IN THE SUPREME COURT OF THE STATE OF NEVADA

DORIE HENLEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83546

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(2)(A), this case is presumptively assigned to the Nevada Supreme Court because it challenges a judgment of conviction based on a plea of guilty involving a category A felony.

STATEMENT OF THE ISSUE(S)

1. Whether the district court abused its discretion in denying Appellant's Motion to Withdraw Guilty Plea.

STATEMENT OF THE CASE

On November 1, 2017, the State charged Dorie Henley ("Appellant") and her codefendants, Andrew Henley and Jose Melvin Franco, by way of Indictment with

the following: Count 1 - Murder with Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 5001), Count 2 - Conspiracy to Commit Murder (Category B Felony - NRS 200.010, 200.030, 199.480 - NOC 50038), Count 3 - Third Degree Arson (Category D Felony - NRS 205.020 - NOC 50416), Count 4 - Conspiracy to Commit Third Degree Arson (Gross Misdemeanor - NRS 205.020, 199.480 - NOC 50422), Count 5 - First Degree Kidnapping (Category A Felony - NRS 200.310, 200.320 - NOC 50051), Count 6 - Conspiracy to Commit Kidnapping (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), Count 7 - Robbery with Use of A Deadly Weapon (Category B Felony - NRS 200.380, 193.165 - NOC 50138), Count 8 - Conspiracy to Commit Robbery (Category B Felony - NRS 200.380, 199.480 - NOC 50147), Count 9 – Grand Larceny Auto (Category C Felony - NRS 205.228.2 - NOC 56011), and Count 10 - Conspiracy to Commit Grand Larceny (Gross Misdemeanor - NRS 205.220, 199.480 - NOC 55982). 1AA42.

On November 28, 2017, Appellant filed a Petition for Writ of Habeas Corpus (Pre-Trial). Respondent's Appendix (RA), at 1. On December 6, 2017, the State filed a Response. RA38. On January 8, 2018, the district court granted in part and denied in part Appellant Petition, dismissing Count 2 and Count 4 of the Indictment. RA45.

As of September 13, 2018, the State had not extended a formal offer to Appellant. RA47. However, the State indicated that it would be extending a package negotiation within the next 45 days. RA52.

On November 15, 2018, the State indicated it had a meeting scheduled with the victim's family regarding the offer. RA56-57. On February 12, 2019, Appellant's counsel informed the court that the parties were still negotiating and were "close to the bottom line." RA69. The outstanding offer at the time was Second-Degree Murder with Use of a Deadly Weapon, with the parties retaining the right to argue. RA72-75 There were also discussions of a stipulated range within the sentencing range of that plea. Id. At that time, codefendant Franco entered a plea of guilty to Second Degree Murder with Use of a Deadly Weapon, and he was set for sentencing. Id.

On September 26, 2019, the court held another status check regarding trial readiness. RA79. Appellant's counsel indicated that there was a discussion of a settlement conference and that the matter should negotiate. RA80-81. On December 5, 2019, the court held another status check regarding trial readiness. RA84. Appellant's counsel advised that she conveyed the offer to Appellant. RA85.

On March 16, 2020, a settlement conference took place between the parties, wherein the parties settled the matter. 1AA63-64; RA90. Later that day, Appellant entered a plea of guilty, pursuant to the Guilty Plea Agreement, to one count of:

Murder (Second Degree) With Use of A Deadly Weapon (Category A Felony - NRS 200.010, 200.030.2, 193.165 - NOC 50011). 1AA72-73, 79. The parties stipulated to recommend a sentence of fifteen (15) years to life in the Nevada Department of Corrections. 1AA79-80.

On June 22, 2020, Appellant filed a Motion for Appointment of Independent Counsel to Determine if Grounds Exists to Withdraw Plea. 1AA89. On July 2, 2020, the district court granted Appellant's Motion for Appointment. RA96-97. On July 9, 2020, Lucas Gaffney, Esq. confirmed as Appellant's counsel. RA98.

On August 25, 2020, Appellant filed, through counsel, a Motion to Withdraw Guilty Plea Agreement ("Motion"). 1AA92. On December 2, 2020, the State filed its Opposition. 1AA104. On January 12, 2021, Appellant filed her Reply. 2AA279. On January 15, 2021, the district court granted Appellant's request for an evidently hearing. RA99-100, 105-04.

On March 4, 2021, Appellant's evidentiary hearing began. 2AA293. At the end of the hearing, the district court continued the hearing for additional argument. Id. at 383-84. On April 16, 2021, the district court placed the matter under advisement after the second day of argument. 2AA385, 413. On March 28, 2021, the district court filed its Decision: Motion to withdraw Plea, wherein the district court denied Appellant's Motion. 2AA426-31.

On August 20, 2021, the district court adjudicated Appellant guilty pursuant to the guilty plea agreement and sentenced Appellant to: fifteen (15) years to life in the Nevada Department of Corrections ("NDOC"), with the court recommending substance abuse and mental health treatment while incarcerated. 2AA433-34. Appellant received one-thousand four-hundred-six (1406) days credit time served. Id. at 434. On August 24, 2021, the district court filed the Judgment of Conviction. Id. at 433.

On September 21, 2021, Appellant filed her Notice of Appeal. On February 10, 2022, Appellant filed her Opening Brief ("AOB").

STATEMENT OF THE FACTS

Facts Presented to the Grand Jury:

On October 10, 2017, Detective Jason McCarthy ("Det. McCarthy"), a member of the LVMPD Homicide team, was called out to a crime scene in the area of Cory and Soprano Street near Dexter Park. 1AA12-13, 26. There, Det. McCarthy discovered Jose Juan Garcia-Hernandez ("Jose") deceased. 1AA15-16, 20. Jose had abrasions to his face, hands, arms, and abdomen. 1AA15. Additionally, Jose had two stab wounds to his abdomen. Id. The wounds were determined to be fatal as they penetrated Jose's aorta. 1AA20.

Det. McCarthy noticed Jose did not have any wallet, cell phone, or personal items on him. 1AA17-18. Additionally, law enforcement could not locate any

vehicle belonging to Jose at the scene. 1AA18. Eventually, law enforcement found a white Pontiac several miles from the scene near the streets of Bruce and Flowmaster registered to Juan. 1AA22, 26-27. Law enforcement observed that the vehicle's interior had been burnt or someone had attempted to burn it. 1AA23-24.

During the investigation, Det. McCarthy interviewed Appellant. 1AA24. Appellant indicated that she was aware of the homicide and had known Jose for a little over a year. 1AA26. Appellant admitted that she had formulated a plan to meet Jose on the night of the 10th of October. Id. Jose wanted to go out to dinner and go dancing. Id.

After meeting up with Jose, Appellant brought Jose to an area near Dexter Park, where she and her Codefendants planned to rob him and take his money. Id. Once there, Appellant began to flirt and drink with Jose. 1AA27. While in the Pontiac, Appellant began unbuckling Jose's belt buckle. Id. At the same time, Appellant put her hands into Jose's pockets to get his wallet. Id. While Appellant was seducing/distracting Jose, her Codefendants arrived and began to beat and kick Jose. Id.

Appellant then fled the scene and was eventually picked up by someone in a red pickup. 1AA27-28. Later, law enforcement discovered that the red pickup truck was registered to the wife of Appellant's Codefendant, Andrew Henley ("Andrew"), Appellant's brother. 1AA28-29

Detective McCarthy interviewed Andrew. 1AA28-29. Andrew admitted that on the day of the murder, he drove someone in his red pickup to the Tiffany apartment complex. 1AA29. He and another person hopped a wall onto Soprano Street, where he and others confronted Jose. Id. Andrew admitted to beating the victim and observed others beating the victim. Id. Andrew observed others taking his wallet, cellphone, and Jose's vehicle, the white Pontiac. 1AA29. Andrew then left and went back to his red pickup and left the scene. 1AA30.

Detective McCarthy also interviewed Appellant's other Codefendant, Jose Melvin Franco ("Franco"). Id. Franco admitted that on the day of the murder, he was with someone else near Dexter Park. Id. While at Dexter Park, he observed Jose with someone. Id. Franco admitted he had been drinking and consuming some Xanax. Id.

However, 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. 1AA30-31. Franco then left the scene but did not acknowledge how he left. 1AA30.

Law enforcement never recovered Jose's stolen phone or wallet. 1AA31. Although, law enforcement did recover Jose's stolen white Pontiac. Id. However, Jose's work tools were missing from the vehicle. 1AA31-32. Later, law enforcement located Jose's work tools in an abandoned apartment next to Franco's residence. 1AA32.

Facts From Appellant's Evidentiary Hearing:

Ms. Browns Testimony

Mary Brown, Esq. represented Appellant from October 2017 to July 2020. 2AA300. While representing Appellant, Ms. Brown received multiple offers from the State and attempted to resolve the case. 2AA301. One of which was an offer made by Chief District Deputy Attorney Christopher Hamner, which contemplated a sentence of eleven (11) years to life in NDOC. Id. Ms. Brown and Mr. Karstedt, Ms. Brown's private investigator, conveyed the offer to Appellant while she was in Clark County Dentition Center ("CCDC"). 2AA302. Appellant rejected the offer indicating that she would not accept anything over ten (10) years on the bottom and did not want to top end of life. Id.

After Appellant rejected the prior offer, the State extended an offer of thirteen years (13) years to life in NDOC. 2AA302-03. Ms. Brown again discussed the offer with Appellant. 2AA303. Appellant rejected the offer, maintaining the offer was too high and that she was upset the offer went up instead of down. Id. Appellant also rejected the identical offer given to her Codefendant Franco; Murder (Second Degree) with Use of Deadly Weapon, State retains the right to argue. 2AA304.

In May 2019, the State revoked any pending offers based upon the discovery of a letter written by Appellant, intending to be sent to a potential witness. 2AA304. However, Ms. Brown continued to try and resolve the case. Id. Because of this, the

parties entered into a settlement conference. 2AA305. However, prior to the settlement conference, the State extended an additional offer of sixteen (16) to life. Id. Prior to the settlement conference, Ms. Brown advised Appellant that it would likely be the final opportunity to resolve the case short of trial. 2AA307.

On March 16, 2020, the settlement conference began. 1AA63-64; 2AA307. Ms. Brown indicated that Appellant did not have a specific memory of the thirteen (13) year to life offer but did have a specific memory of the eleven (11) year to life offer. 2AA307. Ultimately, due to the negotiations that lasted several hours, Appellant agreed to an offer of fifteen (15) years to life. 2AA307-08, 323.

Moreover, Ms. Brown testified Appellant's potential defense for trial would have been a duress defense. 2AA310. Appellant indicated to Ms. Brown that a possible witness incarcerated in CCDC would testify that Andrew forced Appellate to participate and eventually help murder Jose. 2AA310-11. In 2017, Ms. Brown directed Karstedt to interview the witness. Id. The witness's information was consistent with the statement Appellant provided to law enforcement. 2AA312-13.

SUMMARY OF THE ARGUMENT

The district court correctly denied Appellant's Motion to Withdraw Guilty Plea. The court's factual findings were supported by substantial evidence. Moreover, Appellant fails to demonstrate that the district court abused its discretion in denying her Motion; therefore, Appellant is not entitled to reversal of her conviction.

First, the record shows Ms. Brown relayed the State's offer of eleven (11) years to life and thirteen (13) years to life to Appellant. After contemplating the State's offers, Appellant rejected them because she did not want a life tail and she believed the minimum was too high.

Second, Appellant claims that she did not knowingly enter into the plea agreement because Ms. Brown failed to provide a full transcript of the defense witness interview is bare and naked and belied by the record. Here, Appellant knew of the witness and the witness would testify in support of her duress defense. Moreover, Appellant admits that she accepted the plea agreement primary because the State discovered a letter, penned by Appellant, asking for the father of her children to lie that Andrew forced her to commit the charges offenses against Jose. A such, her desired defense had little if no chance of succeeding at trial.

Third, the record contradicts Appellant's claim that she did not have enough time to contemplate the State's offer of 15-to-life. Appellant had nearly three years to contemplate the life tail component of the 15-to-life. Additionally, Appellant had months the contemplate the minimum end, as the offer going into the settlement conference was 16-to-life. Moreover, Appellant admits that she was not pressured into accepting the plea offer and declined to have more time to contemplate accepting the State's offer of 15-to-life. As such, the district court correctly denied

Appellant's Motion, as Appellant failed to demonstrate a fair and just reason for the district court to grant Appellant's Motion.

ARGUMENT

I. STANDARD OF REVIEW

In reviewing a denial of a motion to withdraw a guilty plea, this Court gives deference to the district court's factual findings as long as the record supports them. *See* Stevenson v. State, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015); *See also* Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001). Moreover, "The district court's factual finding, adjudging the credibility of the witnesses and the evidence, is entitled to deference on appeal and will not be overturned by this Court if supported by substantial evidence." Little v. Warden, 117 Nev. 845, 854, 34 P.3d 540, 546 (2001); *See generally* Brass v. State, 129 Nev. 527, 530, 306 P.3d 393, 395 (2013) (Acknowledging that "we are not a fact-finding court."); Mulder v. State, 116 Nev. 1, 15, 992 P.2d 845, 853 (2000) ("The trier of fact determines the weight and credibility to give conflicting testimony.")

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA

A guilty plea is presumptively valid. Wilson v. State, 99 Nev. 362, 373, 664 P.2d 328, 334 (1983). This Court has long held that a district court's determination regarding a motion to withdraw guilty plea before sentencing "is discretionary and will not be reversed unless there has been a clear abuse of that discretion." State v.

Second Judicial Dist. Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969); see also Johnson v. State, 123 Nev. 139, 144, 159 P.3d 1096, 1098 (2007) ("This court will not reverse a district court's determination concerning the validity of a plea absent a clear abuse of discretion."). That court described the granting of a motion to withdraw a guilty plea as "proper" for any substantial reason that is "fair and just." Id. (internal citation omitted).

In order to conduct its analysis, "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." Stevenson v. State, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015). However, the district court cannot "allow the solemn entry of a guilty plea to 'become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim.'" Id. at 605, 354 P.3d at 1282 (quoting United States v. Barker, 514 F.2d 208, 221 (1975)). Indeed, Nevada's stance on guilty plea agreements mirrors that of the Ninth Circuit Court of Appeals, which has declared, "[t]he guilty plea is not a placeholder that reserves [a defendant's] right to our criminal system's incentives for acceptance of responsibility unless or until a preferable alternative later arises . . . Once the plea is accepted, permitting withdrawal is, as it ought to be, the exception, not an automatic right." United States v. Ensminger, 567 F.3d 587, 593 (9th Cir. 2009).

Moreover, bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Appellant rests his appeal on three identically framed arguments, (A) the district court improperly weighed the testimony of Ms. Brown over Appellant regarding Ms. Brown conveying an eleven (11) years to life and thirteen (13) years to life plea offer to Appellant, (B) the district court abused its discretion by not finding Ms. Brown's failure to provide a full transcript of a witness interview would have bolstered Appellant's duress defense, and (C) that the district court improperly weighed the evidence regarding the length of time Appellant needed to accept the plea offer. AOB, at 15-16, 20-21, 24, 27.

However, after presiding over an evidentiary hearing for the above issues, the district court considered the totality of the circumstances and found that there was not a substantial reason to justify the extraordinary allowance of withdrawal of Appellant's guilty plea. 2AA at 251. A review of the record shows that the facts and circumstances support the district court's determination and belies Appellant's argument to the contrary. *Generally see* Fox v. First Western Sav. & Loan, 86 Nev. 469, 470 P.2d 424 (1970) (acknowledging that, as the reviewing court, this Court

extends substantial deference to the district court's witness credibility and weight of evidence determinations).

A. The District Court Correctly Found Ms. Brown Conveyed the Eleven to Life and Thirteen to Life Offers to Appellant

Appellant claims the "district court erroneously found Ms. Brown conveyed the offers" of eleven (11) to life and thirteenth (13) to life. However, Appellant does not provide any new factual circumstances that would warrant Appellant relief, nor does Appellant allege the district court neglected to look at the totality of circumstances when making its ruling. Instead, it seems, Appellant is requesting this Court to ignore the factual findings of the court below and engage in its own fact-finding mission.

Here, the district court held that Ms. Brown "advised Ms. Henley each of the offers conveyed by the State and that Ms. Henley rejected them." 2AA426. The record supports the district court's ruling. As early as November 15, 2018, the parties continued negotiations until the settlement conference. RA56-57; 1AA63-64; 2AA301-02. The State extended several offers, the first being an offer to eleven (11) years to life in NDOC. 2AA301. However, after Ms. Brown discussed the offer to Appellant, Appellant rejected it and indicated that she would not accept an offer above ten (10) years or anything with a life tail. 2AA302.

Appellant summarily rejected the State's second offer of thirteen (13) years to life in the same fashion. 2AA302-03. Again, Appellant objected to the offers being

too high and was upset the offer went up instead of down. Id. Moreover, Appellant's testimony at the evidentiary hearing supports Ms. Brown's testimony that Appellant rejected the initial offers of 11-to-life and 13-to-life. 2AA345. Specifically, Appellant testified that:

> **Defense Counsel:** I see. Okay.
> And you heard Ms. Brown testify that the State extended that 11 to life offer, I believe it was early -- after Mr. Hamner came on the case in 2018, had Ms. Brown conveyed that offer to you would you have accepted it at the time the State had extended it?
> **Appellant:** Before I got any offers, I told Mrs. Brown that I didn't want any life tail.
> **Defense Counsel:** Okay. So, if she had come to you with the 11 to life offer in 2018, is that an offer you would have accepted?
> **Appellant:** No.
> **Defense Counsel:** What about the 13 to life offer?
> **Appellant:** No.

2AA345.

Moreover, on cross-examination, Appellant testified that:

> **State:** Okay. And you were not going to accept an offer from 2018 -- or 2017 when the case started, leading up to the discovery of the letter, you wouldn't have taken any offer that included a life tail; correct?
> **Appellant:** Yes.
> **State:** Okay. And you made that pretty clear to Ms. Brown; fair?
> **Appellant:** Yes.
> **State:** Did you also make that clear to Mr. Brown?
> **Appellant:** Yes.
> **State:** Did you make that clear to Mr. Karstedt?
> **Appellant:** Yes.

> **State:** Okay. And so, there's no doubt from that time window, 2017 leading up to March of 2019, when that letter is discovered, you made clear to all of your defense attorneys and investigators that you would not take anything involving a life tail; is that correct?
> **Appellant:** Yes, sir.
> **State:** Okay. So even if a life tail was conveyed to you, you weren't going to take it; correct?
> **Appellant:** Correct.
> **State:** And I think that's -- that kind of mirrors exactly with what Ms. Brown had said, which was you really kind of focused on something less than that, more like a voluntary, maybe like an 8 to 20. Would that be accurate?
> **Appellant:** Yes.

2AA356-57.

In as far as Appellant is claiming that there is no reason the State would have withdrawn the earlier offers of 11-to-life and 13-to-life, appellant neglects to inform this Court that the State did withdraw its early offers based upon the discovery of a letter penned by Appellant. AOB17; 1AA53. Here, after the State extended the above offers, Appellant penned a letter directing the father of her children to fabricate a duress defense to help her get a better plea deal. 1AA236-37. In light of Appellant trying to game the system, the State withdrew all pending offers at that time. 1AA53-54.

Even so, Appellant's assertion now that she would have accepted the prior offer before the discovery of the letter is belied by the record. AOB17. Appellant, as quoted above, indicated that she would not have accepted any offer that included a life tail before the discovery of the letter. 2AA356-57.

Based upon the totality of circumstances, as described above, Ms. Brown continually relayed any offers made by the State to Appellant. Being upset with the life tail, Appellant rejected the offers. As such, Appellant penned a letter directing a possible defense witness to fabricate a duress defense to help Appellant get a better offer from the State. In reaction to this, the State revoked any pending offers.

Additionally, the district court correctly held that Appellant did not suffer any prejudice assuming Ms. Brown failed to convey the prior offers. 2AA426-27. Here, Appellant testified, at the evidentiary hearing, that she would not have accepted any offers that included a life tail before the letter's discovery. 2AA356-57.

Therefore, the district court's factual finding that Ms. Brown conveyed the 11-to-life and 13-to-life off to Appellant is supported by substantial evidence. Thus, this Court should affirm the district court's ruling on the instant claim.

B. The District Court Correctly Found That the Transcript of the Witness Interview Does Not Provide a Reasonable Likelihood That Appellant Would Have Asserted Her Right to Trial

Appellant engages in an extensive recitation of the facts without fully articulating an argument. AOB20-24. Appellant makes the assertion in a conclusory manner that the district court abused its discretion by not finding Ms. Brown's failure to provide a full transcript of the interview constituted a fair and just reason for Appellant to withdraw from her guilty plea agreement. AOB24. However, Appellant's assertion is bare and naked.

In any event, the district court did not abuse its discretion in denying Appellant's Motion. Here, the information contained in the transcript did not affect Appellant's decision to accept the 15-to-Life offer. Appellant knew of the existence of the witness well before the settlement conference. 2AA310-11. Moreover, Ms. Brown and Mr. Karstedt discussed at length "to [Appellant] . . . multiple times, detailing what the witness said" and how Andrew forced Appellate to participate in the murder of Jose. 2AA310-11. Thus, Appellant was aware of the information told to Ms. Brown and what the witness would testify to if Appellant decided to go to trial.

Moreover, on cross-examination during the evidentiary hearing, Appellant indicated that she was willing to engage in a settlement conference and ultimately accept the 15-to-life offer because the State discovered Appellant's letter. 2AA363-37. Specifically, Appellant testified that:

> **Appellant**: Based on my perspective of that letter, that I handwritten to Raphael, you told me how you felt about it and I decided that it was better to take the deal instead of going to trial because that was going to be your final decision.
> **State**: Right. Because isn't it true that letter is a pretty damaging letter; correct?
> Appellant: Yes.
> **State**: Okay. Because if your defense is -- and if your defense is, I'm being forced into this by Andrew and you're caught writing a letter telling another witness in the case to say that very same thing, that could be very damaging for the defense that you were going to take to trial; correct?

> **Appellant**: Right.
> **State**: Okay. And that was a factor that you thought about when you decided to enter your plea; correct?
> **Appellant**: Correct.
> **State**: Because the State did have this evidence in the form of this letter that directly attacked the very defense you wanted to use at trial; isn't that right?
> **Appellant**: Yes, sir.

2AA363-37. As indicated above, Appellant entered negotiations and plead guilty because the letter discovered by the State would have discredited Appellant's duress defense. This is contrary to Appellant's instant assertion that she would have gone to trial if she had received the transcripts from Ms. Brown's interview of the witness.

Additionally, based upon the above, the district court is correct to conclude that Appellant did not suffer any prejudice. 2AA428-29. Appellant knew of the exitance of the witness, the content of the interview, and decided to plead guilty because of the discovery of Appellant's letter to a potential witness asking him to lie about Andrew forcing Appellant into killing Jose. 1AA235-38; 2AA310-11.

Therefore, the district court did not abuse its discretion in denying Appellant's claim, as the court's findings are supported by substantial evidence. Thus, this Court should affirm the district court's ruling on the instant claim.

C. Appellant Freely, Knowingly, and Voluntarily, Entered Into the Guilty Plea Agreement

Appellant claims she did not freely and voluntarily enter into her guilty plea agreement because Appellant did not have enough time to contemplate the offer.

However, the district court correctly determined Appellant did have enough time to contemplate the offer and that Appellant freely, knowingly, and voluntarily entered into the guilty plea agreement. 2AA429-30.

Under NRS 176.165, after sentencing, a defendant's guilty plea can only be withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394. Additionally, a plea of guilty is presumptively valid, and the burden is on the defendant to show defendant did not voluntarily enter into the plea. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citation omitted). A district court may grant a presentence motion to withdraw a guilty plea for any "substantial reason" if it is "fair and just." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); *see also* NRS 176.165.

To determine whether a guilty plea was voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. Under Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983), a proper plea canvass should reflect that:

> [T]he defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; (3) the defendant understood the consequences of his plea and the range of punishments; and (4) the defendant understood the nature of the charge, i.e., the elements of the crime.

Additionally, the presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107, 107 (1975).

This standard requires the court accepting the plea to personally address the defendant when he enters his plea to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not rely simply on a written plea agreement without some verbal interaction with a defendant. Id. Thus, a "colloquy" is constitutionally mandated, and a "colloquy" is but a conversation in a formal setting, such as that occurring between an official sitting in judgment of an accused at plea. See id. However, the court need not conduct a ritualistic oral canvass. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases," but only that the record demonstrates a defendant entered his guilty plea understandingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973); *see also* Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct. 1463, 1470 (1970).

Appellant claims she was given anywhere between two to thirty minutes to accept or reject the State's offer of 15-to-life. AOB25. However, the record belies Appellant's claim. Here, Appellant started negotiating with the State in November 2018. 2AA301. All the offers from November 2018 up to the settlement conference,

except one, included a stipulated life tail. 2AA301-05. As such, Appellant had three years to contemplate accepting a plea agreement that included a life tail.

Moreover, months prior to the start of the settlement conference, Appellant knew of the State's pending offer of 16-to-life. 2AA305, 320. During the settlement conference, the State reduced the bottom end from sixteen (16) to fifteen (15). 2AA322. During the evidentiary hearing, Ms. Brown indicated that Appellant had several hours to contemplate accepting the fifteen (15) year bottom end. 2AA322-23. Specifically, Ms. Brown testified:

> **State**: [audio distortion] about 15 minutes, I think you had mentioned there was maybe about 15 minutes during the settlement conference where she was mulling taking the offer, I think you said that on direct examination; is that correct?
> **Brown**: I said that I thought that that was the maximum from the time that you made the offer to the time that you went and got the paperwork. But there were discussions -- I mean the settlement conference was extremely long.
> **State**: Right. And it went for several hours; isn't that correct?
> **Brown**: Yes.
> **State**: And in that conference it wasn't just a meeting where I'm in the room the entire time, there were large amounts, hours, where you sat
> with a judge, with not me in the room, where you guys discussed the merits or the values of potentially settling the case; is that correct?
> **Brown**: Correct.
> **State**: And then I came back into the room and I was asked to bring down the offer, which the State did; is that correct?
> **Brown**: Yes.

> **State**: And then after some talking she ultimately decided to take that offer; is that correct?
> **Brown**: Yeah, because – I had wanted 14 because I thought she should get less than Jose Franco.

2AA323.

As shown above, Appellant had a significant amount of time contemplating accepting or rejecting the State's offer. Moreover, the State's offer did not drastically deviate from the past offers. As such, Appellant had sufficient time to contemplate accepting the 15-to-life offer.

Moreover, as argued *supra*, Appellant knew the information that her potential witness provided. 2AA310-11. As such, the record belies Appellant's assertion that she hastily decided on the plea agreement "without . . . knowing her defense would" have been "bolstered by the witness' statement." AOB26.

In any event, on October 7, 2020, the district court canvassed Appellant wherein Appellant pled guilty. At no time did Appellant indicate that she did not want to go forward with the plea to have more time to contemplate the offer. Specifically, the district court canvassed:

> **Court**: Okay, ma'am, I understand that you – both of your counsel went through the -- went through a settlement conference this afternoon with Judge Bell; is that correct?
> **Appellant**: Yes, Your Honor.
> **Court**: And did you enter into that conference freely and voluntarily?
> **Appellant**: Yes, sir.
> **Court**: And are you satisfied with the results of that settlement conference?

Appellant: Yes, Your Honor.

. . .

Court: Before I can accept your plea of guilty, I must make sure it is freely and voluntarily entered. Has anyone forced you to plead guilty?

Appellant: No, sir.

Court: Has anyone threatened you or anyone closely associated with you in order to get you to plead guilty?

Appellant: No, sir.

. . .

Court: Ma'am, did anyone -- now, I do see here in the guilty plea agreement, it says both parties stipulate to a term of 15 years to life in the Nevada Department of Corrections. Do you understand that, ma'am?

Appellant: Yes, Your Honor.

. . .

Court: And, ma'am, in this particular case, it seems like which has been going since 2017, have your attorneys had the opportunity to go over the evidence in this case that's against you, for example, police reports, and witness statements, any forensic tests, photographs, video tapes, et cetera?

Appellant: Yes, Your Honor.

Court: And has your attorneys discussed with you any potential defenses that you might have for this case?

Appellant: Yes, Your Honor.

Court: Have your attorneys answered all of your questions?

Appellant: Yes.

. . .

Court: Did your attorneys recommend that you accept these negotiations?

Appellant: Yes, Your Honor.

Court: Okay. And you -- but you understand it's still up to you whether or not you accept the negotiations?

Appellant: I accept.

Court: Okay. And you understand that whether or not your attorneys have recommended that you take these negotiations, you still have the right to go to trial on the original charges. Do you understand that?

> **Appellant**: Yes, Your Honor, I do.
> **Court**: Before we go any further, do you have any additional questions for your attorneys?
> **Appellant**: No. I'd just like to thank them.
> **Court**: Do you have any questions for me?
> Appellant: No.
> **Court**: *Ma'am, do you understand that I will not allow anyone to rush you into accepting these negotiations?*
> **Appellant**: *Yes, Your Honor*.
> **Court**: Okay. And, ma'am, based upon the discussion with your attorneys and the negotiations, have you determined that it is your belief that accepting these negotiations are in your best interest?
> **Appellant**: Yes, Your Honor.

1AA67-76. (emphasis added)

As indicated above, the district court specifically inquired if Appellant was giving her plea freely and voluntarily. Id. Appellant replied in the affirmative while failing to claim she needed more time to complete the offer. Id. Moreover, the district court specifically inquired if she needed more time to contemplate the negotiations. Id. However, Appellant replied in the negative and again failed to indicate to the court that she needed more time to review the plea offer. Id.

Therefore, the district court did not abuse its direction in denying Appellant's claim, as the court's findings are supported by substantial evidence. Thus, this Court should affirm the district court's ruling on the instant claim.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM Appellant's Judgment of Conviction in this case.

Dated this 9th day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 5,846 words and 25 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of March, 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 9th day of March, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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