IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

DORIE HENLEY	)	
	)	
Appellant,	)	
	)	CASE NO.: 83546
vs.	)	
	)	
THE STATE OF NEVADA	)	
	)	
Respondent.	)	
	)	

APPELLANT'S OPENING BRIEF

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I.
JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter as an appeal of the district court's Judgment of Conviction pursuant to Nev. Rev. Stat. 177.015(3) and (4).

II.
NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

NONE

Attorney of Record for Dorie Henley:

/s/ Lucas J. Gaffney

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III.
STATEMENT OF THE CASE

This is an appeal from an Order filed on May 28, 2021, in which the district court denied the Appellant's motion to withdraw his plea agreement.

IV.
ROUTING STATEMENT

Pursuant to the Nevada Rules of Appellate Procedure (hereinafter, "NRAP") 17(b)(1) this case is presumptively assigned to the Nevada Court of Appeals.

V.
STATEMENT OF THE ISSUES

A. Whether The District Court Abused Its Discretion By Failing To Find The Appellant Presented A Fair And Just Reason To Withdraw From Her Guilty Plea Agreement.

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VI.
RELEVANT PROCEDURAL HISTORY

On November 1, 2017, Defendant Dorie Henley (Henley) was charged by way of indictment with Murder with Use of a Deadly Weapon, Conspiracy to Commit Murder, Third Degree Arson, Conspiracy to Commit Third Degree Arson, First Degree Kidnapping, Conspiracy to Commit Kidnapping, Robbery with Use of a Deadly Weapon, Conspiracy to Commit Robbery, Grand Larceny Auto and Conspiracy to Commit Grand Larceny. Her co-defendants, Andrew Henley (Andrew) and Jose Melvin Franco (Franco), were also indicted at the same time and charged with the same offenses.

Initially, Chief Deputy District Attorney David Stanton was assigned to the case. For nearly a year, Mr. Stanton litigated the case and was responsible for the negotiations. As of September 13, 2018, no formal offers were made to any of the co-defendants in the case. A November 15, 2018, status check trial readiness was set, and a March 2019 trial date was set as well.

After a personnel change in the District Attorney's office, Chief Deputy District Attorney Christopher Hamner joined the Major Violators Unit and took over the instant case in November of 2018. Mr. Hamner made his first appearance in the case at the November 15, 2018, status check. At that hearing, Mr. Hamner indicated to the court that he had a meeting scheduled with the family regarding the offer. A

status check was set on January 10, 2019. At the January 10, 2019, hearing, Attorney Andrea Luem stood in for Mary Brown who represented Ms. Henley. Mr. Hamner stated that the parties agreed to continue the motions set for that day while the parties work on resolving the matter. The motions were continued to February 12, 2019.

On February 12, 2019, Ms. Brown stated that the parties were still negotiating and were close to reaching a resolution. The outstanding offer at the time was a Second-Degree Murder with Use of a Deadly Weapon with the parties retaining the right to argue. There were also discussions of a stipulated range within the sentencing range of that plea. At that time, Franco entered a plea of guilty to Second Degree Murder with Use of a Deadly Weapon and he was set for sentencing. The matter was continued to March 15, 2019. On March 11, 2019, the evidentiary hearing on Defendant's motion to Suppress statement took place.

On May 23, 2019, the Court denied Ms. Henley's motion to sever defendants. After the trial was set, offers were generally discussed with no significant or substantive change announced on the record. At that hearing, the State revoked any offer as to Ms. Henley, but kept the offer open as to Andrew.

On September 26, 2019, the court held another status check trial readiness hearing. Ms. Brown indicated that there was discussion of a settlement conference and that the matter should negotiate.

On December 5, 2019, the court held another status check trial readiness. Ms. Brown advised that an offer has been conveyed.

On March 16, 2020, a settlement conference took place between the parties. The matter was settled, and Defendant entered a plea of guilty to one count of Second-Degree Murder with use of a Deadly Weapon. Pursuant to the negotiations, the parties stipulated to recommend a sentence of Fifteen (15) years to Life in the Nevada Department of Corrections.

On June 22, 2020, Ms. Brown filed a motion to appoint independent counsel to determine if grounds existed to allow Ms. Henley to withdraw from the plea agreement.

On August 25, 2020, Ms. Henley filed a motion to withdraw from the plea agreement. On December 2, 2020, the State filed its Opposition. On January 12, 2021, Ms. Henley filed her Reply. On March 4, 2021, the district court held an evidentiary hearing on Ms. Henley's motion. On April 16, 2021, the parties submitted closing arguments to the district court. On May 28, 2021, the district court issued an order denying Ms. Henley's motion to withdraw plea agreement.

On August 20, 2021, the district court sentenced Ms. Henley to LIFE with a minimum parole eligibility of fifteen (15) years in the Nevada Department of Corrections, with one thousand four hundred six days credit for time served.

On September 21, 2021, Ms. Henley filed her Notice of Appeal.

VII.
STATEMENT OF FACTS

The following information was presented to the Grand Jury which resulted in an indictment against Ms. Henley, Andrew, and Franco. On October 10, 2017, Detective Jason McCarthy, a member of the LVMPD Homicide team, was called out to a scene in the area of Cory and Soprano. Appellant's Appendix (AA), Volume I, bates number 12-13. There the victim, Jose Juan Garcia-Hernandez, was located. AA I 15-16. The victim had abrasions to his face, hands, arms and abdomen. AA I 15. Additionally, the victim had two stabbing and/or penetrating wounds to his abdomen. AA I 15. These were determined to be fatal injuries as they penetrated the victim's aorta. AA I 20. The victim was dead at the time of the detective's arrival. AA I 20.

Detective McCarthy noticed that the victim did not have any wallet, cell phone or personal items on his person. AA I 17. Additionally, the police were unable to locate a vehicle belonging to the victim at the scene. AA I 18. Eventually, the victim's Pontiac was found several miles from the scene near the streets of Bruce and Flowmaster here in Clark County. AA I 22. Police observed that the interior of the vehicle had been burnt or there was an attempt to burn it. AA I 23.

During the course of the investigation, Detective McCarthy interviewed Ms. Henley. AA I 24. Ms. Henley indicated that she was aware of the homicide and had

known the victim for a little over a year. AA I 26. Ms. Henley indicated she made a plan with the victim to meet on October 10, 2017. AA I 26. The victim wanted to go out to dinner and go dancing. AA I 26. Ms. Henley invited him to an area near Dexter Park. AA I 26. The area they met was the location where the victim's body was found. AA I 26. Once there, Ms. Henley flirted and drank with the victim. AA I 27. While Henley interacted with the victim, her co- defendants arrived and began to beat and kick the victim. AA I 27. Ms. Henley fled the scene and was eventually picked up by someone in a red pickup. AA I 28.

Detective McCarthy also interviewed Andrew. AA I 29. Police determined that the red pickup truck was registered to Andrew's wife. AA I 28-29. Andrew admitted on the day of the murder, he drove someone in his red pickup to the Tiffany apartment complex. AA I 29. He and another person hopped a wall onto Soprano Street where he observed the victim and others. AA I 29. Andrew admitted to possibly beating the victim and observed others beating the victim. AA I 29. Andrew observed others taking his wallet, cellphone as well as the victim's vehicle a white Pontiac. AA I 29. Andrew then left and went back to his red pickup and left the scene. AA I 29.

Detective McCarthy also interviewed Franco. AA I 30. Franco said that on the day of the murder he was with someone else near Dexter Park. AA I 30. At the park he observed the victim with someone. AA I 30. Franco said he had been

drinking and consumed some Xanax. AA I 30. Franco recalls there had been a plan and he did not remember too much of the details other than he was supposed to "kick the victim's ass" and that is what he did. AA I 30. Franco stated he then left the scene but didn't acknowledge how he left. AA I 30

Police never recovered the victim's stolen phone or wallet. AA I 31. Police did recover the victim's stolen white Pontiac, but the victim's tools were missing from the vehicle. AA I 31. The tools were located by police in an abandoned apartment next to Franco's residence. AA I 32.

Dorie Henley's Statement

During an interview with detectives, Ms. Henley indicated the victim was someone who had wanted to date her for three years and was willing to do anything for her. AA I 139. Ms. Henley indicated she convinced the victim to meet her at the park. AA I 139. Ms. Henley stated she told Andrew the general location of where she and the victim were prior to the robbery and murder. AA I 144-146. Ms. Henley admitted she was kissing the victim around the time Andrew and Franco approached the victim. AA I 178. Ms. Henley indicated she was supposed to get paid money for the robbery of the victim. AA I 191. Ms. Henley also indicated the victim was unarmed on the night he died, and prior to the robbery/murder, the victim was in possession of his cell phone and a wallet. AA I 194. Ms. Henley also indicated she told the father of her children that she was part of the robbery of the victim. AA I

198.

Defendant's Text Messages to Raphael Cordoso:

During the investigation, Detectives interviewed Raphael Cordoso, who is the father of Ms. Henley's children. AA I 208. According to Cordoso, he talked to Ms. Henley on October 11, 2017, one day after police located the victim's body. AA I 211. During the conversation, Ms. Henley purportedly revealed her plan to lure someone to a location and rob him for money. AA I 212-213. Ms. Henley also told Cordoso her brother Andrew was involved. AA I 213.

The following day on October 12, 2017, Ms. Henley told Cordoso she had done something, and that she was going to be on the run. AA I 212. According to Cordoso, Ms. Henley indicated she tried to lure a male around the corner near Jones. AA I 213. Ms. Henley allegedly explained that during the robbery, the victim began to fight back since she was attempting to get his wallet by being affectionate, luring him with sex. AA I 213. The victim figured out what was going on and grabbed her. AA I 216. Ms. Henley then yelled out for Andrew and Franco. AA I 216. Ms. Henley told Cordoso that she did not know they (Andrew and Franco) were going to stab him. AA I 216.

Cordoso stated after talking to Ms. Henley, he received several text messages her on October 12, 2017. AA I 208. Throughout these text messages, Ms. Henley relayed to Cordoso that she participated in a robbery. AA I 230-232.

Henley's CCDC Letter:

While Ms. Henley resided at the Clark County Detention Center (CCDC) awaiting trial, she wrote a letter to Cordoso. AA I 288-292. In the letter, Ms. Henley asked Cordoso to tell the police Andrew forced her to participate in the robbery. AA I 290. Upon receipt of this letter, the State temporarily revoked all offers as to Ms. Henley, but later extended several offers to resolve the case in lieu of trial.

VIII
SUMMARY OF THE ARGUMENT

During the proceedings below, Ms. Henley offered three reasons why a fair and just reason existed to withdraw her plea agreement: 1) Ms. Brown failed to convey two offers the State extended to resolve the case; 2) Ms. Henley was not fully apprised of the evidence supporting her defense prior to entering into the plea agreement; and 3) Ms. Henley did not have sufficient time to consider the 15-to-Life offer the State extended during a settlement conference. AA I 92-103, AA II 425-426. Following an evidentiary hearing and oral argument by the parties, the district court ruled the arguments and evidence presented did not establish a fair and just reason to allow Ms. Henley to withdraw her guilty plea agreement. AA II 426. Ms. Henley submits the district court erred in its ruling.

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IX.
ARGUMENT

THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO FIND A FAIR AND JUST REASON EXISTED TO ALLOW THE APPELLANT TO WITHDRAW FROM HER GUILTY PLEA AGREEMENT.

A guilty plea is presumptively valid and the burden is upon appellant to show the denial of a motion to withdraw the plea constituted a clear abuse of discretion. Wynn v. State, 96 Nev. 673, 675, 615 P.2d 946, 947 (1980); *also see* Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990).

Nevada Revised Statute § 176.165 provides:

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

The decision to grant a pre-sentence motion to withdraw a guilty plea under NRS 176.165, is vested in the district court, which is not constrained to ask only whether a defendant entered into a plea "knowingly, voluntarily, and intelligently[,]" but rather has wide latitude to allow withdrawal of a guilty plea "for *any reason* where permitting withdrawal would be fair and just …." Stevenson v. State, 131 Nev. 598, 603-604, 354 P.3d 1227, 1281 (2015) (emphasis added). "Accordingly, Nevada trial courts must apply a more relaxed standard to presentence motions to

withdraw guilty pleas than to post-sentencing motions." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004).

In Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), this Court held that in assessing the validity of a guilty plea, "we *require* the district court to look *beyond the plea canvass* to the entire record and the totality of the circumstances." Rubio v. State, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008). (emphasis added; internal quotations, citation omitted). In other words, a district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what she was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea. Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

Moreover, and more importantly, "a defendant does *not* have to prove that her plea is invalid … to establish a fair and just reason for withdrawal before sentencing*."* U.S. v. Davis, 428 F.3d 802, 806 (9th Cir. 2005) (emphasis original). Rather, the "proper inquiry is whether the defendant has shown a fair and just reason for withdrawing his [or her] plea *even if the plea is otherwise valid*." Id. (emphasis added). Thus, the plea withdraw analysis turns entirely on what a court, as an impartial arbiter, believes is "fair and just."

A plea of guilty must be the result of an informed and voluntary decision. *see* Smith v. State, 110 Nev. 1009, 1010, 879 P.2d 60, 61 (1994). A defendant who

pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that she received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. Molina, 120 Nev. at 190 (2004). Alleged ineffective assistance of counsel is evaluated under Strickland, which requires demonstrating (1) counsel's deficient (objectively unreasonable) performance; and (2) prejudice (the reasonable probability that, but for the deficient performance, the outcome would have been different). *See, e.g.,* Johnson v. State, 133 Nev. 571, 575-576, 402 P.3d 1266, 1273 (Nev., 2017) (*citing* Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

Indeed, a conviction cannot stand when defense counsel fails to provide effective assistance during a critical stage of criminal proceedings. U.S. Const. Amends. V, VI, & XIV; Nevada Constitution Art. I. Counsel is ineffective, thereby depriving a defendant of his rights, when (1) it is deficient, such that counsel made errors so serious it ceased to function as the "counsel" guaranteed by the Sixth Amendment, and (2) when that deficiency is prejudicial to the defendant, such that the result of the proceeding is rendered unreliable. Strickland, 466 U.S. at 687-88. The question of whether a defendant has received ineffective assistance is a mixed question of law and fact and is subject to independent review. State v. Love, 109 Nev. 1136, 1136-1138, 865 P.2d 322, 323 (Nev. 1993).

Performance of counsel will be judged against the objective standard for reasonableness and is deficient when it falls below that standard. State v. Powell, 122 Nev. 751, 759, 138 P.3d 453, 458 (Nev. 2006); Means v. State, 120 Nev. 1001, 103 P.3d 25 (Nev. 2004). Prejudice to the defendant occurs where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (Nev. 1996). A "reasonable probability" is one sufficient to undermine confidence in the outcome. Id.

A. Ms. Brown's Failure to Convey Two Offers to Ms. Henley Constitutes a Fair and Just Reason to Allow Ms. Henley to Withdraw From the Guilty Plea Agreement.

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. Missouri v. Frye, 566 U.S. 134, 140, 132 S. Ct. 1399, 1405 (2012). The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Montejo v. Louisiana, 556 U.S. 778, 786, 129 S.Ct. 2079 (2009) (*quoting* United States v. Wade, 388 U.S. 218, 227–228, 87 S.Ct. 1926 (1967)). Critical stages include arraignments, post-indictment interrogations, post-indictment lineups, and the entry of a guilty plea. *See* Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea). Thus, the right to effective assistance of counsel extends to the plea-bargaining process. Lafler v. Cooper, 132 S.Ct. 1376, 1385, 182 L.Ed.2d 398 (2012) (*See also*,

McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441 (1970)) - Defendants are "entitled to effective assistance of competent counsel."). In Frye, the Court held "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Frye, 566 U.S. at 145. When defense counsel allows an offer to expire without advising the defendant or allowing her to consider it, defense counsel did not render the effective assistance the Constitution requires. Id. Furthermore:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover v. United States,* 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

Frye, 566 U.S. at 147.

Here, Ms. Henley testified that Ms. Brown failed to convey two offers—11-to-Life and 13 to Life for her consideration. AA II 373-374. Nevertheless, the district court erroneously found Ms. Brown conveyed the offers. AA II 426. The district court supported its conclusion by indicating it found Ms. Brown more credible than

Ms. Henley because Ms. Henley indicated she would not have accepted any offer that included a Life tail before the State discovered the letter Ms. Henley wrote to Cordoso. AA II 426-427. Thus, the district court concluded Ms. Brown must have conveyed the offers because the offers included a Life tail, and Ms. Henley would not have adopted the position of rejecting all offers with a Life tail without first knowing an offer including a Life tail existed. AA II 427. However, Ms. Brown indicated the first offer she received from the State consisted of Ms. Henley pleading guilty to Second Degree Murder with Use of a Deadly Weapon and the parties retaining the right to argue the appropriate sentence. AA II 315-316. And then the parties discussed alternative offers that contemplated pleading guilty to Second Degree Murder with Use of a Deadly Weapon before reaching a stipulated sentence consisting of 11-to-Life. AA I 316. Because Second Degree Murder includes a potential sentence of 10 to Life, it is reasonably plausible that Ms. Henley adopted her position after discussing the initial offers with Ms. Brown, and before the State extended the offer contemplating a stipulated 11-to-Life or 13-to-Life sentence. As such, the district court's basis for concluding Ms. Brown must have extended the 11-to-Life and 13-to-Life offers merely because Ms. Henley had knowledge of offers including a Life tail is without merit.

Additionally, the district court found Ms. Henley would not have been prejudiced if Ms. Brown failed to convey the offers because Ms. Henley would have

rejected any offer that included a Life tail. AA I 427. The district court based its conclusion on Ms. Henley's testimony she would have rejected the offers. AA I 427. However, Ms. Henley testified that even though she did not want a stipulated sentence that included a Life tail, she still would have considered the offers, and possibly accepted them prior to the State finding the letter she wrote to Cordoso and revoking all offers. AA II 346, 373.

Again, Ms. Henley submits that Ms. Brown failed to convey the offers. Accordingly, Ms. Brown's failure to convey the offers constituted a fair and just reason to allow Ms. Henley to withdraw from the parties' plea agreement because but for counsel's failure to convey the earlier offer, there is a reasonable probability that Ms. Henley would not have accepted the 15-to-Life offer.

First, the sentences contemplated by the 11-to-LIFE and 13-to Life offers are manifestly more favorable than the plea agreement Ms. Henley later accepted which recommended a larger aggregate sentence of 15-to-Life. Second, Ms. Henley testified that despite her position she still would have considered and possibly accepted either offer. Third, there is no evidence to suggest the State would have revoked the plea offer if Ms. Henley accepted it soon after the offer had been conveyed to counsel. Indeed, from a logical standpoint, it is inexplicable that the State would extend an offer to resolve Ms. Henley's case if it had no intention to honor the negotiated terms. It also makes little sense that the State would extend the

offer, but then suddenly revoke it before Ms. Henley had a chance to consider it. Thus, any absence of evidence as to this factor does not inure to the State's benefit as custom, practice, and logic dictate that the offer would remain available for a period of time to allow Ms. Henley to consider accepting it.

Additionally, there is no evidence to suggest that the district court would have rejected a negotiation that contemplated Ms. Henley receiving a 11-to-Life or 13-to-Life sentence. It is certainly not unreasonable to believe the district court would have accepted a resolution that contemplated Ms. Henley pleading guilty to a lesser degree of the most egregious, charged offense of murder, and agreeing to serve an 11-to-LIFE or 13-to-Life sentence in the Nevada Department of Corrections. Especially given that the district court accepted the plea agreements of Ms. Henley's co-defendants which recommended sentences that were not significantly greater than the 11-to-LIFE offer.[1] Nor was the 11-to-LIFE offer atypical of other plea agreements the State has entered to resolve murder cases in the Eighth Judicial District Court.

Accordingly, but for counsel's failure to convey the more favorable offer there is a reasonable probability that the end result of the criminal process in Ms. Henley's

[1] Co-defendant Jose Franco, who stabbed the victim, received an aggregate sentence of 15 to LIFE. And co-defendant Andrew Henley received an aggregate sentence of 12 to 35 years.

case would have been more favorable by reason of a plea to a sentence of less prison time. Thus, Ms. Brown's failure to convey the earlier offer constitutes a fair and just reason to allow Ms. Henley to withdraw from the parties' plea agreement and either proceed to trial or enter into a new plea agreement recommending an aggregate sentence of 11 to LIFE.[2] As such, the district court abused its discretion by not finding Ms. Brown's failure to convey the offers constituted a fair and just reason to allow Ms. Henley to withdraw from the plea agreement.

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[2] In Lafler, the U.S. Supreme Court suggested that the proper exercise of discretion to remedy a constitutional injury of ineffective assistance at the plea-bargaining stage "may be to require the prosecution to reoffer the plea proposal." Lafler, 566 U.S. at 171. Henley acknowledges that in Lafler the defendant rejected the proposed offer based on counsel's erroneous advice, as opposed to Frye where counsel failed to convey the plea offer all together. However, because the end result of both scenarios are the same—a defendant does not accept a favorable plea offer due to the ineffective assistance of counsel—the potential remedies should be the same as well.

B. Ms. Brown's Failure to Convey Information That Bolstered Ms. Henley's Defense of Duress Constituted a Fair and Just Reason to Allow Henley to Withdraw From Her Guilty Plea Agreement.

On December 7, 2017, Ms. Brown's investigator, Michael Karstedt, interviewed a witness at CCDC that indicated Andrew forced Ms. Henley to participate in the robbery of the victim. AA II 310-311. Mr. Karstedt recorded the interview and had it transcribed. AA II 311. Ms. Brown testified she gave Ms. Henley a detailed, oral summary of the interview but could not recall the contents of their discussions word for word. AA II 311. Ms. Brown further testified she did not have a copy of the transcript available to read from, or the audio available to play, when she discussed the interview with Ms. Henley. AA II 332.

Ms. Henley testified Mr. Karstedt made her aware he interviewed a witness in CCDC that had information beneficial to her defense. AA II 350-351. In contrast to Ms. Brown, Ms. Henley testified she only received a brief summary of the interview from Ms. Brown and Mr. Karstedt. AA II 351. Ms. Henley testified that Ms. Brown and Mr. Karstedt only told her the witness indicated: 1) Andrew forced her to participate in the robbery; 2) She did not have a good relationship with Andrew; and 3) that Andrew accused Ms. Henley of mistreating him when they were children. AA II 352.

Ms. Henley testified she knew Mr. Karstedt recorded the interview and had it transcribed. AA II 352. When Ms. Henley asked for a copy of the transcript Mr. Karstedt told her it would be best if she did not have the transcript in order to protect the safety of the witness. AA II 352. As such, the entirety of Ms. Henley's knowledge about the contents of the interview came from her discussions with Ms. Brown and Mr. Karstedt. AA II 371-372. Ms. Henley testified she had no reason to believe the audio and transcript of the interview would be any different than the information she received during the oral summaries from Ms. Brown and Mr. Karstedt. AA II 371-372. However, after obtaining a copy of the transcript Ms. Henley was surprised to learn the witness provided details that gave additional support to her defense but were not conveyed to her by Ms. Brown or Mr. Karstedt. AA II 353.

Ms. Henley testified that after reading the transcript she learned the witness knew what happened, where it happened, and who was involved, which went far beyond what Ms. Brown and Mr. Karstedt conveyed during their oral summaries. AA II 353. Ms. Henley also discovered the witness' statement contained details that corroborated information she provided to the police, thereby offering further support for her defense. AA II 354. For instance, the witness indicated: 1) Andrew initially identified the victim based on his infatuation with Ms. Henley; 2) the purpose of the robbery was to obtain money to pay co-defendant Franco's rent; 3) Andrew provided the witness details about how his hatred for Ms. Henley fueled his motivation to

force her to participate in the robbery; 4) the original plan was to rough up the victim and take his property, not kill him; 5) that Andrew monitored Ms. Henley as the events were unfolding; 6); and that Andrew and Franco held Ms. Henley hostage so she would not speak to the police. AA I 394-395.

Ms. Henley testified that if she had obtained a transcript or the audio recording of the witness' interview before changing her plea, she would have insisted on going to trial. AA I 354. Clearly, the witness' testimony could have been used to support a defense of duress pursuant to NRS 194.010(8), which provides that all persons are liable to punishment except those belonging to one the following classes:

> 8. Persons, unless the crime is punishable with death, who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to believe, and did believe, their lives would be endangered if they refused, or that they would suffer great bodily harm.

Nevada's duress statute does not limit the defense by reference to certain crimes, like murder and manslaughter, but rather limits the defense by reference to the potential punishment (death). Cabrera v. State, 135 Nev. 492, 496, 454 P.3d 722, 725 (2019). Accordingly, because the State did not seek the death penalty in this case, duress would have provided a complete defense to all of the offenses Ms. Henley faced. Indeed, Ms. Brown agreed that Ms. Henley's best defense to the charges she faced would be that she acted under duress. AA II 309-310.

Although Ms. Brown and Mr. Karstedt provided Henley with a brief, oral summary of the interview, Ms. Henley submits she never received a transcript or the audio recording of the interview, and therefore did not know the full extent to which the witness' statements supported a defense of duress prior to her change of plea. Therefore, Ms. Henley submits that had she known the detailed contents of the witness' statement prior to the settlement conference, she would not have accepted the 15-to-LIFE offer but insisted on proceeding to trial.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162 (1970); *see* Boykin v. Alabama, 395 U.S. 238, 242, 89 S.Ct. 1709, 1711 (1969); Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513 (1962). Indeed, a defendant has the right to make a reasonably informed decision whether to accept a plea offer. *See* Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985).

However, Ms. Brown denied Ms. Henley the ability to render a reasonably informed decision whether to accept the plea offer, or proceed to trial, by withholding the transcript and audio recording of the witnesses' statement that bolstered Ms. Henley's defense of duress. As such, Ms. Brown rendered ineffective assistance by advising Ms. Henley to accept the State's plea offer without disclosing

the statement so Ms. Henley could make an intelligent choice among the alternative courses of action that were open to her. And but for Ms. Brown's failure to disclose the statement or apprise Ms. Henley of the full contents of the statement, there is a reasonable probability that Ms. Henley would not have accepted the State's 15-to-Life offer and insisted on proceeding to trial. Thus, Ms. Brown's failure to fully disclose the statement constitutes ineffective assistance providing a fair and just reason to allow Henley to withdraw from the parties' plea agreement. Accordingly, the district court abused its discretion by not finding Ms. Brown's failure to provide Ms. Henley with information that bolstered her defense constituted a fair and just reason to allow Ms. Henley to withdraw from her Guilty Plea Agreement.

C. Ms. Henley Did Not Have Sufficient Time to Decide Whether to Accept the Plea Agreement.

In its Decision, the district court found that Ms. Henley had sufficient time to decide whether to accept the State's offer consisting of pleading guilty to Second Degree Murder With Use of a Deadly Weapon that included a stipulated sentence of 15-to-Life. AA II 429. The district court supported its ruling by indicating Ms. Henley had sufficient time to contemplate the offer while the parties were waiting for a Judge to conduct the change of plea hearing, and that the final offer consisted of a Life tail which had been a part of other offers previously extended by the State. AA II 429. Ultimately, the district court concluded that even if given more time, Ms.

Henley would not have changed her mind about accepting the plea agreement. AA II 430.

The first time the State extended the specific offer of 15-to-Life was at the settlement conference, which occurred on March 16, 2020. AA II 307, 346. Ms. Brown advised Ms. Henley to accept the offer. AA II 307-308. However, Ms. Henley was hesitant to accept the offer because of the amount of prison time it contemplated. AA II 308. Ms. Brown indicated she likely told Ms. Henley the 15-to-Life offer was the best deal she could get, and she would not have another opportunity to enter into a plea agreement. AA II 308, 347.

Ms. Brown further testified that to the best of her recollection, Ms. Henley had less than fifteen (15) minutes to decide whether to accept the offer. AA II 309, 336. Specifically, that 15 minutes was the window of time between when the State extended the offer and provided the written Guilty Plea Agreement and Amended Indictment. AA II 323. Then, another approximately fifteen (15 minutes) passed as the parties waited for a judge to conduct the plea canvass. AA II 325. Thus, Ms. Henley had approximately 30 minutes to decide to accept the State's offer.

Contrary to the district court's findings, Ms. Henley testified that she did not have enough time to give the offer meaningful consideration. AA II 348. Ms. Henley testified she had about two (2) minutes to accept the State's offer. AA 347-348. If given more time, Ms. Henley would have sought the input of her friends and family

that supported her throughout the proceedings. AA II 348. Ms. Henley testified that discussing the offer with her friends and family would have impacted her decision whether to accept it because the amount of prison time contemplated by the offer would have a significant effect on her five (5) children. AA II 376. Additionally, Ms. Henley testified she did not fully understand the plea agreement process because she had never been through it. AA II 377-388. Thus, Ms. Henley did not know she had the option of asking for additional time to contact her family to discuss the plea agreement. AA II 374. Indeed, Ms. Henley believed if she did not immediately accept the State's offer, she would have no choice but to proceed to trial where it was likely she would be convicted and face a greater sentence. AA II 347-348. Therefore, Ms. Henley did not have enough time to think through all of the ramifications of the plea agreement, speak to her family, or seek a second opinion about the offer. Ms. Henley believed the only choice before her was to decide between the lesser sentence contemplated by the plea agreement, and a greater sentence resulting from her conviction. A decision she made hastily without the benefit of knowing her defense would potentially be bolstered by the witness' statement. Accordingly, Ms. Henley did not have sufficient time to make a decision that affected the next 15 years, or more, of her life. Ms. Henley submits that had she been given adequate time to consider the offer and its consequences she may have insisted on proceeding to trial. As such, Ms. Henley's inability to give the offer

meaningful consideration within the limited amount of time she was provided constitutes a fair and just reason for the district court to allow her to withdraw from the plea agreement. Thus, the district court erred by finding Ms. Henley had sufficient time to accept or reject the plea agreement.

XI.
CONCLUSION

Based on the foregoing, the Appellant submits that the district court erred in denying the motion to withdraw her guilty plea agreement. Therefore, the Appellant respectfully requests this Honorable Court vacate her conviction and remand her case for trial.

Respectfully submitted this 10th day of February, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word, a word-processing program, in 14-point Times New Roman.*

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I further certify that this brief does comply with the type volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more and contains 7,075 words. I understand that I may be subject to sanctions in the event that the accompanying brief in not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on February 10, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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