigilance,” which  
8 causes “attention deficits” and other problems pertaining to a lack of impulse control.<sup>2</sup> Exhibit  
9 B, at 1.

11 In December of 2013, Pinkney experienced another significant trauma when he  
12 witnessed his brother commit suicide. Exhibit A, page 5. Pacult noted that the event had to have  
13 been “traumatic on many levels” for Pinkney. Exhibit A, page 5. Pinkney’s mother described  
14 the event as having an “extremely detrimental” impact on him. Exhibit A, page 5. Pacult noted  
15 that Pinkney does not have a history of auditory or visual hallucinations. Exhibit A at 2.  
16 However, a competency evaluation conducted by Daniel Sussman, M.D. (Dr. Sussman), on  
17 December 16, 2018, indicated that Pinkney reported auditory hallucinations consisting of his  
18 brother speaking to him. *See* Competency Evaluations, attached hereto as Exhibit C, bates 2.

20 The above referenced traumatic events have shaped many aspects of Pinkney’s life, but  
21 they have had an acute impact on his substance abuse and mental health issues.

22 ///

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24 <sup>2</sup> Dr. Pierce found no indication that Pinkney displayed psychotic, suicidal or homicidal  
25 ideation. *See* Exhibit B, at 3.

26 Additionally, a competency evaluation conducted by Lawrence Kapel, Ph.D. (Dr. Kapel),  
27 indicated that Pinkney suffers from a “possible traumatic brain injury.” *See* Competency  
28 Evaluation, attached hereto as Exhibit C, bates number 7.

1           **b. Mental Health Issues.**

2           In addition to his childhood traumas, Pinkney has been plagued by mental health issues  
3 since a young age. Records obtained from the Social Security Administration (SSA) reveal that  
4 Pinkney's past diagnoses include a significant learning disability, Post Traumatic Stress  
5 Disorder (PTSD), and Attention Deficit Hyperactivity Disorder (ADHD). *See* Exhibit B, bates  
6 5-6.<sup>3</sup> In addition Pinkney also suffers from Bipolar Disorder (Exhibit A at 6), Unspecified  
7 Depressive Disorder a/w Bereavement, Polysubstance Dependence, and Schizoaffective  
8 Disorder, Depressive Type. *See* Exhibit C, bates 2.  
9

10          The SSA records also show that during a 2012 psychological evaluation, a psychologist  
11 described Pinkney as having a "deficient IQ" and "mild mental retardation." Exhibit B, bates 4-  
12 7. The psychologist noted that Pinkney's intellect was "capable only to very early elementary  
13 levels academically." *Id.* A 2016 psychological evaluation noted Pinkney demonstrated  
14 "moderate-to-severe impairment on more complex attentional tasks also involving mental  
15 flexibility in shifting sets," and that his intellectual functioning was estimated to be in the  
16 "borderline range." Exhibit B, bates 8-9. The psychologist also indicated that Pinkney presented  
17 with signs of cognitive/short-term memory weakness (Exhibit B, bates 9) and that he showed a  
18 "Markedly Limited" ability to understand and remember detailed instructions, and to maintain  
19 attention and concentration for extended periods. Exhibit B, bates 10.<sup>4</sup> Unfortunately, against the  
20 advice of numerous mental health professionals, Pinkney has not taken medication or received  
21 treatment for his mental health ailments.  
22  
23  
24

25          <sup>3</sup> Pinkney has received disability benefits for his mental health issues since 2004. For the sake  
26 of brevity, counsel has only provided a portion of Pinkney's mental health records which  
27 summarize his ailments for the Court.

28          <sup>4</sup> Pacult, Dr. Kapel, and Dr. Sussman all found that Pinkney suffers from cognitive disabilities,  
which is consistent with the findings contained in the attached SSA documentation.

1 As noted throughout his mental-health evaluations, Pinkney developed a significant  
2 problem with impulse control due to his unique combination of mental health conditions.  
3 Pinkney's diminished degree of concentration often results in him making impulsive decisions  
4 without any forethought as to the consequences of his actions. Indeed, Pinkney's mental health  
5 evaluations contain numerous references to his inability to focus on schoolwork—which resulted  
6 in Pinkney participating in special education classes since the second grade, and attending  
7 twenty-two (22) different schools until he dropped out of high school in the ninth grade. Exhibit  
8 B, bates 2, 5. Pinkney's impulsive behavior is also reflected in his inability to maintain steady  
9 employment. Exhibit A at 5; and PSI at 3.

11 Indeed, Pinkney's participation in the robberies that occurred on September 28, 2017 are  
12 a prime example of Pinkney's untreated, impulsive behavior. The symptoms of his mental health  
13 ailments are also reflected in Pinkney's willingness to participate in multiple felony offenses  
14 without considering or understanding that his behavior would result in substantial consequences.

15 **c. Substance Abuse.**

16  
17 Pinkney also suffers from a significant substance abuse problem, which is both a  
18 symptom and product of his mental health afflictions. Exhibit A at 2-3. According to his PSI,  
19 Pinkney began ingesting marijuana at age fourteen (14). PSI at 3. He began using cocaine,  
20 ecstasy, and Xanax at age 19. PSI at 3. Pinkney has specifically acknowledged having an addiction  
21 to Xanax—a benzodiazepine used to treat anxiety and depression.<sup>5</sup> Pinkney also indicated that  
22 prior to his arrest he was drinking "about a fifth of Hennessy a day." Exhibit C, bates 9. Notably,  
23 Pinkney was under the influence of marijuana and cocaine, when he committed the instant  
24

25  
26 <sup>5</sup> Benzodiazepines belong to the group of medicines called central nervous system (CNS)  
27 depressants, which are medicines that slow down the nervous system. See  
28 <https://www.mayoclinic.org/drugs-supplements/alprazolam-oral-route/description/drg-20061040>

1 offenses. PSI at 3. At the time of his arrest, Pinkney was “off Xany,” which affected his mental  
2 state by making him desperate for more Xanax. Exhibit C, bates 9.

3       Leading up to his arrest, Pinkney regularly ingested alcohol and controlled substances in  
4 an attempt to treat his mental-health symptoms. Exhibit A. For instance, as noted by Pacult,  
5 Pinkney ingested Xanax and cocaine to “mellow... out,” in an effort to treat his ADHD. Exhibit  
6 A at 2. Even Pinkney’s mother observed that prior to his arrest, Pinkney had lost weight due to  
7 his substance abuse. Exhibit A at 3. During August and September of 2017, Pinkney did not  
8 realize the adverse effect his daily consumption of the substances had on his physical and mental  
9 welfare. However, after more than a year of sober reflection in the Clark County Detention  
10 Center, Pinkney realizes that the robberies were a “dumb mistake” fueled by his addictions and  
11 lack of mental health treatment. Exhibit A at 4. Specifically, Pinkney believed the robberies  
12 would provide him with funding to purchase Xanax, or give him an opportunity to steal the drug  
13 from a pharmacy. Exhibit A at 1; PSI at 6.

15       Pinkney has never received substance abuse treatment. PSI at 3. However, he now realizes  
16 how his addiction negatively affected his life by bringing him before this Court for sentencing.  
17 Exhibit A at 5. Now that he understands the depth of his addiction, and the involuntary control it  
18 exerted over his life, he wholeheartedly believes that participating in a substance abuse program  
19 would be greatly beneficial for him. Exhibit A at 5. Notably, Pacult opined that given Pinkney’s  
20 limited criminal history, there is a high likelihood that Pinkney’s participation in the robberies  
21 were more connected to his substance abuse than engrained criminal thinking/behavior. Exhibit  
22 at 5.

24 ///

26 ///

27 ///

**d. Acceptance of Responsibility.**

Pinkney accepts full responsibility for participating in the robberies that occurred on September 28, 2017. He has admitted his guilt during his change of plea hearing, and during his interview with Pacult. Exhibit A at 5. Although Pinkney moved this Court to withdraw his guilty plea, his request was rooted in his misunderstanding of the consequences of his plea, rather than a failure to admit his culpability. Pinkney realizes he made extremely poor choices that have resulted in the loss of his freedom, and the lifelong stigma of being a convicted felon. Exhibit A at 5. He has expressed empathy for the trauma he caused the victims, and is genuinely remorseful for his actions. Exhibit A at 5. Pinkney's desire to be a better person and parent marks a milestone in his life—an epiphany that he can no longer suppress his problems by denying they exist, or trying to suppress them with controlled substances. It is unfortunate it took the current circumstances to bring Pinkney to this realization, but it is not too late for him to become a productive, law abiding citizen.

Although Pacult recommended the Court place Pinkney into a diversionary program, Pinkney acknowledges that this Court must impose a prison term based on the offenses to which he pleaded guilty. However, as noted by Pacult, “long-term incarceration is not going to help him develop the skills and mindset to be a functional adult and parent in our society.” Exhibit A at 6. Pinkney needs treatment for his mental health and substance abuse issues, parenting classes, and to obtain his GED or vocational training so he can find and maintain gainful employment. Exhibit A at 6. While some form of the programs (e.g. Westcare, FIT, Sentinel, etc.) suggested by Pacult are available to inmates through the NDOC, they require Pinkney to be out of custody. Accordingly, Pinkney proposes this Court impose the minimum sentence available as he is a young man who deserves a second chance to pursue his redemption before he becomes institutionalized and less likely to function in society.



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### III.

## CONCLUSION

Based on the foregoing, Lorenzo Pinkney respectfully requests this Honorable Court impose an aggregate sentence of six (6) to fifteen (15) years.

As of May 22, 2019, Pinkey will have been in custody for six-hundred and two (602) days.

Dated this 20<sup>th</sup> day of May, 2019.

Respectfully submitted.

*/s/ Lucas Gaffney*  
 LUCAS J. GAFFNEY, ESQ.  
 Nevada Bar No. 12373  
 1050 Indigo Drive, Suite 120  
 Las Vegas, Nevada 89145  
 Telephone: (702) 742-2055  
 Facsimile: (702) 920-8838

**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of May, 2019, I served a true and correct copy of the foregoing Defendant Lorenzo Pinkney's Sentencing Memorandum on the following:

STEVEN B. WOLFSON  
Clark County District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89101  
Motions@clarkcountyda.com

JOHN GIORDANI  
Chief Deputy District Attorney  
200 Lewis Avenue  
Las Vegas, Nevada 89101  
Motions@clarkcountyda.com

/s/ Lucas Gaffney  
An employee of GAFFNEY LAW

# **EXHIBIT A**

# JOHN S. PACULT, LCSW, INC.

6655 W. Sahara, Suite B200, Las Vegas, Nevada 89146

Telephone: (702) 248-5456 Fax: (702) 889-4232

## MENTAL HEALTH EVALUATION

### IDENTIFYING DATA

Name: Lorenzo Isiah Pinkney  
Aliases/former names: None  
DOB: 5-25-96  
Age: 22  
SSN: \*\*\*-\*\*-\*\*\*\* (did not know it)  
Ethnic Background: African-American  
Current Placement: CCDC  
Home Address: Unknown (stating he can live with the mother of one of his sons, Ms. Tiffany Hunter - Darnell's mother)  
Family members: Mr. Pinkney is single, never married, and has four children – London (3); Lorenzo (3); Darnell (2) and Isiah (2) – all by different women – two in Las Vegas and two in CA. Mr. Pinkney's mother lives in CA and he has no family here.

The Honorable Judge Ronald J. Israel  
Department XXVIII  
Sentencing Date: October 31, 2018  
Case # C-17-327767-1  
Date Evaluation Submitted: October 25, 2018

### REASON FOR REFERRAL

Mr. Benjamin Durham, Esq. referred Mr. Pinkney for a mental health evaluation to determine if there are any underlying issues that may explain his actions in this matter. Mr. Pinkney (and a co-defendant) has been accused of and admits to being involved in several robberies that included local restaurants, gas stations and a pharmacy. Mr. Pinkney used a bb-gun that looked like a gun to rob the stores. Mr. Pinkney stated that he developed an addiction to Xanax as to why he robbed the pharmacy and takes responsibility for his actions in this matter. He has pled guilty to multiple felony counts and is facing years in prison.

### SOURCES OF INFORMATION

This evaluator met with Mr. Pinkney on September 24, 2018, at the CCDC. For the purposes of this evaluation, this evaluator utilized documents that were provided by his attorney that consisted of Mr. Pinkney's District Court Petitions (Guilty Plea Agreement and Information), Las Vegas Metropolitan Police Department (LVMPD) Arrest Reports, Voluntary Statements from the victims, some of Mr. Pinkney's school records that reflect a learning disability,

and his PSI Report. This evaluator also spoke with his mother, Ms. Earlene Fullilove.

### **INFORMED CONSENT**

Mr. Pinkney was given a full description of the evaluation process, the risks and benefits involved and the rationale for the evaluation. He was advised of the importance of cooperation and honesty in order for the evaluation to be effective. The parameters of confidentiality were carefully explained, and, in particular, when it had to be broken in accordance with the law. While acknowledging his attorney's directive that he be evaluated, the voluntary nature of the evaluation was emphasized. Comprehension of these issues was confirmed and any questions Mr. Pinkney had were answered. Written and voluntary consent to proceed was obtained prior to starting the evaluation.

### **MENTAL STATUS EXAMINATION**

Mr. Pinkney is a twenty-two-year-old male who is of average weight and height, appears his stated age, had a thin beard and mustache and has numerous tattoos. He admits that he is gang affiliated – "Brick Boys – Long Beach – Crip." He was polite, cooperative, able to maintain adequate eye contact and his body language suggested that he was comfortable during the evaluation process. Mr. Pinkney was oriented to person, time, situation and place. He appeared to be of average intelligence and his thought process and memory appeared intact. However, while dreaming he is communicating with his dead brother. He is not sure if his brother is truly in his dreams or not as it feels very real, but it does not happen when he is conscious. He denied having a history of auditory or visual hallucinations, or homicidal ideations. Mr. Pinkney admitted to setting a fire in a hotel room when he was six. He remembered that he tried to cover it up but his mother was there and realized what happened. Mr. Pinkney was shot at age seven by a 13-year-old with a .22 just under his right eye. It was a friend who shot him, accidentally. He had to be airlifted to a hospital. Mr. Pinkney does not think it affected him but he noted that his mother thinks he has "not been right" since then. He described how he will read something and "will forget what I just read. My train of thought is not good (possibly ADHD or could be trauma related). Mr. Pinkney denied having any problems with his appetite or sleep. He described himself as "a loving caring person at times but different since my brother died – he committed suicide in front of me and lot of people – it was in CA – I was 17 and he was 18." Mr. Pinkney stated that in terms of self-esteem (had to explain the concept) on a scale from one to ten with one being low, he rated his current self-esteem at a "eight." Prior to his arrest, his self-esteem was the same.

### **SIGNIFICANT HISTORICAL INFORMATION**

Mr. Pinkney was born and raised in CA and came to Las Vegas due to the cost of living. He moved her with the mother of one of his children. He has been in Las Vegas 18 months but was back and forth between NV and CA during that time. Mr. Pinkney cited his use of drugs (cocaine and Xanax) which would "mellow me out" (he described ADHD symptoms).

Just before he came to jail his mother told him he was losing weight (from drug use) which he did not see at the time but does now. Mr. Pinkney was raised by his mother only, has no recall of his father and does not know any of his paternal half siblings.

#### **EDUCATION/EMPLOYMENT HISTORY**

Mr. Pinkney completed school through only the 9<sup>th</sup> grade. He was clear that he wants a GED or a diploma, commenting that he knows he needs help. His school records reflect struggles with his behavior at times, having a specific learning disability, having average to low-average testing results, and having a visual processing disorder. Mr. Pinkney added that he did not like to read in front of the class and would act out so he did not have to so he was not made fun of.

In terms of employment, Mr. Pinkney worked at a Wal-Mart for a short time but admits that he was “fired for being lazy and making too many mistakes” (which would be reflective of his learning disabilities). He had been on Social Security Disability for years. When asked what he would like to do for a vocation he said “work with animals, help people who are sick, I relate to people.”

#### **MAJOR MEDICAL PROBLEMS**

Despite his age, Mr. Pinkney reports that he has high blood pressure and is not sure why, describing an occasional elevated heart beat and feeling tired (which is in his school records as well).

#### **ALCOHOL/SUBSTANCE ABUSE HISTORY**

Mr. Pinkney has used marijuana, no alcohol, but admits that he was under the influence of cocaine, marijuana and Xanax at the time of the crimes, adding “I’m ashamed of my actions.”

#### **MENTAL HEALTH HISTORY**

Mr. Pinkney recalls going to Star View Counseling in CA due to “behavioral issues.” He was encouraged to take ADHD medication but never took it, believing he did not need it because he feared that it would change his thought process.

#### **CRIMINAL/INSTITUTIONAL HISTORY**

Mr. Pinkney admits to arrests as a juvenile but no placements or probation, and no prior adult convictions.

## **CURRENT FUNCTIONING OF FAMILY CONSTELLATION**

Mr. Pinkney said he would like to stay in Las Vegas as he wants to be a father and referenced his actions as a “dumb mistake, it was very serious and over drugs – I wanted more drugs – I’ve been sober for a year now” and noted that he has a very clear mind now and has no desire to ever use drugs again, “even if I do time, I learn from my mistakes, I’m not saying I deserve a slap on the wrist, there should be consequences for my actions, but I was not in my right mind at the time. This is the time to better myself” (which demonstrates a positive and healthy attitude). Mr. Pinkney added that prior to his arrest he was involved with his children “but not fully, I was there but not there. I was messing with other girls. I missed out on their major milestones” (seemingly realizing the impact his actions are now having upon his children). He was most recently together with Isiah’s mother who lives here. She is 24 and has no criminal record.

## **CASE EVALUATION**

Mr. Pinkney admits to being involved in both offenses but said he was the driver for the first one and that the gun was a BB-gun and he did not own a real gun. He added that the co-defendant was the one who suggested taking the current deal, so he did, not fully realizing what it entailed. When asked how he thinks he affected the victims Mr. Pinkney said they were “likely scared, had bad dreams at night, and will have a hard time working by themselves in the future.” He believes that drug use and a negative peer group were a part of his actions, as he had no priors, but the co-defendant did. However, Mr. Pinkney admits that he was the one to put the gun to the victim’s head during the second robbery. Mr. Pinkney added that he had to have the GPA read to him and needed explanation concerning the concept of “concurrent vs. consecutive.” He stated that when he was sitting there waiting for the trial to start he “did not know what was going on, everyone was talking quickly and I did not understand what they were saying. You can see on the tape my confusion. I was given the deal as the jurors were walking in.” Mr. Pinkney added that he listened to the co-defendant at trial as he was the one with priors “so it was a good deal for him” (the co-defendant). His mother was also not able to help him with the court process as she lives in CA and could not be present. His grandfather also died while he was in custody. Mr. Pinkney needed some mild redirection and he said he was distracted, akin to how it was in school and remarked “it’s hard to concentrate.”

**This evaluator has heard this time and time again, and when defendants have a lower IQ and/or other underlying issues they truly do not understand what is happening in the court room – which should never be the case. Defendants are embarrassed to ask for help and are literally signing their life away and only after court, when another inmate takes the time to read over things and explain the elements of the plea do they start to grasp the magnitude of what they just agreed to – which in this evaluator’s opinion merits consideration as Mr. Pinkney has a documented learning disability and a history of impulsivity. This evaluator is not questioning his competency as he appears marginally competent but it may warrant a re-consideration considering the number of charges he has pled guilty to that could be run consecutively.**

## SUMMARY & CLINICAL IMPRESSIONS

This evaluator cannot count the number of cases I've been involved in with young African-American males who grew up without a father, no positive male role model, and struggled in school due to a myriad of issues related to learning disabilities, dysfunction at home, etc. that lead to behavior problems and then dropping out of school. Mr. Pinkney was shot in the face as a child which had to contribute to his inability to concentrate and was possibly connected to Post Traumatic Stress Disorder (PTSD) which is another common theme for young black men in urban settings. If the brain believes the trauma is still real, concentration is impacted, along with trust and other areas, and if the brain is constantly on guard it usually leads to drug use as an attempt to concentrate, numb the pain, thoughts, etc. He reports that he witnessed his brother commit suicide in front of him which had to be traumatic on many levels. Mr. Pinkney was diagnosed with ADHD as a child but did not want to take the medication which also likely led to his illegal drug use and subsequent drug addiction. His mother confirmed his self-report and added that he has had a history of impulsive behavior and she does not understand it. She added that the SSD doctors added that he was diagnosed with Bipolar Disorder, and also believes that witnessing his brother's death was extremely detrimental. He was resistant to help and/or medication then and she wishes that he would have received help then. She is doing the best she can with his children (her grandchildren), she has custody of one of the children, and added that after the suicide her son seemed bent on having as many children as he could (leaving some type of legacy).

As a young adult, he has fathered four children by four different women and admits that he was irresponsible in doing so and wants to be an active and involved father for his children. Mr. Pinkney tried to work but was fired after a short time due to his inability to follow directions, etc. He has been on SSD for many years as well and has no employment history to speak of. He has two children in Las Vegas and two in CA. He has no other family here.

Mr. Pinkney admits to his actions in this matter and while he realizes that his poor choice in peers and drug use contributed to his decision making, he also knows he made poor decisions that led to people being traumatized. Mr. Pinkney expressed remorse and regret during this evaluation, along with a desire to be a better person and parent, which are all positives. Mr. Pinkney is also a young adult. The current term for teens and young adults is emerging adulthood and the research reflects that their brains are not fully developed (the frontal lobe area) which is directly correlated with impulse control, empathy, consequential thinking, etc. A court in San Francisco has recently started the first young adult court recognizing the current scientific research and the need to treat young adult offenders differently than fully developed adults. Mr. Pinkney is open to substance abuse counseling and was clear that he is willing to do whatever is asked of him. His juvenile record is minor, which is significant, in this evaluator's opinion and points to the possibility that his actions were much more connected to substance abuse as opposed to a pattern of engrained criminal thinking/behavior.

Mr. Pinkney is going to need a host of services in order to be a productive member of society and he reports that he is committed to recovery and sobriety.



## CONCLUSIONS AND RECOMMENDATIONS

Mr. Pinkney suffers from PTSD; ADHD, Opioid Abuse (in remission due to current circumstances – jail) and Bipolar Disorder (by history). He had a very traumatic childhood and no real direction as an adult. Given his age, childhood traumas, and underlying mental health and substance abuse issues, ideally, Mr. Pinkney should receive long-term substance abuse and mental health treatment, ideally in a program such as Westcare. This evaluator understands the seriousness of Mr. Pinkney's crimes, but long-term incarceration is not going to help him develop the skills and mindset to be a functional adult and parent in our society. Mr. Pinkney is open to treatment and doing whatever he can do to better himself.

Mr. Pinkney also needs parenting classes; to obtain his GED and/or have vocational services so he can find gainful employment in our community once released. If given the opportunity at in-patient substance abuse treatment he could transition into a sober living home with the same support, be referred to programs such as FIT or Sentinel through Parole and Probation and have an opportunity at being a parent and productive member of the community as opposed to going to prison and still not having the long-term planning and services required for his and the community's wellbeing, both short and long-term.

Boot camp could be another option since he has a very minor criminal history and his age.

Respectfully submitted,

*John S. Pacult, LCSW*

John S. Pacult, LCSW, Clinical Director,  
Contracted evaluator with the Department  
of Public Safety, the Division of Juvenile Justice Services,  
the Department of Family Services and certified Competency Evaluator

# **EXHIBIT B**

**Mark D. Pierce, Ph.D., Clinical Psychologist**  
**DYNASTY MEDICAL GROUP**  
44439 N 17<sup>th</sup> St W. Ste 105  
Lancaster CA 93534  
(661) 940-5125

February 29, 2012

**DEPARTMENT OF SOCIAL SERVICES**  
Disability And Adult Programs Division  
Los Angeles, North Branch  
P.O. Box 54800  
Los Angeles, CA 90054-0800

RE: **Lorenzo Pinkney**  
SSN: [REDACTED]  
ATTN: **A. Son**

The following is a summary report of the **PSYCHOLOGICAL EVALUATION** performed at this medical facility at the request of your department.

**TESTS ADMINISTERED:**

Complete Psychological Evaluation  
Mental Status Exam

Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV)  
Wide Range Achievement Test-IV (WRAT-IV)\*  
Vineland Adaptive Behavior Scale\*

\*The WRAT-IV is added for reported history of all day special education placement, in the absence of school records.

\*The VABS is added to measure adaptive deficits, in light of apparent developmental delay.

**GENERAL OBSERVATIONS:**

The claimant is a 15-year-9-month-old, African-American male who arrived on time for the appointment. The claimant was brought to the clinic by his mother. The claimant's mother provided a somewhat limited insight historical record.

The claimant's posture, gait, and mannerisms were within normal range, except that he presented as cognitively slowed. The claimant was fairly dressed in clean but baggy clothing. He is taken back alone initially, as his mother completes the Patient History, with mother being interviewed subsequently.

**PRESENTING COMPLAINTS:**

This claimant has been diagnosed with ADHD but cannot take medications because of his having a heart condition which continues to be under evaluation, and is not yet treated. Of likely greater significance, this teen has the extreme trauma history of having been shot in the face at age 7 when a peer was playing with a gun by him, which broke his jaw. Since then he has been "jittery with noises and is always worried that something bad is going to happen", clearly showing posttraumatic adjustment. He is reportedly only a part day special education student, for mathematics and English as a 9<sup>th</sup> grader, with his today showing extreme challenges both with I.Q. and achievement testing, which does appear to be well motivated. He is a behavior problem at school, will not pull his pants up or take his cap off during the day, with history of suspensions, both in and out of school and full school expulsions, with his having attended an extreme 22 schools to

PAGE 2  
RE: Lorenzo Pinkney  
SSN: [REDACTED]

present.

**REVIEW OF MEDICAL RECORDS**

There are no records available for review today.

**PAST MEDICAL HISTORY:**

Medical history is significant for an undiagnosed heart condition preventing him from taking psychiatric medications, and he was accidentally shot in the face at age 7, sustaining a broken jaw.

**CURRENT MEDICATIONS**

The claimant is not currently taking prescription medication.

**DEVELOPMENTAL HISTORY**

The mother reports no complications with the birth or pregnancy. The claimant sat at 3 months, stood at 9 months, walked at 9 months and was toilet-trained by 2 years. First 'mama-papa' speech was heard at 10 months, identification speech emerged by 1 year, with short, 2-3-word sentences by 1 year.

**PAST PSYCHIATRIC OR PSYCHOLOGICAL HISTORY:**

The claimant has never been psychiatrically hospitalized. He reportedly has an open door policy for accessing counseling at school, without benefit of needed professional counseling and medication management.

**PERSONAL HISTORY:**

**SOCIAL:** The claimant was born in Long Beach, CA. He resides with his single mother, 6-year-old brother, and 5-year-old sister. Dad is not in his life, while mom has history of SLD and diagnosed ADHD, herself.

**EDUCATION:** The claimant is described as only a part day special education student as a 9<sup>th</sup> grader with special services from 2<sup>nd</sup> grade.

**LEGAL:** The claimant apparently was not arrested for reportedly breaking into a classroom at school in the middle of the day on a nonschool day.

**CURRENT LEVEL OF FUNCTIONING**

At the present time, the claimant goes to school everyday. In addition to attending school, the claimant enjoys watching TV and listening to music.

The claimant also goes outside the home to shop, attend sports events, go to movies, and visit friends.

The claimant can use eating utensils appropriately. He can dress and bathe himself and can use the bathroom independently.

PAGE 3  
RE: Lorenzo Pinkney  
SSN: [REDACTED]

The mother reports the claimant helps out at home by taking out the trash, feeding the pets, cleaning his room, and sweeping, "when I make him".

The claimant is described as getting along "excellent" with family and "fair" with friends ("He treats them like they don't matter").

The claimant relies on family members for transportation. He is able to handle small amounts of spending money independently.

Mother concludes, "I have problems getting him to stay on task. He always talks back and tries to talk his way out of stuff."

#### **MENTAL STATUS EXAMINATION:**

**ATTITUDE AND BEHAVIOR:** The claimant was alert, responsive, and cooperative during the evaluation, though shows quite challenged cognitive capacities. His general attitude was characterized by fair effort, interest, and compliance. Clothing, grooming, and hygiene were adequate.

**INTELLECTUAL FUNCTIONING:** The claimant is estimated to be functioning within the well deficient intellectual range, based on intake interview and the history obtained.

**MOOD AND AFFECT:** The claimant's mood and affect were under-modulated, and consistent with depressive and anxious, posttraumatic adjustment. Mother endorsed mood and/or behavioral problems included: "nervous and poor habits." "He always thinks something bad is going to happen. He will do good, but just for a period of time." At home he acts up and at school there are teacher complaints, fights, suspensions and history of expulsion. He adds, "I fight if somebody tries to mess with me." When asked directly how he typically feels, the claimant responded, "I feel pissed at having to do the work at school 'cause I can't do the work. At home I feel good." He indicates having "no" friends; "but that's no problem." This youngster appears to suffer from fairly severe, unresolved posttraumatic adjustment from having been shot at age 7, with reported hypervigilance, attention deficits and significant acting out behavior as described. There was no indication of psychotic, suicidal or homicidal ideation or behavior noted during the contact period.

**SPEECH:** The claimant's speech is mildly dysarthric. Verbal response time was slowed. The claimant's tone is under-modulated.

**CONCENTRATION/ATTENTION SPAN:** The claimant's concentration and attention span were deficient. Formal measures of attention and concentration (WISC-4 Working Memory and Processing Speed Composite) are higher deficient and mild to moderately deficient range, respectively, commensurate with overall I.Q. composite scores.

**INSIGHT AND JUDGMENT:** Insight and judgment were mildly deficient and mild to moderately deficient, respectively. When asked what an apple and banana have in common, the claimant said, "You eat." When asked, "What would you do if you saw thick smoke coming from your neighbor's house?" he responded, "Call 911."

PAGE 4  
RE: Lorenzo Pinkney  
SSN: [REDACTED]

**TEST RESULTS:**

The claimant was administered the: Wechsler Intelligence Scale for Children-IV, Wide Range Achievement Test-IV, and Vineland Adaptive Behavior Scales.

The results are as follows:

**WECHSLER INTELLIGENCE SCALE FOR CHILDREN-IV (WISC-IV):**

The claimant was administered the WISC-IV, obtaining the following subtest scale scores.

<u>Verbal</u> Comprehension		<u>Perceptual</u> Reasoning		<u>Working</u> Memory		<u>Processing</u> Speed	
Similarities	4	Block Design	2	Digit Span	4	Coding	1
Vocabulary	2	Picture Concepts	2	Letter Number Sequencing	4	Symbol Search	1
Comprehension	1	Matrix Reasoning	3				
<u>V C Composite</u>		<u>P R Comp</u>		<u>W M Comp</u>		<u>P S Comp</u>	<u>Full</u> <u>Scale</u>
55		53		65		50	48

The claimant's performance is extremely limited, from the mild to mostly mild to moderately deficient range. The full scale I.Q. is in the moderately deficient range, while this claimant is estimated to show lower, mild developmental delays overall.

**WIDE RANGE ACHIEVEMENT TEST (WRAT) - IV:**

The claimant was administered the Wide Range Achievement Test-IV. The results are as follows:

DOMAIN	Raw Score	Standard Score	Grade Equivalence
Word Reading	24	64	1.8
Sentence Comprehension	3	55	K.6
Spelling	20	62	1.4
Math Computation	21	63	2.2
Reading Composite	119	59	N/A

The claimant shows very limited capacity with language-related achievement screening, with Reading, Sentence Comprehension and Spelling scores from the lower mild to mild to moderately deficient range. Mathematical achievement is also lower mildly deficient range. This is not a profile of diagnosable learning disorder for language-related or mathematics achievement, for obtained WRAT-IV standard scores paralleling, to rising somewhat higher than his tested low I.Q. scores, and are best subsumed under the primary mild mental retardation diagnosis. Notably, he is capable only to very early elementary levels academically.

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RE: Lorenzo Pinkney  
SSN: [REDACTED]

**VINELAND ADAPTIVE BEHAVIOR SCALES: INTERVIEW EDITION:**

The claimant was administered the Vineland Adaptive Behavior Scales.

The claimant achieved the following scores:

Domain	Raw Score	Standard Score	Adaptive Level
Communication	67	20	Severely to profoundly deficient
Daily Living Skills	109	33	Severely deficient
Socialization	55	22	Severely to profoundly deficient
Adaptive Composite		22	Severely to profoundly deficient

Overall, mother rates extreme, severely to profound adaptive deficits across the board, which seems to be an overestimate of the level of actual challenge for this troubled teen.

Given fair, estimated typical effort and rapport, the following diagnostic and prognostic impressions are estimated reliable and valid and appear to accurately represent the claimant's abilities and functional level at this time.

**DIAGNOSTIC IMPRESSIONS:**

Given the test results and clinical data, the claimant is diagnosed as:

- AXIS I:** Posttraumatic stress disorder (severe, unresolved, from sustaining a GSW at age 7, thought to underlie additional behavior disorders below, the claimant has attended 22 schools, untreated).
- Disruptive behavior disorder, not otherwise specified (estimated pre-conduct disordered aggression as well as oppositional-defiance at school, also not treated).
- AXIS II:** Mild mental retardation (moderately deficient I.Q. testing, lower mildly deficient achievement screening against severe to profound adaptive deficits per mother).
- AXIS III:** Sustained GSW to the face at age 7, resulting in a broken jaw and a still undiagnosed/untreated heart condition.

Deferred to the appropriate specialists.

**PROGNOSTIC IMPRESSIONS:**

This claimant appears to require aggressive psychiatric intervention for what today is diagnosed as an untreated, severe PTSD adjustment from his having been shot in the face as a 7-year-old. He

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RE: Lorenzo Pinkney  
SSN: [REDACTED]

shows classic hypervigilance, "always worried that something bad is going to happen", with likely underreported nightmares and flashbacks. This condition has expanded into extreme disruptive behavior, oppositional-defiance and aggression in the classroom, with serious potential for delinquent behavior if not aggressively intervened upon soon. Mother reports that he cannot take ADHD medications for an undiagnosed heart condition, while he makes a severe psychiatric presentation per his history, compounded by very likely high familial instability for his having attended 22 schools to present. He presents as well mentally retarded, with commensurate adaptive deficits such that he likely requires a highly structured school environment, possibly of the non-public variety, where he could obtain the aggressive mental health services that he seems to require.

The claimant shows related, quite challenged social skills with this examiner.

The claimant can follow simple one and two part instructions. However, he appears unable to reason sufficiently to avoid typical, age-related hazards, by the generally challenged testing effort obtained today.

Thank you for the opportunity of assisting in this interesting consultation.

Submitted by,



MARK D. PIERCE, Ph.D.  
Clinical Psychologist  
CA License Exp. 06/13



CASE ANALYSIS	SSN: [REDACTED]
	Name: LARENZO ISIAH PINKNEY
	Date: October 14, 2016

FROM: MS. MOORE/V80	CEMOOR
NAME: LARENZO ISIAH PINKNEY	DATE OF BIRTH: [REDACTED]
SSN: [REDACTED]	AGE: 20 SEX: M
CASE NUMBER: 1185340	HEIGHT: 70 IN WEIGHT: 153 LB
AOD 05/25/2014	EDUCATION: 11
CASE FILING DATE	CASE LEVEL: PH
DATE LAST INSURED: 00/00/0000	CASE TITLE: T16
PRIOR DENIAL DATE 00/00/0000	CASE TYPE:
PP CONTROLLING DATE 00/00/0000	PP/AGE22: 00/00/0000

T16 Age 18 Redet

**\*\*PH CASE\*\***

**ALLEGATIONS:**

ADHD; Learning problems;, Condition Changed Start  
Date 01/2014, Condition Changed Description WELL H  
E BEEN HAVING HEADACHES ALMOST EVERYDAY. LORENZO W  
AS SHOT IN THE FACE AT 7 YEARS OLD, New Conditions  
Start Date 02/2016, New Conditions Description UN  
CONTROLLABLE OUT BRAKES

**SOURCES:**

CHERRY MEDICAL CLINIC report received 09/21/2016

**DISCUSSION OF EVIDENCE AND ISSUES INVOLVED**

**SIGNIFICANT OBJECTIVE FINDINGS:**

**CPD:** MET 112.05C. FUNCTIONING BELOW GRADE LEVEL. HX OF ADHD BUT NOT  
ON MEDS. DEFFICIENT IQ SCORES PER 2/2012 YOCE: WISC IV- VC 55, PR 53,  
WM 65, PS 50, FIQ 48.  
**GIVEN: MEETS LISTING 112.05C.**

**CDR:** CASE RETURNED FROM FO AFTER CASE WAS CLOSED FOR FTC. 2014  
MEOR NOTES CT IS NOT IN TX WITH PSYCHIATRIST OR PSYCHOLOGIST. HE  
HAS NO PEDIATRICIAN OR PCP. ATTENDING MISSION VIEW CHARTER HS. 4/14

IEP NOTES HE IS ELIGIBLE UNDER SLD. FUNCTIONING ACADEMICALLY BELOW GRADE LEVEL. NO PROBLEMS NOTED IN MOTOR SKILLS, COMMUNICATION, SOCIAL INTERACTION, ADAPTIVE SKILLS. NO MEDICAL PROBLEMS NOTED.

DETERMINATION: INSUFFICIENT EVIDENCE 2/2 WAU. THIS IS THE 2ND TIME CT'S WHEREABOUTS ARE UNKNOWN.

CASE RETURNED ON 03/18/16 AFTER THE CASE WAS CLOSED TO W AU FOR THE 2ND TIME. THE CLAIM, IS NOW BEING CLOSED FOR FTC. THE UPDATED ADDRESS WAS RECEIVED AND A CE WAS SCHEDULED BUT THE CLAIMANT FAILED TO KEEP THE EXAM AGAIN. DUE PROCESS 2 CALLS AND LETTERS SENT TO THE CLAIMANT AND MOTHER W/O RESPONSE. RETURNED MAIL HAS BEEN RECEIVED BUT UNABLE TO ENTER INTO SYSTEM 2/2 BARCODE ISSUES.

YMC REC INSUFFICIENT EVIDENCE 2/2 FAILURE TO COOPERATE WITH A CONSULTATIVE EXAM. NO EVIDENCE AVAILABLE FOR REVIEW.  
GIVEN: IE.

**PH** CHERRY MEDICAL CLINIC 9/7/16 MSE: the clmt was able to state his full name, age, and date of birth. His thinking was coherent, though concrete. The clmt's speech was clear and understandable. Response time was average. No psychomotor retardation was noted. The clmt's mood was withdrawn. Affect was constricted. Current symptoms of depression and anxiety were reported. Present suicidal ideation was denied. No unusual perceptual experiences were reported. Signs of paranoia were evident during the exam. The clmt could repeat 4 digits forward and 3 digits backwards. He could recall the names of 2 out of 3 familiar objects after an interval of 5 minutes and an interference task. The clmt could provide general details regarding his daily activities. Remote memory appeared grossly intact. The clmt demonstrated a mildly diminished attention span in responding interview questions and following test instructions. During performance tasks, the clmt lacked persistence as he tended to give up easily when challenged. The clmt knew how many months there are in a year but could not identify the direction in which the sun rises. He could name the current president of the United States and the last president. The clmt's legal history suggests a proneness to lapses in impulse control and judgment. When asked, what is the thing to do if he was the first person in a movie theater to see smoke and fire, the patient responded, "Yell for help." When asked, how he would find his way out if he was lost in the forest during the daytime, the patient responded, "Yell for help."  
TESTING: WAIS 4- VERBAL COMP 74, PR 77, WM 71, PS 84, FSIQ IS 82. WMS4- AUDITORY MEMORY 75, VISUAL MEMORY 76, VISUAL WORKING MEMORY IS 73, INTERMEDIATE MEMORY IS 72, DEALYED MEMORY IS 72.

TRAILS- Trails A was completed in 38 seconds, which is in the non-impaired range. On Trails B, the clmt made repeated errors. He was able to correct some of the initial errors with feedback but ultimately gave up at 115 seconds, having completing less than half of the task. Results indicate no signs of impairment on simple tasks requiring sustained

attention or visual-tracking ability, and moderate-to-severe impairment on more complex attentional tasks also involving mental flexibility in shifting sets.

**DX:** Axis I: Conduct Disorder, NOS, given the clmt's legal/school district juvenile disciplinary history. Learning Disorder, NOS, by report. Depressive Disorder, NOS, given the report of chronic depressed mood, sadness over losses, anhedonia, pessimism about the future, irritability, constriction of interests and restriction of daily activities. Axis II: Intellectual functioning is estimated to be in the Borderline Range. Antisocial/paranoid Traits, given the clmt's legal history. Axis III: Deferred to the appropriate medical specialist.

**MSS:** The clmt would be able to learn a simple, repetitive nonverbal task but may have moderate limitations in performing detailed, varied, or complex tasks. His ability to sustain attention and concentration for extended periods of time may be moderately diminished, due to cognitive and emotional factors. During testing, the clmt demonstrated mild to moderately diminished attention, concentration, persistence, and pace in completing tasks. From a psychological perspective, the clmt presents with signs of cognitive/short-term memory weakness, depressive/anxiety symptoms, and proneness to engage in impulsive, antisocial behaviors, which may result to moderate limitations in ability to manage customary work stress and persist for a regular workday. Given test results and current activities of daily living, the clmt appears capable of following a routine but may have moderate limitations in organizing for high level tasks. Given his dysphoria, test behavior, and school dropout record, the clmt may have difficulty persisting despite obstacles. The effects of any medical conditions upon work functioning should be evaluated by the appropriate medical specialist. The clmt would be able to work independently on basic tasks. Given his dysphoria, irritability, and preference for social isolation, the clmt may have mild limitations in sustaining cooperative relationships with co-workers and supervisors. He may function most optimally in a semi-isolated work setting. The clmt relates in a cooperative manner with supportive authority figures, as demonstrated by his behavior with this evaluator. The clmt appears technically capable for the self-management of funds, given test results, though he would benefit from continued assistance, due to impulse control/judgment problems.

**QUESTIONS/RECOMMENDATIONS:** less than SRT?

10/12/16 Y less than SRT. gfjohnsonmd

☒ THESE FINDINGS COMPLETE THE MEDICAL PORTION OF THE DISABILITY DETERMINATION

SIGNATURE: G. Johnson MD	SPECIALTY: 37	OFFICE Covina
		DATE October 12, 2016

**MENTAL RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT**

NAME

LARENZO ISIAH PINKNEY

SOCIAL SECURITY NUMBER

CATEGORIES (From 1C of the PRTF)

12.02, 12.04, 12.08

ASSESSMENT IS FOR:

☒ Current Evaluation☐ 12 Months After Onset:☐ Date Last Insured:☐ Other: to**I. SUMMARY CONCLUSIONS**

This section is for recording summary conclusions derived from the evidence in file. Each mental activity is to be evaluated within the context of the individual's capacity to sustain that activity over a normal workday and workweek, on an ongoing basis. Detailed explanation of the degree of limitation for each category (A through D), as well as any other assessment information you deem appropriate, is to be recorded in Section III (Functional Capacity Assessment).

If rating category 5 is checked for any of the following items, you MUST specify in Section II the evidence that is needed to make the assessment. If you conclude that the record is so inadequately documented that no accurate functional capacity assessment can be made, indicate in Section II what development is necessary, but DO NOT COMPLETE SECTION III.

	Not Significantly Limited	Moderately Limited	Markedly Limited	No Evidence of Limitation in this Category	Not Ratable on Available Evidence
<b>A. UNDERSTANDING AND MEMORY</b>					
1. The ability to remember locations and work-like procedures.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
2. The ability to understand and remember very short and simple instructions.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
3. The ability to understand and remember detailed instructions.	1. <input type="checkbox"/>	2. <input type="checkbox"/>	3. <input checked="" type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
<b>B. SUSTAINED CONCENTRATION AND PERSISTENCE</b>					
4. The ability to carry out very short and simple instructions.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
5. The ability to carry out detailed instructions.	1. <input type="checkbox"/>	2. <input checked="" type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
6. The ability to maintain attention and concentration for extended periods.	1. <input type="checkbox"/>	2. <input type="checkbox"/>	3. <input checked="" type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
7. The ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances.	1. <input type="checkbox"/>	2. <input checked="" type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
8. The ability to sustain an ordinary routine without special supervision.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
9. The ability to work in coordination with or proximity to others without being distracted by them.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
10. The ability to make simple work-related decisions.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>

	Not Significantly Limited	Moderately Limited	Markedly Limited	No Evidence of Limitation in this Category	Not Ratable on Available Evidence
Continued-- <u>SUSTAINED CONCENTRATION AND PERSISTENCE</u>					
11. The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.	1. <input type="checkbox"/>	2. <input checked="" type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
<u>C. SOCIAL INTERACTION</u>					
12. The ability to interact appropriately with the general public.	1. <input type="checkbox"/>	2. <input type="checkbox"/>	3. <input checked="" type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
13. The ability to ask simple questions or request assistance.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
14. The ability to accept instructions and respond appropriately to criticism from supervisors.	1. <input type="checkbox"/>	2. <input checked="" type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
15. The ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
16. The ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
<u>D. ADAPTATION</u>					
17. The ability to respond appropriately to changes in the work setting.	1. <input type="checkbox"/>	2. <input type="checkbox"/>	3. <input checked="" type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
18. The ability to be aware of normal hazards and take appropriate precautions.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
19. The ability to travel in unfamiliar places or use public transportation.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
20. The ability to set realistic goals or make plans independently of others.	1. <input checked="" type="checkbox"/>	2. <input type="checkbox"/>	3. <input type="checkbox"/>	4. <input type="checkbox"/>	5. <input type="checkbox"/>
<b>II. REMARKS:</b> If you checked box 5 for any of the preceding items or if any documentation deficiencies were identified, you MUST specify what additional documentation is needed. Cite the item number(s), as well as any other specific deficiency, and indicate the development to be undertaken.					

Continued on Page 3

# EXHIBIT C

STATE OF NEVADA -v-

Lorenzo Pinkey  
ID NO.: 8295438

[ ] Interpreter Required

CLARK COUNTY  
COURTS

JUSTICE COURT CASE NO.:

DEPT. \_\_\_\_\_

DISTRICT COURT CASE NO.:

C-327767 TRACK DEPT. 28

**REQUEST FOR EVALUATION(S) FOR COMPETENCY**

I, Lucas Gaffney, on behalf of Lorenzo Pinkey do hereby request that the above named defendant be evaluated for competency based on the following:

The defendant DOES NOT:

- ☒ appear to understand the charges or allegation  
☒ understand the adversarial nature of the legal process  
☐ appear to disclose to defense attorney pertinent facts  
☐ do you believe the defendant currently suffers from:  
[ ] TBI [ ] Dementia [ ] Alzheimer's

- ☒ understand the range and nature of the penalties  
☐ display appropriate courtroom behavior  
☐ demonstrate ability to provide relevant testimony

please indicate range of punishment: Up to Life (1st Degree)  
Voluntary

12/10/18  
Date

[Signature]  
Signature of Person Requesting Evaluation

702-742-2055  
lucas@gaffneylawlv.com  
Contact Number & Email

**ORDER FOR COMPETENCY EVALUATION(S)**

THIS MATTER having come before the Court at a hearing where the Defendant was  
[X] PRESENT [ ] NOT PRESENT

THE COURT FINDS AND ORDERS that doubt has arisen as to the competence of the Defendant and that the proceedings are suspended until the question of competence is determined.

IT IS FURTHER ORDERED that pursuant to N.R.S. 178.415 the appropriate evaluation(s) will be conducted; the defendant having been charged with a

[ ] MISDEMEANOR [X] GROSS MISDEMEANOR / FELONY competency hearing to be set at 9:00 A.M. in District Court Department 9 on the 4th day of January, 2019.

FURTHERMORE, IT IS ORDERED the following records be made available to the Specialty Court Division of the Clark County Courts: 1) Any and all jail records to include, but not limited to, custody records, psychiatric records, medical records and incident reports. 2) Any and all criminal records, including but not limited to, criminal complaint, police records and discovery.

ADDITIONALLY, it is ordered that the Clark County Detention Center and/or NaphCare shall provide the referring attorney and/or attorney's staff with any and all medical/psychiatric records of the defendant upon request and NaphCare staff including but not limited to physician and nursing records. Lastly, they shall speak with the referring attorney and/or their staff about the defendant's condition including but not limited to prognosis, diagnosis and treatment.

IT IS FINALLY ORDERED that the report(s) of said examination be submitted to the Specialty Courts Division no later than 5:00 PM on the third judicial day preceding the scheduled hearing.

DATED this 10th day of Dec, 2018

[Signature]  
JUDGE

# COMPETENCY EVALUATION - COVER SHEET

☒ **COMPETENT**  
☐ **NOT COMPETENT**

DEFENDANT NAME: Lorenzo Pinkey CASE NO.: C173277671

EVALUATION DATE: 12/16/18 LENGTH OF EVALUATION: 60 minutes

REPORT DATE: 12/17/18 INFORMED CONSENT: ☒ YES ☐ NO

## SUMMARY OF RESULTS PERTAINING TO DUSKY vs. UNITED STATES

Is there substantial impairment or gross deficit in the following areas:

	YES	NO
1. Capacity to understand the nature of the criminal charges.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
2. Capacity to understand the nature and purpose of court proceedings.	<input type="checkbox"/>	<input checked="" type="checkbox"/>
3. Capacity to aid and assist counsel in the defense.	<input type="checkbox"/>	<input checked="" type="checkbox"/>

## DIAGNOSTIC IMPRESSIONS:

ADHD, Combined Type (untreated)  
h/o Unspecified Depressive Disorder a/w Bereavement  
Polysubstance Dependence  
r/o Schizoaffective Disorder, Depressive Type

## PSYCHIATRIC HISTORY:

	YES	NO
Currently taking medication for mental illness:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
If yes, specify:		
Prior mental health treatment: <u>Starview Counseling from 9-13 years old in school.</u>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Prior hospitalizations:	<input type="checkbox"/>	<input checked="" type="checkbox"/>
If yes, dates and duration:		

## MALINGERING:

Is there a substantial degree of weakness in the interview, response style, or testing data that suggests a malingered disorder is present?

☐ YES ☒ NO ☐ NOT RULED OUT

## REVIEW OF RECORDS - COLLATERAL INFORMATION

☐ Discovery ☒ Jail Medical Records  
☐ Jail Disciplinary Records ☐ Mental Health Records  
☒ Other: Request of for Competency Evaluation

Submitted by: Daniel Sussman, M.D.,





**Daniel Sussman, M.D., Esq., MBA**

**ABPN Certified Psychiatrist**  
4205 Mont Blanc Way  
Mt. Charleston, Nevada 89124  
(702) 493-5203 (cell)

Attn: Kimberly Alexander  
Eighth Judicial District Court  
Justice Court, Las Vegas Township  
Specialty Courts Division  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155  
Fax (702) 671-3325

Defendant Name: Lorenzo Pinkey  
ID Number: 8295438  
DOB: [REDACTED]  
Case Number: C173277671  
Date of Evaluation: December 16, 2018 at Clark County Detention Center Video

**PSYCHIATRIC EVALUATION**

**REFERRAL SOURCE & INFORMED CONSENT:**

This defendant was referred by Administrative Specialist Kimberly Alexander via order on December 13, 2018 for a psychiatric evaluation to determine competency to stand trial. Competency hearing is scheduled December 28, 2018.

Prior to beginning the evaluation, Mr. Pinkey was advised of the purpose of this evaluation and informed that the usual doctor/patient relationship did not exist. He was told that information he chose to provide would not be kept confidential. Mr. Pinkey was informed that a report would be prepared and submitted to the court. He was informed that in order to maintain continuity of care, this report would be distributed to the treating jail psychiatrist, in addition to the Court and attorney of record. His comments during the discussion of these issues indicated that he understood the limits of confidentiality and the purpose of the evaluation. He was periodically reminded of these conditions as the interview progressed.

**SOURCES OF INFORMATION:**

1. Defendant Interview 12/16/18
2. Court Order for Evaluation 12/13/18
3. Amended Indictment 7/30/18
4. CCDC Violation History
5. CCDC Psychiatric Services Records
6. Request for Evaluation for Competency 12/10/18

**IDENTIFICATION:**

22 year old Male evaluated for competency to stand trial.

**RECENT HISTORY:**

Public Defender Lucas Gaffney believes the defendant is unable to:

- Understand the charges or allegation;
- Understand the adversarial nature of the legal process;
- Understand the range and nature of the penalties

Charged with (1) 2 counts of Conspiracy to Commit Robbery (B), (2) 2 counts Burglary while PDW (B), (3) 2 counts First Degree Kidnapping with UDW, (4) 7 counts Robbery with UDW (A), (5) Unlawful Taking of Vehicle (GM)

Per the Indictment:

On 9/28/17 the defendant and a co-defendant robbed 7 people Pepe's Tacos and Walgreens at gunpoint. They took jewelry, currency, pharmaceuticals, and a car.

Twenty one conduct violations between 9/28/17 and 10/10/18 associating with disruption, not following directions, vent surfing, sagging pants, creating minor disturbance, and using barber scissors without permission.

**PAST PSYCHIATRIC HISTORY** (Per Defendant): GSW at 7 in R orbital region.

Inpatient: negative

Outpatient: Starview Counseling 9-13 in school.

Suicidality / Self-Injurious behavior: negative

Past Diagnosis: ADHD, unspecified others.

Family Psychiatric History:

Trauma: Witnessed 18 y.o. brother killed playing with gun when defendant 17

Past Psychotropic Medication: Was Rx'ed psychotropics in past for ADHD, impulsivity and depression.

Substance Abuse: started drugs "heavily" after brother died.

Cocaine, THC, and Xanax: QD to DOA since 17.

Tobacco: 1 ppd x 3-4 years.

**PAST MEDICAL AND SURGICAL HISTORY** (Per Defendant & Records):

**ALLERGIES:** Amoxicillin, Pediazole, Vancomycin.

**CURRENT MEDICATIONS:** none.

**SOCIAL HISTORY:** (Per Defendant & Records):

Legal: denies.

Relations / Children: Never children. 4 children (2-4).

Education: 9<sup>th</sup> grade, Special with IEP and regular.

Occupational: States he gets SSI (psychiatric basis since 8 y.o. after GSW). States he had trouble holding job for inattentivity, not following instructions.

Residence: Lived with girlfriend and 5 of her children in LV.

**MENTAL STATUS EXAM:**

**General:** Alert, cooperative, attentive → difficulty focusing toward end of interview, fair Eye Contact, no PMA/PMR

**Speech:** Conversant, normal rate/rhythm/volume

**Mood/affect:** "better", euthymic, full. No passive death wishes/SI/HI.

**Symptom Review:** Denies racing thoughts, panic attacks, excessive worrying or hyperactivity. Denies euphoria, irritability, anger, mood swings, or depression. Sleep impaired when thinking about deceased brother; appetite good. States comprehension difficulty.

**Thought process /content:** Occasional auditory hallucinations of brother which defendant talks back to. Denies delusions. No formal thought disorder.

**Insight:** good.

**Judgment:** good during interview.

**Intelligence:**

**Cognition:**

Alert and Oriented x 4

Short Term Recall: 1 of 3 at 5 minutes.

Fund of Knowledge: poor-fair (last 3/6 Presidents)

Abstraction: good.

Serial 7's: unable.

Long Term Recall: good.

**COMPETENCY BASED EVALUATION:**

**Ability to comprehend charges, sentencing, and court proceedings:**

- *Ability to understand criminal charges:* with excellent self-recital.
- *Awareness of misdemeanor/felony class and possible range of sentences:* with excellent self-recital.
- *Ability to understand possible pre-trial pleas:* with fair self-recital.
- *Ability to understand and differentiate possible trial outcomes:* with fair self-recital.

- *Awareness of Not Guilty by Reason of Insanity pleas/outcomes:* with no self-recital; good retention when explained.
- *Ability to understand plea bargaining:* with no self-recital; fair retention when explained.
- *Understanding of the role of Judge, Public Defender, and Prosecutor:* with excellent self recital.

**Ability to assist in his own defense:**

- *Willingness to cooperate with defense counsel and follow advice:* Conditional ("depends on what he's trying to do").
- *Awareness of encounters with counsel:* IDs P.D. Gaffney and states they met three times.
- *Ability to appraise the legal defenses available:* no self-recital; good retention when explained.
- *Likelihood of appropriate courtroom deportment:* Conditional (might "cuss out P.D. if he's saying something he shouldn't in court.")
- *Ability to assist counsel with pertinent and plausible accounting regarding his behavior and whereabouts at time of arrest:* Good spontaneous recital of allegations (states he charged with Robbery at a Pepe's Taco and a pharmacy in September with a co-defendant). Denies that charges. His strategy is to require the prosecution to carry the burden of proof. He offers no other explanations.
- *Capacity to testify relevantly, and challenge prosecutorial evidence/witnesses:* fair.

**DSM5 DIAGNOSIS:**

ADHD, Combined Type (untreated)  
h/o Unspecified Depressive Disorder a/w Bereavement  
Polysubstance Dependence  
r/o Schizoaffective Disorder, Depressive Type

**SUMMARY AND CONCLUSIONS:**

- 1) **COMPETENT:** regarding ability to understand charges and court proceedings, and to assist in his own defense per the Dusky standard.
- 2) **Malingering Potential:** very unlikely.
- 3) **Psychotropics recommended:** consider Wellbutrin (for inattentivity and history of depression), or Strattera.



Daniel Sussman, M.D., Esq., MBA  
Diplomate of the American Board of Psychiatry & Neurology

**COMPETENCY EVALUATION - COVER SHEET**

☒ **COMPETENT**  
☐ **NOT COMPETENT**

DEFENDANT NAME: Lorenzo R. PinkneyCASE NO.: C-17-327767-1EVALUATION DATE: 12-21-18LENGTH OF EVALUATION: 45 minutesREPORT DATE: 12-21-18INFORMED CONSENT: ☒ YES ☐ NO**SUMMARY OF RESULTS PERTAINING TO DUSKY vs. UNITED STATES**

Is there substantial impairment or gross deficit in the following areas:

YES NO

1. Capacity to understand the nature of the criminal charges.
2. Capacity to understand the nature and purpose of court proceedings.
3. Capacity to aid and assist counsel in the defense.

[ ] [X]  
 [ ] [X]  
 [ ] [X]

**DIAGNOSTIC IMPRESSIONS:**

Borderline Intellectual Functioning vs  
 Learning Disability  
 Possible Traumatic Brain Injury  
 Alcohol Use Disorder  
 Benzodiazepine use disorder

**PSYCHIATRIC HISTORY:**

YES NO

Currently taking medication for mental illness:

If yes, specify:

[ ] [X]

Prior mental health treatment:

Prior hospitalizations:

[X] [ ]

If yes, dates and duration:

[ ] [X]

**MALINGERING:**

Is there a substantial degree of weakness in the interview, response style, or testing data that suggests a malingering disorder is present?

[ ] YES ☒ NO [ ] NOT RULED OUT

**REVIEW OF RECORDS - COLLATERAL INFORMATION**☒ Discovery [ ] Jail Medical Records

[ ] Jail Disciplinary Records [ ] Mental Health Records

[ ] Other \_\_\_\_\_

Submitted by: Lawrence Kapel  
PrintSignature Lawrence Kapel

**LAWRENCE KAPEL, Ph.D.**

**1090 Wigwam Pkwy #100  
Henderson, NV 89074**

**(702) 454-0201**

**Competency Evaluation**

Client Name: Lorenzo Pinkey

Case Number: C-17-327767-1

Date of Evaluation: 12-21-18

Date of Report: 12-21-18

The results of my evaluation are summarized in this report. Mr. Pinkey related a history of cognitive impairment, psychiatric illness and substance abuse. He reported no active symptoms of psychosis or irrational thought process and no active symptoms were noted. In applying the Dusky standard he is aware of the charges he is facing and the options secondary to the charges. He is aware of the adversarial legal process. He is motivated to help himself and can relate his mental state at the time of the alleged offenses in a rational fashion. He is open to his attorney presenting these factors both in his defense and as options to resolve his case. He did report some cognitive deficits and information would best be presented in concrete terms but overall it is my opinion that he can aid in his defense and is competent to proceed.

Information used to render the above opinion:

1. Grand jury testimony
2. Jail medical record
3. Request for evaluation of competency
4. Criminal complaint
5. Clinical interview with Mr. Pinkey

Identifying information: Lorenzo Pinkey is a year old male who was evaluated in the Clark County Detention Center (CCDC). He is charged with conspiracy to commit robbery, burglary while in possession of a deadly weapon, 3 counts of first degree kidnapping with use of a deadly weapon, 7 counts of robbery with use of a deadly weapon, conspiracy to commit robbery and unlawful taking of vehicle. He was referred by the Eighth Judicial District Court, Specialty Courts Division to aid in determining if he is competent to stand trial. He was advised that a copy of this report would be sent to

Client Name: Lorenzo Pinkey  
Case Number: C-17-327767-1  
Date of Evaluation: 12-21-18

the court and the customary psychologist-client confidentiality didn't apply. He agreed to proceed with the evaluation.

**Behavioral observation and mental status:** Mr. Pinkey was cooperative with the evaluation. He was interviewed in a private interview room. His speech was slow in rate but fluent and goal directed. His responses were appropriate to the questions asked and there wasn't evidence of loose associations or tangential thinking. His responses didn't reflect active psychosis, delusions or irrational process. He was aware of the current and past president. He was unable to spell WORLD forward and struggled with serial 3's. He was able to answer simple abstract reasoning problems. Overall his mental status was noteworthy for cognitive limitation (e.g. borderline intellectual functioning) but wasn't suggestive of active psychotic or irrational process.

**Current psychological symptoms:** Mr. Pinkey reported that he isn't currently taking any psychiatric medication and he reported no current need for treatment. He reported appetite and energy are OK. He reported sleep is mostly OK unless he dreams of his brother. He reported poor memory citing "sometimes I forget stuff". He also stated "I read stuff and don't know what I read". He reported feeling anxious around people. He reported infrequent hallucinations of his "brother coming to see me" but this is "before I go to sleep". He denied bipolar symptoms. He denied any suicidal or homicidal ideation.

**Past mental health history:** Mr. Pinkey reported that he has never been inpatient. He reported that he was shot in the face when he was 7 and received some mental health treatment as a child. He reported he was told he had problems with "impulse and ADHD" but he wasn't compliant with medication as an adult.

**Family mental health history:** Mr. Pinkey reported that he has a cousin with schizophrenia who "hears things and gets real violent" and his brother committed suicide four years ago.

**Substance abuse history:** Mr. Pinkey reported that prior to his arrest he was drinking daily "until I couldn't drink no more" and was drinking about a fifth of Hennessey a day. He reported daily use of Xanax and Cocaine. He reported that at the time of his arrest "I was off Xany" and this impacted his mental state.

**Legal history:** Mr. Pinkey denied any previous legal issues.

**Health:** Mr. Pinkey reported he was "shot at age 7" and since then has had problems with impulse, learning and thinking. He reported "I have all the documents" to support these claims.

**Education:** Mr. Pinkey reported that he left school in the 9<sup>th</sup> grade and was in special education and had a mix of resource classes and regular classes. He reported that he has an IEP.

Client Name: Lorenzo Pinkey

Case Number: C-17-327767-1

Date of Evaluation: 12-21-18

**Psychosocial history:** Mr. Pinkey reported that he was raised in Long Beach by his mother. He had only lived in Las Vegas a few months before his arrest. He was living with his girlfriend. He reported he has four children with four different women and two are two and two are four. He reported that he gets SSI for his cognitive deficits and he gets about \$800 and his mother is his payee.

**Competency issues:** Mr. Pinkey is aware that he is facing 3 "robbery" counts and "a lot of other charges". He is aware that the kidnapping is the most severe charge. He is aware that the charges are felonies and he could serve extended prison time. He is aware that the alleged robberies occurred "last year" and that there were two separate events. He was able to describe where the events allegedly occurred. He is aware that he has a co-defendant. He is aware of what guilty and not guilty meant. He was open to his attorney presenting his history of substance abuse, untreated mental health issues and cognitive impairment as factors in his defense. He reported that he took a deal stating "I really didn't read it over my co-defendant said to take it". He stated that his mother told him not to accept the deal and she would provide evidence of his impairment to the court in hope for a better deal. He reported that he didn't expect the additional information to get him probation but he was hoping for some type of treatment. Overall, he has the capacity to understand the charges and options secondary to the charges.

Mr. Pinkey reported that his attorney is "Gaffney" and he is court appointed. He reported his job is to "work with me" and "see if he can tell the judge stuff to help me". He reported that the district attorney is "out to get me". He reported that the judge is "supposed to be listening to both sides" and "sentences you". He is aware that in trial evidence would be presented and in his case that would include fingerprints, video and witnesses. He reported that his best defense would be presentation of his mental state. Overall, he has the capacity to appreciate the legal process.

Mr. Pinkey is motivated to help himself. He reported little memory for the alleged offenses but is able to state what he is alleged to have done. He is able to relate that he wasn't on his medication and was withdrawing from xanax at the time of the alleged offense. He is open to sharing information with his attorney and was able to relate in a rational and goal directed fashion. He does have some cognitive limitations and will need to have information presented concretely but overall it is my opinion that he can aid in his defense.



12-21-18 12:51 FROM- Green Valley Psych

T-400 P0006/0006 F-254


Client Name: Lorenzo Pinkey

Case Number: C-17-327767-1

Date of Evaluation: 12-21-18

**Impression:**

Borderline intellectual functioning versus learning disability  
Possible traumatic brain injury-per his report  
Alcohol use disorder-in institutional remission  
Benzodiazepine use disorder-in institutional remission

  
LAWRENCE KAPEL, PH.D.  
Licensed Clinical Psychologist

Case No. C-17-327767-1  
Dept. No. XXVIII

FILED

NOV 21 2019

IN THE ~~Eighth~~ JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

*John J. Schumacher*  
CLERK OF COURT

Lorenzo Pinkey  
Petitioner,

v.

PETITION FOR WRIT  
OF HABEAS CORPUS  
(POSTCONVICTION)

A-19-806862-W  
Dept. XXVIII

The State of Nevada  
Respondent.

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.
- (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Indian Springs, NV
2. Name and location of court which entered the judgment of conviction under attack: Dept XXVIII District Court Clark County Nevada
3. Date of judgment of conviction: MAY 22, 2019
4. Case number: C-17-327767-1
5. (a) Length of sentence: 132 to 600 months

RECEIVED

NOV 21 2019

CLERK OF THE COURT

RA 130

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ☒ .....

If "yes," list crime, case number and sentence being served at this time: .....

N/A

7. Nature of offense involved in conviction being challenged: Conspiracy to Commit Robbery,  
Burglary w/in possession of a deadly weapon, Robbery w/ use, unlawful taking of vehicle  
first degree kidnapping w/ use

8. What was your plea? (check one)

(a) Not guilty .....

(b) Guilty ☒ .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: .....

N/A

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury .....

11. Did you testify at the trial? Yes ..... No .....

12. Did you appeal from the judgment of conviction? Yes ..... No .....

13. If you did appeal, answer the following:

(a) Name of court: .....

(b) Case number or citation: .....

(c) Result: .....

(d) Date of result: .....

(Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not: .....

2 N/A

3  
4 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any  
5 petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ☒

6 16. If your answer to No. 15 was "yes," give the following information:

7 (a) (1) Name of court: ..... N/A

8 (2) Nature of proceeding: ..... N/A

9  
10 (3) Grounds raised: ..... N/A

11  
12  
13 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ☒

14 (5) Result: ..... N/A

15 (6) Date of result: ..... N/A

16 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

17 N/A

18 (b) As to any second petition, application or motion, give the same information:

19 (1) Name of court: ..... N/A

20 (2) Nature of proceeding: ..... N/A

21 (3) Grounds raised: ..... N/A

22 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No ☒

23 (5) Result: ..... N/A

24 (6) Date of result: ..... N/A

25 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

26 none

27 (c) As to any third or subsequent additional applications or motions, give the same information as above, list  
28 them on a separate sheet and attach.

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any  
2 petition, application or motion?

3 (1) First petition, application or motion? Yes ☒ No ☐

4 Citation or date of decision: .....

5 (2) Second petition, application or motion? Yes ☐ No ☒

6 Citation or date of decision: .....

7 (3) Third or subsequent petitions, applications or motions? Yes ☐ No ☒

8 Citation or date of decision: ..... N/A

9 (e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you  
10 did not. (You must relate specific facts in response to this question. Your response may be included on paper which  
11 is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in  
12 length.) ..... N/A

13 .....  
14 17. Has any ground being raised in this petition been previously presented to this or any other court by way of  
15 petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

16 (a) Which of the grounds is the same: ..... None

17 .....  
18 (b) The proceedings in which these grounds were raised: ..... N/A

19 .....  
20 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this  
21 question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your  
22 response may not exceed five handwritten or typewritten pages in length.) .....

23 ..... N/A  
24 18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached,  
25 were not previously presented in any other court, state or federal, list briefly what grounds were not so presented,  
26 and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your  
27 response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not  
28 exceed five handwritten or typewritten pages in length.) ..... N/A

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

no, I'm not  
filing more than 1 year after conviction.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ☒

If yes, state what court and the case number: None

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

no direct appeal

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ☒

If yes, specify where and when it is to be served, if you know: None

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

Ineffective Assistance of Counsel  
Counsel failed to show muster in his duty as defendants attorney. Counsel was Ineffective.

Prosecution did not serve a proper  
Marcum notice.

(a) Ground ONE: Ineffective Assistance of Counsel / Prosecution  
did NOT SERVE A VALID MARCUM NOTICE.

Supporting FACTS (Tell your story briefly without citing cases or law.): Defendant was charged with multiple felonies and gross misdemeanors on September 28, 2017. On October 17, 2017 the first proceedings of a grand jury hearing was held (see case summary events). On November 7, 2017 a second hearing of a grand jury was held (see case summary events). During this process the prosecution failed to provide Mr. Pinkney with a notice of his rights to testify at the grand jury pursuant to Sheriff Humboldt County v. Marcum and N.R.S. § 172.241 in wanton disregard for his procedural rights. N.R.S. 172.241 necessitates a timely notice of intent to seek a indictment. In regard to this case C-17-327767-1, the Indictment Warrant was sent a day after the second hearing (see case summary). Making this Indictment on the defendant void. See also N.R.S. 172.241. This willful unlawful act lead to the defendant taking a plea deal. The Indictment should be dismissed because no notice of intent to seek indictment was served prior to convening the grand jury. The State via The prosecution consciously disregarded Mr. Pinkney procedural and constitutional right to testify, which lead to Mr. Pinkney's unlawful conviction. Mr. Pinkney counsel was ineffective for not taking notice of this amendment right's violation. The proper remedy should take place. Mr. Pinkney was denied his constitutional and fundamental rights, which lead to a unlawful conviction. The proper remedy must take place for this willful and unlawful act.

1 (b) Ground TWO: .....

5 Supporting FACTS (Tell your story briefly without citing cases or law.): .....



1 (c) Ground THREE: .....

5 Supporting FACTS (Tell your story briefly without citing cases or law.): .....

1 (d) Ground FOUR: .....

5 Supporting FACTS (Tell your story briefly without citing cases or law.): .....

BEFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at High Desert State Prison on the 15<sup>th</sup> day of the month of November 2019.

Lorenzo Pinkey #1217414

High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

#### VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Lorenzo Pinkey #1217414

High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

#### AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-17-32767-1 Does not contain the social security number of any person.

Lorenzo Pinkey #1217414

High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

#### CERTIFICATE OF SERVICE BY MAIL

I, Lorenzo Pinkey, hereby certify pursuant to N.R.C.P. 5(b), that on this 15<sup>th</sup> day of the month of November, 2019, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070

Attorney General of Nevada  
100 North Carson Street  
Carson City, Nevada 89701

Clark County District Attorney's Office  
200 Lewis Avenue  
Las Vegas, Nevada 89155

Lorenzo Pinkey #1217414

High Desert State Prison  
Post Office Box 650  
Indian Springs, Nevada 89070  
Petitioner in Proper Person

\* Print your name and NDOC back number and sign

Lorenzo Pinkey #1217414  
Lorenzo Pinkey

Lorenzo Pinkey  
#1217414  
High Desert State Prison  
P.O. Box 650  
Indian Springs, NV 89070

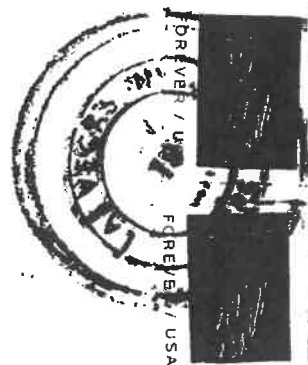
HIGH DESERT STATE PRISON

NOV 18 2019

UNIT 6 C/D

8310186300 0075

Steven D. Grierson  
Clerk of the Court  
200 Lewis Ave 3rd Floor  
Las Vegas, NV 89158-1200



RA 140

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ADRIAN POWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**Supreme Court No. 79037**  
District Court Case No. C327767

**FILED**

**JUN 16 2020**

**CLERK'S CERTIFICATE**

STATE OF NEVADA, ss.

*Elizabeth A. Brown*  
CLERK OF COURT

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

**JUDGMENT**

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to conduct an evidentiary hearing on Powell's presentence motion to withdraw his guilty plea."

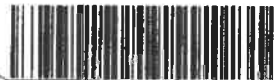
Judgment, as quoted above, entered this 11 day of May, 2020.

IN WITNESS WHEREOF, I have subscribed  
my name and affixed the seal of the Supreme  
Court at my Office in Carson City, Nevada this  
June 05, 2020.

Elizabeth A. Brown, Supreme Court Clerk

By: Danielle Friend  
Chief Assistant Clerk

C-17-327767-2  
CCJR  
NV Supreme Court Clerks Certificate/Judgm  
4918089



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ADRIAN POWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 79037-COA

**FILED**

MAY 11 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

**ORDER OF REVERSAL AND REMAND**

Adrian Powell appeals from a judgment of conviction, pursuant to a guilty plea, of two counts each of conspiracy to commit robbery, burglary while in possession of a deadly weapon, and first-degree kidnapping with the use of a deadly weapon, and seven counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Powell claims the district court erred by denying his presentence motion to withdraw his guilty plea without first conducting an evidentiary hearing. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and "a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just," *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). Courts should not focus exclusively on whether the plea was knowingly, voluntarily, and intelligently pleaded. *Id.* at 603, 354 P.3d at 1281. Nor should courts generally consider the guilt or innocence of the defendant. *See Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984).

Ineffective assistance of counsel could be a fair and just reason for withdrawing a guilty plea. *See Stevenson*, 131 Nev. at 604, 354 P.3d at

1281. A defendant is entitled to an evidentiary hearing on a claim of ineffective assistance of counsel only if he asserts specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Hargrove*, 100 Nev. at 502-03, 686 P.2d at 225.

As Powell points out on appeal, he claimed counsel was ineffective for advising him to enter a guilty plea when part of the purported benefit was the State foregoing filing new charges but neither counsel nor Powell fully understood the nature of the new charges. Powell further claimed that, because he has since learned there was no evidence linking him to the new charges, he would not have pleaded guilty but would have insisted on going to trial. Powell's claims, if true and not belied by the record, entitled him to relief. *See Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (setting forth the deficiency and prejudice prongs of the test for ineffective assistance of counsel). The record does not belie Powell's claims. We therefore conclude the district court erred by denying this claim without first conducting an evidentiary hearing.


Powell also points out that he claimed counsel advised him he would receive a sentence of approximately 6 to 15 years, and this untrue assurance led him into accepting the guilty plea. Powell's claim, if true and not belied by the record, entitled him to relief. *See id.* The record does not belie Powell's claim. We therefore conclude the district court erred by denying this claim without first conducting an evidentiary hearing.

Finally, Powell claims the district court should have conducted an evidentiary hearing regarding whether or not he understood the nature of the pending trial. None of Powell's claims, either below or in this court, are particularly well pleaded, but it does not appear that Powell raised this

underlying claim below. We therefore conclude the district court did not err by not conducting an evidentiary hearing on this issue.

For the foregoing reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court to conduct an evidentiary hearing on Powell's presentence motion to withdraw his guilty plea.<sup>1</sup>

  
Gibbons C.J.

  
Tao J.

  
Bulla J.

cc: Hon. Ronald J. Israel, District Judge  
Monique A. McNeill  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>1</sup>Although not raised in the appeal, we note the district court applied the wrong standard for presentence motions to withdraw a guilty plea. The district court reviewed Powell's motion for whether his guilty plea was knowingly and voluntarily entered instead of for whether there was a fair and just reason to grant withdrawal.



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DATE: June 5, 2020

Supreme Court Clerk, State of Nevada

By [Signature] Deputy

RA 145

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

ADRIAN POWELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

**Supreme Court No. 79037**  
District Court Case No. C327767

**REMITTITUR**

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.  
Receipt for Remittitur.

DATE: June 05, 2020

Elizabeth A. Brown, Clerk of Court

By: Danielle Friend  
Chief Assistant Clerk

cc (without enclosures):

Hon. Ronald J. Israel, District Judge  
Monique A. McNeill  
Clark County District Attorney

**RECEIPT FOR REMITTITUR**

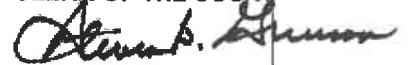
Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the  
REMITTITUR issued in the above-entitled cause, on JUN 16 2020.

HEATHER UNGERMANN  
Deputy District Court Clerk

RECEIVED  
APPEALS

JUN 16 2020

CLERK OF THE COURT



1 RTRAN

2  
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4  
5 DISTRICT COURT  
6 CLARK COUNTY, NEVADA

7  
8 STATE OF NEVADA,

CASE#: C-17-327767-2

9 Plaintiff,

DEPT. XXVIII

10 vs.

11 ADRIAN POWELL,

12 Defendant.

13  
14 BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE  
15 THURSDAY, AUGUST 13, 2020

16 **RECORDER'S TRANSCRIPT OF HEARING**  
17 **HEARING RE: APPEAL REMAND-DENIAL OF**  
18 **WITHDRAWAL OF GUILTY PLEA**

19 APPEARANCES:

20 For the State:

21 JOHN L. GIORDANI III, ESQ.  
22 Chief Deputy District Attorney  
(via Bluejeans)

23 For the Defendant:

MONIQUE A. MCNEILL, ESQ.

24  
25 RECORDED BY: JUDY CHAPPELL, COURT RECORDER

1 Las Vegas, Nevada, Thursday, August 13, 2020

2  
3 [Case called at 1:21 p.m.]

4  
5 THE COURT: 327767, Powell.

6 Counsel, state your appearance for the record.

7 MS. MCNEILL: Monique McNeill, Bar Number 9862, on  
8 behalf of Mr. Powell, who is joining us via video from Southern Desert  
9 Correctional Facility.

10 MR. GIORDANI: Good afternoon, John Giordani on behalf of  
11 the State.

12 THE COURT: Okay. And who's testifying?

13 MS. MCNEILL: Michael Kane.

14 THE COURT: Okay. This is on remand so we can have a  
15 hearing.

16 State.

17 MR. GIORDANI: I'm sorry, Your Honor, you cut out.

18 THE COURT: Oh, I just -- before we get started, is there  
19 anything you want to say?

20 MR. GIORDANI: Not much other than in looking at the [audio  
21 cut out] it appears that things that we're to discuss are the claim that  
22 Mr. Kane was ineffective for advising Mr. Powell to enter a plea when  
23 part of the purported benefit was the State foregoing filing new charges.

24 And then the other claim is that he claimed Counsel advised  
25 him would receive a sentence of approximately 6 to 15 years and this

1 untrue assurance led him into accepting the guilt. I believe that's what the  
2 remand was limited to.

3 MS. MCNEILL: That's correct. My questions are focused only  
4 to those two issues.

5 THE COURT: Okay. And before Ms. McNeill -- is that  
6 correct?

7 MS. MCNEILL: Yes.

8 THE COURT: Okay. Is your client going to be waiving his  
9 right to -- regarding attorney-client privilege?

10 MS. MCNEILL: Well, Judge, I don't think that Mr. Powell is  
11 going to be testifying because the affidavit that we submitted is part of  
12 the record. So.

13 THE COURT: But if he's basing his ineffective assistance, we  
14 need to inquire of the whole purpose that Mr. Kane is here as to  
15 discussions which are --

16 MS. MCNEILL: Sure.

17 THE COURT: -- generally protected by attorney-client.

18 MS. MCNEILL: Correct and --

19 THE COURT: And my understanding is if you're making that,  
20 you have waive attorney-client privilege.

21 MS. MCNEILL: That is correct, Judge, and I know Mr. Powell  
22 and I discussed this a long time ago when I first did the motion.

23 Mr. Powell, you understand that they're going to ask Mr. Kane  
24 questions about his conversations with you and so attorney-client  
25 privilege is waived between you and Mr. Kane for the purposes of this

1 hearing --

2 THE DEFENDANT: Yes, ma'am.

3 MS. MCNEILL: -- today. Okay.

4 THE COURT: So and because it was a while ago, do you  
5 have any questions you'd like to ask your attorney outside the presence  
6 of us? In other words, you are going to be waiving your attorney-client  
7 privilege. Mr. Kane is going to be talking about conversations you and he  
8 had that normally would be confidential, private, and would not be  
9 allowed to be discussed. But you fully understand you're waiving that  
10 privilege, correct?

11 THE DEFENDANT: Yes, Your Honor.

12 THE COURT: All right. And did you want to ask your attorney  
13 any questions? Because apparently you may not have been able to talk  
14 to her. We'll -- we could take a break.

15 THE DEFENDANT: Is there -- is there a possible, is there a  
16 possibility she can come see me or I can get a video conference with  
17 her?

18 THE COURT: Well --

19 MS. MCNEILL: No, he means right now, Adrian, before we  
20 start the hearing.

21 THE DEFENDANT: Okay. No, I'm okay.

22 MS. MCNEILL: Okay.

23 THE DEFENDANT: No, I'm okay. I just need to know my  
24 next court date.

25 THE COURT: Okay. Call -- it's Mr. Kane. Who's calling

1 Mr. Kane?

2 MS. MCNEILL: I'll call Mr. Kane, Judge. Before we begin,  
3 Mr. Giordani and I, just to sort of streamline things because I know that  
4 some of these dates might not be in Mr. Kane's head. We did -- we have  
5 a stipulation to some dates.

6 THE COURT: Go ahead.

7 MS. MCNEILL: So we are stipulating that the day Mr. Kane  
8 was appointed was November 13<sup>th</sup>, 2017. That the first day of trial in this  
9 case was July 30<sup>th</sup>, 2018. And then based on an email I received from  
10 co-defendant's attorney, Ben Durham, that the discovery on the  
11 uncharged cases was received September 11<sup>th</sup>, 2018. I believe  
12 Mr. Giordani is stipulating to that date.

13 THE COURT: Is that correct?

14 MR. GIORDANI: I'm stipulating to those dates, but just so  
15 we're clear, Your Honor, the discovery referenced just now by  
16 Ms. McNeill was the same packet that was provided to Your Honor prior  
17 to sentencing. And I think we'll get into this during the hearing, but there  
18 was discovery shown prior to that date. Just the packet is what we're  
19 discussing. The packet was received on September 11<sup>th</sup>, 2018.

20 MS. MCNEILL: Right.

21 THE COURT: All right.

22 MS. MCNEILL: And that's on the uncharged cases,  
23 not -- we're not saying that's the discovery in total on the charged cases.

24 MR. GIORDANI: Right.

25 THE COURT: Okay, fine.

1 Go ahead and swear Mr. Kane in.

2 **MICHAEL KANE**

3 [having been called as a witness and being first duly affirmed,  
4 testified, via bluejeans, as follows:]

5 THE CLERK: Please state your name for the record.

6 THE WITNESS: Michael Kane.

7 THE COURT: Okay, just one second. The packet that --  
8 Will you tell you Sandy? Or, okay, go ahead.

9 That I had with the remand and everything that's supposed to  
10 be on the bench. That's --

11 Did you get -- okay, thank you.

12 Okay, go ahead.

13 MS. MCNEILL: Thank you, Judge.

14 **DIRECT EXAMINATION**

15 BY MS. MCNEILL:

16 Q Mr. Kane, you heard the dates that we discussed which were  
17 that trial began July 30, 2018, correct?

18 A I did.

19 Q Okay. Prior to that date, well actually can you explain to us  
20 when you told -- discussed the deal with Mr. Powell? The deal to which  
21 he pled. Sorry that was a bad question.

22 A Okay. I believe it was the second day of trial during jury  
23 selection. At that time, Mr. Giordani approached myself and co-counsel,  
24 Roy Nelson, with an offer. And that is the first time that I told him of the  
25 deal. Then we went into the back and discussed it.



1 Q Okay. And part of the leverage that the State was offering for  
2 that deal was that they would not file some charges on a series of other  
3 criminal offenses, correct?

4 A No. I have a problem with the term leverage. That wasn't  
5 really a consideration for Mr. Powell during our discussions. It was more  
6 just a benefit of not having to go through that.

7 Q Okay. So you never had a --

8 A Yes, we definitely had a conversation about that -- about the  
9 ten, some of the ten other cases that were out there.

10 Q Okay. Did you see then not filing charges on those cases as a  
11 benefit to taking the deal? Or did you -- what were your conversations in  
12 that regard?

13 A Yeah, it was definitely a benefit.

14 Q Okay. Prior to having a conversation about the deal, had you  
15 seen the discovery on the uncharged cases?

16 A So I don't remember when exactly when I first became aware  
17 of the potential filing the other cases. It was during a private hearing and  
18 we discussed this. Said, hey, you know what, they had mentioned,  
19 before the hearing, they had mentioned that they may have him on ten  
20 other cases. Sometime -- well after the offer and after we had a  
21 discussion with Mr. Powell, he asked, if I remember correctly, he asked  
22 me and Roy to see what they had. Because he adamantly denied, he's  
23 like, I don't care about those cases.

24 THE DEFENDANT: This dude cracks me up.

25 THE WITNESS: So at that point, we went up to -- it was either

1 Mr. Giordani's office or somebody else's office in the DA, and they had,  
2 we saw photos, we saw there was a police board, like a picture of the  
3 police board that had, you know, the events circled with lines. Yeah, I  
4 mean, yeah, that's when I first, I believe it's when I first saw.

5 BY MS. MCNEILL:

6 Q Okay, but when you -- the day that you told him what the deal  
7 was, the second day of trial, and you mentioned that they weren't going  
8 to file charges on those cases, had you actually reviewed the police  
9 reports in those cases that they were willing to not file charges on?

10 A I don't believe so, no.

11 Q Okay. So we had a stipulation that Ben Durham said that that  
12 discovery was received September 11, 2018. Does that sound accurate  
13 to you as to about the timeframe that you also received that discovery on  
14 those uncharged cases?

15 A I have no reason to dispute that.

16 Q Okay. And that's after Mr. Powell entered the plea, correct?

17 A Right.

18 Q So you had a dispute with me over the term leverage, but you  
19 would agree that you said it was one of the benefits of taking the deal  
20 would be that those charges would not get filed.

21 A Correct.

22 Q Would you agree with me that it would be important to know if  
23 the State could have actually proceeded with filing those charges against  
24 Mr. Powell and that would require reviewing the discovery?

25 A No.

1 Q Okay. So you do not believe you needed to know if the State  
2 would have ever actually been able to file those charges.

3 A No, I do not believe so.

4 Q Okay. When you were discussing the deal with Mr. Powell,  
5 did you tell him that you were going to get him a 6-to-15-year sentence?

6 A Never.

7 Q You never told him that.

8 A Nope.

9 Q Okay. Did you tell him that if it weren't for the uncharged  
10 cases, you could have gotten the 3 to 8?

11 A No.

12 Q How much contact have you had with Mr. Powell prior to the  
13 start of the trial?

14 A Okay. So I reviewed -- I went back today. I looked at it for  
15 about an hour and I looked at the original Motion to Withdraw and the  
16 attached visits which candidly didn't seem right to me. So I looked at  
17 Rob Lawson's billing records which showed that he had been there eight  
18 times. And I believe I had been there at least two, if not three times. The  
19 communication that we had was he had my cell phone number and with  
20 the direct bill line that he called quite frequently usually always at the  
21 same time. And so we did discuss things over the phone as well.

22 Q Okay. Do you have any recollection of how many phone  
23 calls?

24 A Between Mr. Powell, his mom, it's either his girlfriend or  
25 fiancée, and his dad --

1 Q Well let's just narrow it to Mr. Powell.

2 A So for Mr. Powell, how many times he called or how many  
3 times we actually spoke? I mean, he called --

4 Q How many times you actually spoke?

5 A Okay. We probably spoke 15 plus times [indiscernible due to  
6 interruption by inmate] --

7 THE DEFENDANT: Oh, really?

8 THE COURT: Mr. Powell, this isn't your chance to speak.  
9 Please remain quiet. If you have to talk or would like to talk to your  
10 attorney, then you can tell me and we'll take a break and you can talk to  
11 your attorney.

12 MS. MCNEILL: Thank you, Judge.

13 THE DEFENDANT: Okay. Can I talk to my attorney?

14 THE COURT: If you want to take a break and talk to your  
15 attorney, sure. Is that -- do you want to do it now? Or --

16 THE DEFENDANT: Yes, sir.

17 THE COURT: -- wait and --

18 MS. MCNEILL: Judge, I'll do it --

19 THE DEFENDANT: Just afterwards.

20 MS. MCNEILL: Mr. Powell, just relax.

21 If we do it now, maybe we can cut down the interruptions if he  
22 can get his question out.

23 THE DEFENDANT: Okay.

24 THE COURT: All right. We'll take a break.

25 MS. MCNEILL: Thank you, Judge.

1 MR. GIORDANI: Do you want me to log off?

2 THE COURT: You're going -- can you, usually they have a  
3 number to call.

4 MS. MCNEILL: They do to CCDC. I don't know about to -- is  
5 there an officer in the room?

6 THE DEFENDANT: Yeah.

7 THE COURT RECORDER: You know what? I can do --

8 THE DEFENDANT: Yes.

9 THE COURT RECORDER: I can do that conference, like I did  
10 yesterday.

11 MS. MCNEILL: Oh, okay.

12 THE COURT: All right.

13 THE DEFENDANT: I didn't --

14 MS. MCNEILL: I'll trust the tech woman to make it happen.

15 THE COURT: Okay.

16 THE COURT RECORDER: Mr. Giordani, I'm going to  
17 just -- I'm going to mute you for a while so you can't hear the  
18 conversation, if you want to stay on.

19 MR. GIORDANI: Okay.

20 THE COURT: All right. And I'll step out.

21 MS. MCNEILL: Thank you, Judge.

22 THE WITNESS: I think you probably need to mute me too.

23 THE COURT RECORDER: Oh, yeah, you too. Thanks.

24 MS. MCNEILL: Yeah.

25 THE COURT RECORDER: Thanks for the reminder of that.

1 THE WITNESS: Thank you.

2 [Proceeding recessed at 1:37 p.m.]

3 [Proceeding resumed at 1:49 p.m.]

4 **DIRECT EXAMINATION CONTINUED**

5 BY MS. MCNEILL:

6 Q Thank you. Mr. Kane, I just have one last question. So you  
7 indicated that you didn't believe that you used the uncharged cases as  
8 leverage or incentive to take the deal even though you did discuss it as  
9 part of the reason. What was the reason that you advised Mr. Powell to  
10 take the deal?

11 A I don't believe I advised him to take the deal. Ultimately it's up  
12 to him whether he wants to proceed with trial or not as explained to him  
13 what the possible -- possibilities were going through trial as opposed to  
14 taking this which the offer was. And he decided to -- that he wanted to  
15 accept the deal as opposed to going to trial. Roy and I were fully capable  
16 and ready to proceed with trial. It was our turn to conduct voir dire which  
17 we had prepared for. We got the deal, we explained it to him. He made  
18 the decision that he wanted to take it.

19 Q Okay. But as part of explaining to a client what the deal is  
20 from the State, it's not part of your practice to give your opinion on  
21 whether or not you think it's a deal a client should consider.

22 A Yeah it is part. That's true.

23 Q Okay. So what was the reason you thought he might consider  
24 this deal?

25 A I don't remember the specifics, but knowing what the charges

1 were and knowing what the evidence was against him, I thought that this  
2 deal, probably would have given him my opinion that this deal was better  
3 than a jury coming back and, you know, convicting him on all the  
4 charges.

5 Q Okay.

6 MS. MCNEILL: No further questions, Judge.

7 THE COURT: Cross. State.

8 MR. GIORDANI: Thank you.

9 **CROSS-EXAMINATION**

10 BY MR. GIORDANI:

11 Q Mr. Kane, do you recall first of your preparation for the trial  
12 that there was both [audio cut out] evidence between Mr. Powell and  
13 Mr. Pinkney to the robberies that were [audio cut out] of the trial?

14 A I'm sorry. You broke up.

15 Q Do you recall in your preparation for trial, that there was DNA  
16 and fingerprint evidence linking Mr. Powell and Mr. Pinkney to the  
17 charges for which they were going to trial?

18 A Yes.

19 Q You indicated on direct examination that you took issue with  
20 the claim part of the leverage was that the State was going to file  
21 additional charges for ten prior incidents. Do you recall that?

22 A Yes.

23 Q Can you explain why you took issue with that, a little more  
24 depth?

25 A Because it wasn't -- it was, it wasn't like that those, it was

1 never presented that had we not had these ten other alleged cases  
2 where we believe that Mr. Powell was a part of, that the deal was going  
3 to get any better. Because it was just, listen, we're going to -- we'll just  
4 close these other ten files. Wasn't like had these not been there, you  
5 know, this is a whole different -- whole different offer.

6 Q Okay. Ultimately, we were all sitting in trial having already  
7 completed the State's portion of jury selection when we first conveyed an  
8 offer to you. Is that right?

9 A Yes, the second day.

10 Q Okay, correct. And prior to that, you had prepared and  
11 reviewed the evidence on the trial [audio cut out] for trial, correct?

12 A Correct.

13 Q And you enlisted the assistance of Mr. Roy Nelson, attorney.

14 A Yes.

15 Q And you previously mentioned Rob. Who is that?

16 A You broke up. Did you say Rob Lawson?

17 Q Yes.

18 A He's a private investigator that we hired on this case as well.

19 MR. GIORDANI: Okay. And, Your Honor, may I just request  
20 that the prison mute their microphone until Mr. Powell has something to  
21 say because I'm getting a lot of feedback.

22 THE COURT: Okay. But I'm not getting it here unless.

23 MS. MCNEILL: I think that may be what's cutting him out.

24 THE COURT: But, yeah, go ahead and mute him. If --

25 THE CLERK: I get it too.



1 THE COURT: We will take a break before so you can -- if  
2 there was, if you want to talk to them. If he wants to talk to you.

3 So okay. Go ahead.

4 MR. GIORDANI: Thank you, Your Honor.

5 BY MR. GIORDANI:

6 Q Mr. Kane, you indicated that Robert Lawson was an  
7 investigator enlisted by you and that he visited Mr. Powell or billed for  
8 business eight different times? Is that correct?

9 A Yeah, from what I could tell by looking at his billing today.

10 Q And you also indicated he and his family had my cell phone  
11 number. You're referring to Mr. Powell himself, correct?

12 A Correct.

13 Q And you had multiple conversations with Mr. Powell leading up  
14 to trial. Is that right?

15 A That's correct.

16 Q I'm not sure if you're familiar with Mr. Powell's affidavit, but I  
17 want to ask you a couple of questions about allegations he made in the  
18 affidavit.

19 A Sure.

20 Q Paragraph 1 says: Prior to trial, my attorney had only visited  
21 me twice at the Clark County Detention Center and only spoke to me on  
22 the phone a few times.

23 Is that true or false?

24 A False.

25 Q He also indicated: My attorney did not go through the

1 discovery with me.

2 Is that true or false?

3 A That is also false and I can expand on that, if you'd like me to.

4 Q Please, go.

5 A He was very, I mean, he was obviously very active in this case  
6 and so he would, when we would go see him, either Rob or I, he would  
7 have notes for us. And even underline certain things and he'd want us to  
8 either look at or discuss in which we did. When we brought to his  
9 attention the DNA evidence, he said, I don't have it. And this is well  
10 before the start of trial. We called Rob and like, hey, could you drop him  
11 off the DNA evidence, which he did. He would have -- he wanted to talk  
12 to us about alibi witnesses, you know, that we checked out. He wanted,  
13 whenever we would -- whenever I would explain something to him, he  
14 would then request that I call his mom or call his, I think it was his  
15 fiancée, I don't -- his fiancée, girlfriend, or wife. Call them and explain it  
16 to them. So there was always tell him, and then tell the family members.  
17 And so.

18 Q So the claim that you did not go through the discovery with  
19 him is false?

20 A Correct.

21 Q He also claims: My attorney did not show me the results from  
22 the DNA processing until we had already started jury selection.

23 True or false?

24 A False.

25 Q He also claims: At no point did my attorney discuss the

1 discovery with me or discuss the theory of defense at trial.

2 Is that true or false?

3 A That is false.

4 Q And if any point you want to expound, please -- please do.

5 There's also a --

6 A Yeah --

7 Q Oh, go ahead.

8 A It goes back to what I was talking about with the alibi. You  
9 know, part of the issue when we were talking about defenses was this  
10 case, it was a tough case for him. And so, you know, going through the  
11 evidence and talking to him, I would and then I know I did, and then I'm  
12 almost a hundred percent sure Rob Lawson did as well, but if you asked  
13 him, well, listen, what's missing? What should we look for? Your alibi  
14 witness, you know, whatever. And so, we did discuss the defenses  
15 leading up to trial. We discussed the defenses for -- not the defenses  
16 specifically, but the facts of the case and the evidence in the back room  
17 right there where they, where they keep the defendants for, had it was  
18 well over 30 minutes from what I recall. And I want to be conservative on  
19 that and it could have been even longer going through the evidence, the  
20 date, yeah, before he took it. I don't, yeah, that's all I got on that.

21 Q He also claimed in his affidavit: My attorney told me that  
22 regardless of what the guilty plea agreement said, I was going to get a  
23 sentence of 6 to 15 years.

24 Is that true or false?

25 A No, and that's, you know, when I was reading that today,

1 that's the one I took the most offense of, out of all of them. And that's  
2 because very early on in my career, I forgot how it came about, but one  
3 of my mentors, Josh Tomshek, he says, listen, you can never promise a  
4 sentence. Just like in civil cases, you can never promise a client that  
5 they're going to get X amount of money out of a settlement. Never have  
6 done it on any of my cases, either criminal or civil. And so, yeah, that  
7 absolutely did not take place. I've never promised a sentence. And  
8 going further, you go -- I went over the Guilty Plea Agreement with him as  
9 well as the sentencing memo multiple times. He -- we cannot guarantee  
10 you a sentence. You cannot be guaranteed a sentence. This is the  
11 sentencing range that you're looking at. The discretion's up to the Judge.  
12 We'll do our best. We're going to get a sentencing memo for you which  
13 we did. And we'll argue like hell for you, but, no, did not tell him that.

14 Q Okay. There's one more claim: The advice my attorney gave  
15 me about taking the plea involved the uncharged cases listed on Guilty  
16 Plea Agreement. However, he misled me about the strength of the  
17 evidence in those cases.

18 Is that true or false?

19 A That's false.

20 Q And you had said previously that not -- the State not filing  
21 those additional charges was a benefit, for lack of a better term. Did you  
22 want to expound on that?

23 A So he -- it never really, those cases never really mattered with  
24 Mr. Powell anyway because just adamantly denied, laughs to whatever.  
25 So it was never -- it was never, I guess, he never made it appear that he

1 was worried about those, even if they charged him in fact, he probably.  
2 But the fact of the matter is, based on the prior offers or his lack thereof  
3 and the way that it was presented by yourself and co-counsel at the time  
4 of trial, that this is the offer and you know what, we'll throw in, we got  
5 these ten other cases we think he's involved in. We'll just throw those in.  
6 And so it wasn't like, yeah, so.

7 Q Understood. The evidence in the case we actually went to  
8 trial on or began to go to trial on, would you agree that it was really  
9 strong, for lack of a better term?

10 A Yeah, it was, I mean, yes, it was going to be a tough case  
11 from the defense in the sense that, you know, there really weren't a lot of  
12 defenses. I mean, Roy -- Roy and I, well a couple of weeks at least  
13 before the trial, and this is not the first time I reviewed the file, I viewed it  
14 multiple times over the course, you know, discussed a lot of, you know,  
15 what are we going to do because Mr. Powell didn't, he made it clear that  
16 he wasn't going to take anything unless it was really, really low. So, you  
17 know, we went through it. What can we attack? What are the defenses?  
18 And there was a lot -- there really wasn't a lot there, so.

19 Q With regard to the claim in the motion that neither counsel nor  
20 Powell fully understood the nature of those uncharged crimes, with  
21 regard to that claim, did you think according to your interactions with  
22 Mr. Powell that those uncharged acts or the dismissal of those uncharged  
23 acts are the thing that caused him to take this deal? Or was it the  
24 strength of the evidence in the case we're going to trial on?

25 MS. MCNEILL: Well, Judge, --

1 THE WITNESS: No, I --

2 MS. MCNEILL: -- I'm going to object to speculation unless it's  
3 actually something that was discussed.

4 THE COURT: Well, I'll sustain the objection as if -- unless it  
5 was discussed. But if it was discussed, it's, I guess, overruled. So let's  
6 ask him.

7 MS. MCNEILL: Okay, foundation was my objection too.

8 MR. GIORDANI: Yeah, that was a poor question. I'm sorry.

9 THE COURT: All right.

10 BY MR. GIORDANI:

11 Q Based on your discussions with Mr. Powell, was the main  
12 thrust of the deal the fact that the State was taking life off the table? Or  
13 was the main thrust of the deal that these uncharged acts would not be  
14 filed?

15 A That life was coming off the table.

16 Q Okay. And you previously indicated you didn't believe that  
17 seeing the full discovery file on the uncharged acts was necessary in  
18 your calculus. Why is that?

19 A Well, in my opinion, when I -- because that was the deal that  
20 we were going to get. In fact, I believe there was discussion that, you  
21 know, it just wasn't going to get any better. You made -- you guys made  
22 it very clear that, you know, based on the evidence that you had that  
23 there, that's the only deal you're going get is life off the table. And we'll  
24 sweeten it by throwing these other cases out that we think we have him  
25 in. So, and that's how we presented it. Roy and I presented it to him is

1 like, I'm saying it, almost every case. The deals, they're willing to do X.  
2 We're fully prepared to go to trial. This is what you could be looking at  
3 should you lose and should you be convicted on all accounts. And let us  
4 know what you want to do.

5 Q Understood. One last little area of questioning and I'll be  
6 done. Do you recall while we had the jury in the hallway on the second  
7 day of jury selection and prior to the deals being entered, you,  
8 Mr. Nelson, and Mr. Durham and my co-counsel and I sitting out in the  
9 ante room discussing the negotiation for an extended period of time?

10 A Yes. Yes.

11 Q You were shown photographs in the detective's wall on the  
12 quote Jumping Jack Robbery series which included our trial and then ten  
13 uncharged acts, right?

14 A Yeah, I don't know what it was called but there -- ten, allegedly  
15 ten uncharged acts that were --

16 Q Right. And you were shown some discovery on those other  
17 uncharged acts like photographs -- still shots of photographs from  
18 surveillance videos in the uncharged cases, correct?

19 A Correct.

20 Q And we kind of pointed out, look, you can see the shoes are  
21 the exact same in some of the events and the way they all jumped, the  
22 MO is the same. Do you recall those conversations?

23 A I don't recall specifics. I recall that -- that you guys, the DA's  
24 office, you know, thought they had evidence to file.

25 Q Okay. And you recall going through some of it or at least

1 having some understanding of there are ten other events that are  
2 potentially related and potentially could be charged after this trial occurs,  
3 correct?

4 A Yeah, that's correct. And then, in fact, after that discussion,  
5 we -- Mr. Powell and, I don't know Pinkney or Pikney, they wanted to  
6 have a conversation with all the attorneys together. And so we went  
7 back for an extended period of time. And I forgot about Ben, but with  
8 Ben, co-defendant, Mr. Powell, Mr. Nelson.

9 MR. GIORDANI: All right. Thank you, Mr. Kane.

10 And, Judge, I will pass the witness.

11 MS. MCNEILL: Thank you, Judge. Just briefly.

12 **REDIRECT EXAMINATION**

13 BY MS. MCNEILL:

14 Q Mr. Kane, how many criminal jury trials have you done? At  
15 the time --

16 A That would have been my --

17 Q I'm sorry.

18 A That would have been my first criminal jury trial.

19 Q Okay. What was your theory of defense?

20 A Our theory of defense was to, if I remember correctly, was  
21 to -- we thought our best shot was to see what we could go as far as  
22 getting some of them kicked out. Tried to attack, I don't know, like  
23 witness credibility on the IDs. Look at see if the State, you know, didn't  
24 set the right foundation on the videos oo the surveillance videos. I didn't  
25 go back and look at my trial binder, but, I mean, what we were planning



1 on doing, I had, you know, the case law printed out, the statutes,  
2 anything that we're yeah.

3 Q And so you said you brought Roy Nelson on. Was Roy going  
4 to be considered first chair or second chair?

5 A He was going to be considered first chair, I believe. I was  
6 planning on doing the voir dire. I was going to do at least one witness.  
7 But.

8 Q And what made you pick Roy Nelson to be -- to assist you with  
9 the case?

10 A Well he's an ex, I believe, Chief Deputy District Attorney. He's  
11 been doing criminal work as, I don't know how many trials he's done, but  
12 it's got to be more than 20 or 30, if not a hundred jury trials. During that  
13 time, I actually, I called my buddy, Josh Tomsheck, first. He was in a  
14 murder trial at the time so he could not do it. So I called Roy and Roy  
15 agreed to it, to assist.

16 Q Did Roy have any contact with Mr. Powell prior to the start of  
17 the trial?

18 A He did.

19 Q He did. Okay. So when you said you visited two or three  
20 times, how many of those meetings was Roy in?

21 A One.

22 Q Okay. And so you indicated that you believed you visited him  
23 two to three times and that would have been in the months between  
24 November 2017 and July of 2018, correct?

25 A Yes.

1 Q Okay, and so it sounds like you had --

2 A I believe that's correct.

3 Q Sorry I may have cut you off. Sounds like you had your  
4 investigator do the bulk of the client contact. What kinds of -- did, did Mr.  
5 Lawson provide any type of advice about the discovery?

6 A No. So, no I didn't have him do the bulk of the client contact.  
7 What had happened, and Mr. Powell knew this because I discussed this  
8 with him, is I had twins that were born in March -- March 1<sup>st</sup>, and then  
9 subsequently died three weeks later. And so I was working from home  
10 for a period of two months and that's when we were discussing things  
11 over the phone. It wasn't a matter of Mr. Lawson doing the heavy work.

12 Q Okay. You indicated that this was going to be your first  
13 criminal jury trial. Would you say that you sort of deferred to Mr. Nelson  
14 since he was more seasoned?

15 A No. I've conducted, at that time, at least 20 civil jury trials  
16 myself. Well recognized by most of the District Court judges here in town  
17 and have been for many years. Very good at cross-examination, every  
18 aspect of trial really. And so it was more of having his experience with,  
19 you know, if a specific issue would come up with let's say a little nuance  
20 or of criminal law and so that he would be -- just to make sure if I didn't  
21 know something that he was there. I mean, Roy's also very, very, very,  
22 good criminal defense attorney and so I wanted somebody there just like  
23 I did my first civil trial with somebody else, so.

24 Q Mr. Kane, were you aware that during this time period  
25 Mr. Nelson was suffering from some serious substance abuse problems?

1           A       I was not aware of that.

2                   MR. GIORDANI: And, Judge, I would just object and ask to  
3 strike that from the record unless there's some evidence of that or  
4 foundation laid.

5                   THE COURT: Counsel, --

6                   MS. MCNEILL: Judge, I'll withdraw the question. I think it'll --

7                   THE COURT: All right. I'm sustaining the --

8                   MS. MCNEILL: Kind of germane on post-conviction.

9                   THE COURT: -- objection. I mean, that's -- unless there's  
10 clear evidence of that.

11                   MS. MCNEILL: Well, they can leave that to post-conviction,  
12 Judge. I'll withdraw it.

13 BY MS. MCNEILL:

14           Q       Mr. Kane, you indicated that part of your discussion with  
15 Mr. Powell in discussing the deal was to talk about the sentencing range  
16 that he was facing by entering his plea, correct?

17           A       That's correct.

18           Q       What sentencing range did you tell him you believed might be  
19 likely, based on the charges to which he was pleading?

20           A       You know I don't remember what charges he pled to. I'm --

21           Q       Well, to refresh your recollection, --

22           A       -- sorry I don't remember, but.

23           Q       -- it was two counts of conspiracy to commit robbery, two  
24 counts of burglary with a firearm, two counts of first-degree kidnapping  
25 with a deadly weapon, seven counts of robbery with use of a deadly

1 weapon.

2 A Yeah, I don't remember the range that I would have given him.

3 Q Okay. No more question --

4 A I would have told him the specific ranges on each. I don't  
5 know if I did that specifically or if Roy did. Or we both did.

6 Q Okay.

7 MS. MCNEILL: Northing further, Judge.

8 THE COURT: Okay, I've got to ask and both of you can  
9 address this. On the remand, you talked about, on page 2, the first  
10 sentence. But the second one: Powell further claimed that because he  
11 has since learned there was no evidence linking him to the new charges,  
12 he would not have pleaded guilty but would have insisted on going to  
13 trial.

14 There was a little bit of testimony about these other charges  
15 and the evidence, but I think certainly the Supreme Court is relying on, I  
16 guess, the affidavit. So what's that about? Do you see where the --

17 MS. MCNEILL: Well, Judge, I think that that is Mr. Powell's  
18 contentions and then certainly the State can argue that now --

19 THE COURT: Well, all right, but --

20 MS. MCNEILL: -- they think the record belies that.

21 THE COURT: -- shouldn't somebody inquire as to whether or  
22 not that's -- I mean, that's --

23 MS. MCNEILL: Well, I guess --

24 THE COURT: -- supposedly the substance of this hearing is  
25 whether or not his claim would affect going to trial. And so, I --

1 MS. MCNEILL: Well, I mean, I don't know that he can answer  
2 that unless Mr. Powell told him that. That's --

3 THE COURT: Well, right. Did they discuss it, I guess is my  
4 question.

5 MS. MCNEILL: Mr. Kane, did you hear the Judge's question?  
6 Did you discuss, but for those uncharged cases being filed, Mr. Powell  
7 would have gone to trial?

8 MR. KANE: No.

9 MS. MCNEILL: Okay.

10 THE COURT: Does that bring up any questions for the State?

11 MR. GIORDANI: Yes, Your Honor, briefly.

12 THE COURT: Go ahead.

13 MR. GIORDANI: Mister --

14 Thank you.

15 **RECROSS EXAMINATION**

16 BY MR. GIORDANI:

17 Q Mr. Kane, I previously asked you about where the unfilled  
18 charges kind of came in to your calculus? And I believe that your  
19 response was something to the effect it was a minor kind of an added  
20 bonus to the deal. Is that an accurate statement or can you expound a  
21 little bit?

22 A The -- listen, the deal, it just, we told them we don't know if  
23 they're going to charge you with these. They've been, would they have  
24 been talking about it for a while. They -- we don't know what evidence,  
25 but this is the deal and they're going to throw that in. And so it was just

1 a -- it was a bonus. It wasn't like the deciding factor, okay, now I'm going  
2 to take it. And because -- yeah.

3 Q And based upon your conversations with Mr. Powell, did he  
4 enter this deal where he basically pled to the sheet, but got the benefit of  
5 life being taken off the table because it was essentially a foregone  
6 conclusion that he was going to be found guilty at trial? Or --

7 MS. MCNEILL: Well, objection --

8 MR. GIORDANI: -- likely found guilty?

9 MS. MCNEILL: -- you don't know what a jury's going to do.

10 THE COURT: Well, I think he's only asking for the  
11 discussions. Is that -- if you limit it to the discussions, I'll allow it.  
12 Obviously --

13 MR. GIORDANI: Yes.

14 THE COURT: -- it would be a speculation, but on the other  
15 hand, the discussions regarding that are relevant.

16 THE WITNESS: Right. So when we went back there,  
17 obviously I don't remember specifics of what, but I do remember that  
18 we're in there, Mr. Powell and Mr. Pinkney are, you know, they're upset  
19 with the deal. We're explaining it to them. They had a lot of questions  
20 about it that we answered. And most specifically what they were. You  
21 wanted, like I said, it was like 30 minutes, but it could have well been an  
22 hour and a half that we discussed the deal. And it wasn't a lot of time  
23 spent on those ten other cases. Most of it was spent on, you know, just  
24 not a lot there for him. Didn't look good that, you know, yeah. I mean, I  
25 don't remember exactly what we talked about, but we spoke, Roy and I,

1 and Ben, at one point, for a very long time.

2 MS. MCNEILL: And, Judge, if I --

3 MR. GIORDANI: And if you recall --

4 MS. MCNEILL: Oh, sorry, John. I forgot it was --

5 MR. GIORDANI: Oh, I'm sorry.

6 MS. MCNEILL: -- your turn. Sorry.

7 MR. GIORDANI: All right.

8 BY MR. GIORDANI:

9 Q And if you recall, Mr. Kane, at the time of trial, Mr. Powell had  
10 previously been convicted of a robbery and an attempted robbery in a  
11 prior felony case, correct?

12 A Yes, in California, if I remember right.

13 Q And, therefore, it would have been, I guess, admissible as  
14 impeachment had he taken the stand at trial.

15 A Yeah.

16 MR. GIORDANI: Okay, I have no further questions, Judge.

17 THE COURT: Defense.

18 MS. MCNEILL: Just -- just briefly.

19 **REDIRECT EXAMINATION**

20 BY MS. MCNEILL:

21 Q As Mr. Giordani said, Mr. Powell basically pled to the sheet,  
22 including the two first-degree kidnapping counts. Are you familiar with  
23 the Supreme Court case law on first-degree kidnapping as being  
24 incidental to the robbery and did you think that perhaps you could get  
25 those counts kicked by the jury or later on an appeal?

1           A       Yeah, so you're talking about the *Wright* case, I believe, and  
2 that was -- we did discuss it and that was one of the things that we  
3 discussed with Ben and Roy beforehand. And, you know, understand  
4 that this was kind of unusual, I guess, the not have an offer from the  
5 District Attorney's office before -- before voir dire. And so it was unusual  
6 that we, listen, once we get -- when we got the offer too, Roy and I  
7 discussed, and Ben, we were all, you know, kind of confused and pissed  
8 for like, what he, it's not an offer. So this was explained to them, but it  
9 was prefaced with the understanding that the evidence is so bad against  
10 them and their defenses were, if they had minimal, if anything, that they  
11 weren't, it wasn't going -- we didn't believe it was going to get any better  
12 for them even with what you described the Supreme Court, their opinion  
13 in the *Wright* case. So.

14           Q       Okay.

15           A       They weren't made -- the offer was not going to get better.  
16 And they made that clear that the offer was going away at the jury  
17 selection. So.

18           Q       So it sounds like you had some time pressure on the offer?

19           A       No, it wasn't time pressure in the sense that, I mean,  
20 Judge Israel was very patient with us and we had -- they said, it was our  
21 turn, we were just going to start jury selection so I'm sure we could have  
22 continued it, but. Or told the Judge, I guess, we could have requested,  
23 hey, he wants to think about it. Let the jury go for the day.

24           Q       Okay, did -- did you ask for more time to talk about the offer  
25 because previously when you testified, you made it sound like you just



1 had this 30-minute time period that you were talking in the back of the  
2 room while the jury's waiting. Do you think that's the best setting to talk  
3 to a client about an offer?

4 A No, no. I guess you misunderstood what I was getting at  
5 when I said conservatively 30 minutes. I think it was more -- it was more  
6 like hours. And getting to the point where we were just going -- we talked  
7 about just sending the jury home, if I remember correctly, with the DA's  
8 office. They -- so it wasn't the, when I said 30 minutes it was not, I did  
9 not want it to be intended that, hey, this was a quick conversation in the  
10 back. It was more to show -- we were back there for a while. And we  
11 were back and forth talking to Ben, you know, and then going back in.  
12 They wanted to talk together, the co-defendants, they wanted to talk with  
13 all the attorneys. So, I mean, it was, it was some time. And understand,  
14 throughout the course of the case and we -- he discussed the sentences,  
15 the charges, so he knew what he was looking at. This wasn't like it was  
16 the first time that he understood. So.

17 MS. MCNEILL: All right. Judge, I have nothing further.

18 THE COURT: All right. Thank you. Any other witnesses?

19 MS. MCNEILL: No, Your Honor.

20 THE COURT: I'm going to -- did you want to talk to your client  
21 because I want to pull *Strickland*. I have one marked up with lots of good  
22 quotes so I need to review it.

23 MS. MCNEILL: Sure, Judge. If you want to take a break, I  
24 can --

25 THE COURT: And did you want --

1 MS. MCNEILL: -- see if he has any questions.

2 THE COURT: -- to talk with him? So.

3 MS. MCNEILL: Sure.

4 THE COURT: All right. We'll do that again.

5 MR. KANE: Your Honor, am I dismissed?

6 THE COURT: Yes, sorry.

7 MR. KANE: Thank you.

8 [Hearing trailed at 2:24 p.m.]

9 [Hearing resumed at 2:42 p.m.]

10 THE COURT: You may be seated.

11 Are we on?

12 THE COURT RECORDER: Uh-huh.

13 THE COURT: Okay. Argument. Defense.

14 MS. MCNEILL: Judge, I think I'm just going to submit. I know  
15 Your Honor watched the hearing, you listened to it, I know you're well  
16 briefed. Mr. Kane's testimony was what it was. Your Honor was able to  
17 observe him, his demeanor. You can evaluate his credibility. And so I'm  
18 going to submit, Judge.

19 THE COURT: State.

20 MR. GIORDANI: I will submit as well, Your Honor.

21 THE COURT: Wow.

22 MS. MCNEILL: Easier than you thought.

23 THE COURT: Thank you.

24 All right, first of all, I did find Mr. Kane's testimony to be  
25 credible. And certainly his testimony is in direct conflict with Mr. Powell's

1 affidavit, specifically regarding the points that are important to this  
2 hearing. The easiest one is, and I don't know if I quoted, yeah, here: I  
3 never told Mr. Powell he would receive 6 to 15.

4 That is on page 2, the second part of the remand. And  
5 Mr. Kane specifically, well, I'm not a -- I can't write as fast so I, but I wrote  
6 never told Mr. Powell he would receive 6 to 15. Mr. Kane's testimony, as  
7 I said, was credible. I did -- I do acknowledge that this was his first jury  
8 trial, excuse me, criminal jury trial, however, my recollection from the  
9 very, from the beginnings of it was that he was certainly a competent trial  
10 lawyer.

11 In any event, some of the other points -- oh, Mr. Kane testified  
12 that he did, in fact, go over the discovery. And when I say discovery  
13 about this case, with the defendant. And he went over the Guilty Plea  
14 Agreement several times with the defendant and his testimony was that  
15 the ten additional, the ten uncharged cases, and again I think it's a quote,  
16 but: those cases never mattered in this case.

17 We will -- the State, apparently: we will throw in those other  
18 cases.

19 The discussions were, the main thrust was taking life off the  
20 table. As far as, as I said, the second part of the remand, the 6 to 15,  
21 Mr. Kane was clear that he learned early in his career, notwithstanding  
22 that there was or he does significant civil and I think now, although I don't  
23 know, more criminal. In any event that he would not tell a client that  
24 whether, again, whether it's civil where getting a million dollars or in this  
25 case, I can get you 6 to 15. In fact, he specifically refuted that statement.

1 And so regarding the first part, and so therefore, again, if in fact that was  
2 never stated to the defendant, there certainly can't be any ineffective  
3 assistance of counsel on that point. So let's go to the first paragraph,  
4 and I'm reading from the remand: As Powell points out on appeal, he  
5 claimed counsel was ineffective for advising him to enter into a guilty plea  
6 when part of the purported benefit was the State foregoing filing new  
7 charges, but neither counsel nor Powell fully understood the nature of the  
8 new charges.

9 I think what that may be saying is understood the evidence of  
10 the new charges because the next line: Powell further claimed that  
11 because he has since learned, there was no evidence linking him to the  
12 new charges, he would not have pleaded guilty but would have assisted  
13 on going to trial.

14 Once again, that appears to be belied by Mr. Kane's testimony  
15 when he, although it is clear he didn't have all of the discovery on those  
16 additional uncharged ten cases, that it was Mr. Kane's motive or his  
17 objective to get life, the possibility of -- a sentence of life off the table.  
18 They did discuss, according to Mr. Kane, the possibility of these ten  
19 charges and apparently some of the, some of the evidence that existed  
20 or allegedly tied Mr. Powell to those additional uncharged crimes. We  
21 have nothing in the record or today regarding whether or not, as in Mr.  
22 Powell's affidavit, that there's no evidence, and again that's what they  
23 said, there's no evidence linking Mr. Powell to the new charges. And I  
24 believe the questioning and/or there was something about similar shoes  
25 and yes, the individuals, and I did review the original motion, which I'm

1 sure you have, to withdraw the guilty plea.

2           And the affidavit, the argument in the opposition was made  
3 that certainly Mr. Powell would know whether or not any of those  
4 uncharged cases had anything to do with him. And apparently Mr. Kane  
5 didn't feel that that was, and again I can't remember his, let me see if I  
6 have his -- I believe he said I don't believe it mattered. But that's in the  
7 transcript, so.

8           So once again at the third sentence: Powell's claim, if true,  
9 and not belied by the record, entitled him to relief.

10           And given the testimony today and the almost, well, several  
11 contradictory -- contradicted points by Mr. Kane of Mr. Powell's affidavit,  
12 it certainly appears that there was no ineffective assistance of counsel.  
13 The *Strickland* and the subsequent cases talk about the fact that it isn't  
14 the perfect lawyer and I'm just kind of summing it up, They don't use that  
15 wording. But it isn't, a perfect lawyer that the standard is held to,  
16 but -- and, I'm trying to get the exact quote from the case, but in any  
17 event, the lawyer has to do an adequate job -- okay, the proper standard,  
18 the attorney performance is that of a reasonably effective assistance  
19 considering all the circumstances.

20           With regard to the required showing of prejudice, the proper  
21 standard requires the defendant to show that there is a reasonable  
22 probability that but for counsel's unprofessional errors, the result of the  
23 proceeding would have been different.

24           Now that tangentially applies because here we have just an  
25 issue of Mr. Powell requesting to withdraw his plea and that is a different

1 standard for his being able to do that. But the reason for him claiming to  
2 be doing that is the ineffective assistance. Ineffective assistance of  
3 counsel could be a fair and just reason for withdrawing a guilty plea. I do  
4 not find ineffective assistance of counsel. The fact that the defendant  
5 basically pled to the charges is one factor to be considered, but the  
6 advantage that the reason for the plea was, pursuant to Mr. Kane, to take  
7 life off the table. Mr. Kane, and just to make sure I got all of these in my  
8 notes, went over the Guilty Plea Agreement several times and he stated  
9 those cases never mattered in this case. We will throw in the other cases  
10 and that was speaking of what the, I guess, the District Attorney in his  
11 mind that I think he said something that he only considered it, well you'll  
12 get these cases thrown in.

13               So, again, in the remand, Powell's claim of true and not  
14 belied by the record entitled him to relief. But now with the evidentiary  
15 hearing and again the fact that I do not see any ineffective assistance of  
16 counsel and, I guess, certainly the Appeals Court had the record. I  
17 thought I said, the -- at the time, it wouldn't be fair or that I base my  
18 decision on the standard. But I certainly acknowledge that the standard  
19 is permitting withdrawal would be fair and just. And in this case, this  
20 hearing, I don't see any grounds to permit, if you will, or refute that -- no,  
21 not refute, to, that there was no reason under the fair and just standard to  
22 allow the withdrawal of the plea.

23               So I think I covered everything. So that is for the remand and  
24 the State needs to get a copy of all this and present the order. They  
25 can -- I like it when they pass it by you and I may edit it or change it or

1 whatever, just like we do in civil cases. I may not have addressed  
2 everything given the time and given the fact that I don't have all of the  
3 cases in front of me, but I think that covers it.

4 MR. GIORDANI: Thank you, Your Honor.

5 MS. MCNEILL: Thank you, Judge.

6 So Mr. Giordani, just email me that order when it's done and  
7 I'll say okay or not and then we'll get it to the Judge.

8 MR. GIORDANI: Will do.

9 MS. MCNEILL: Thank you.

10 THE COURT: All right.

11 MS. MCNEILL: Thank you, Judge.

12 THE COURT: Thank you.

13 MR. GIORDANI: Thank you.

14 MS. MCNEILL: Be safe everybody.

15 THE COURT: Yes, you too.

16

17 [Hearing concluded at 2:59 p.m.]

18 \* \* \* \* \*

19

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
21 audio/video proceedings in the above-entitled case to the best of my ability.

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25

  
Judy Chappell  
Court Recorder/Transcriber