IN THE SUPREME COURT OF THE STATE OF NEVADA

LEQUANA BROWN, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 84042

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals because it relates to a post-conviction appeal of a non-category 'A' felony. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by finding that Appellant failed to demonstrate "manifest justice" warranting withdrawal of her guilty plea.
2. Whether the district court erred by finding that counsel did not provide ineffective assistance of counsel.

STATEMENT OF THE CASE

On October 17, 2019, Lequana Brown, aka Lequana Leatrice Brown (hereinafter "Appellant") was charged by way of Indictment with two (2) counts of Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480), two (2) counts of Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165), two (2) counts of Burglary (Category B Felony – NRS 205.060), one (1) count of Grand Larceny (Category C Felony – NRS 205.220.1, 205.222.2), and one (1) count of Obtaining and Using Personal Identifying Information of Another (Category C Felony – NRS 205.463) for actions committed on or between June 4, 2019 and June 23, 2019. I AA 102-106.

On March 12, 2020, represented by Carl Arnold, Esq., Appellant pled guilty, pursuant to a Guilty Plea Agreement (hereinafter "GPA"), to one (1) count of Robbery with Use of a Deadly Weapon. I AA 147-89. Contemporaneous with the GPA, the State filed an Amended Indictment reflecting the single count to which Appellant pled guilty. I AA 196-97. Pursuant to the GPA, Appellant agreed to plead guilty to Robbery in a separate case, and the parties stipulated that Appellant would receive sentences of four (4) to ten (10) years on each count, consecutive to each other. I AA 190.

On April 30, 2020, Appellant represented that she wished to withdraw her plea and requested alternate counsel be appointed. I AA 202-05. The Court granted

Appellant's Motion to Appoint Alternate Counsel, and Mr. Arnold was removed as counsel. I AA 202-05. On May 7, 2020, Matthew Lay, Esq., was appointed. Rochelle Nguyen, Esq (hereinafter "Counsel"), associated with Mr. Lay, primarily represented Appellant. I AA 206-09.

On June 4, 2020, Counsel represented that she had spoken with Appellant and Appellant no longer wished to withdraw her plea and wished to be sentenced. I AA 214. On June 11, 2020, Appellant's sentencing was continued to amend the GPA because Counsel noticed the GPA did not include another case that was to be dismissed pursuant to negotiations. I AA 217-33.

On June 17, 2020, Appellant executed an Amended GPA, with the amendment being that the State agreed to dismiss a separate case against Appellant after rendition of sentence in the instant underlying case. I AA 235. On June 18, 2020, the Court canvassed Appellant regarding the Amended GPA and accepted Appellant's guilty plea. II AA 245-56. The Court thereafter sentenced Appellant to two (2) to five (5) years in the Nevada Department of Corrections (hereinafter "NDOC") for Robbery, with a consecutive two (2) to five (5) years for Use of a Deadly Weapon. II AA 256-65. Appellant received three hundred fifty-eight (358) days of credit for time served. II AA 257.

Appellant's Judgment of Conviction was filed on June 22, 2020. II AA 266-67.

Appellant did not file a direct appeal. II AA 417. On October 29, 2020, Appellant filed a Petition for Writ of Habeas Corpus (hereinafter "Petition"). II AA 268. Appellant included in her filed Petition a Motion for Appointment of Counsel. II AA 284. The State filed its Response to Appellant's Petition and Motion on December 17, 2020. II AA 294. On February 25, 2021, the Court granted Appellant's Motion for Appointment of Counsel. II AA 307. On March 9, Steven Owens, Esq. confirmed as counsel. II AA 308.

On June 14, 2021, Appellant filed a Supplemental Brief in Support of Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supplemental Petition"). II AA 312. The State responded on July 29, 2021. II AA 323. Appellant filed a reply on August 16, 2021. II AA 339. On August 26, 2021, this district court heard argument on the Petition and ordered an evidentiary hearing as to Appellant's plea when she was represented by attorneys Matthew Lay and Rochelle Nguyen. II AA 346. The evidentiary hearing was conducted on November 4, 2021, wherein this Court denied the Petition and Supplemental Petition. II AA 351, 411. The Findings of Fact, Conclusions of Law and Order was filed on January 3, 2022. II AA 415.

On January 3, 2022, Appellant filed a Notice of Appeal.

STATEMENT OF THE FACTS

The Court relied on the following factual synopsis when sentencing Appellant:

On June 23, 2019, officers learned of the following events from the victim and other employees of Big 5. They stated the co-defendant, Sarah Gonzalez, started shopping for various clothing items. Shortly after, defendant, Lequana Brown, entered the store with a canvas shopping bag and began selecting various shoes and other items. Store employee #1 attempted to help Ms. Gonzalez; however, she stated that she did not need help. Employee #1 noted Ms. Gonzalez and Ms. Brown began interacting with each other and that they were associated with one another. Ms. Brown told the employee she just won money and was engaging in some spending. Ms. Gonzalez then came to the register where employee #2 was ringing up her transaction.

As employee #1 was ringing up Ms. Brown's items, she told employee #2 she was in a hurry and needed to have her items rung up. Ms. Gonzalez then told employee #2 to ring all the items up on the same bill so that she and Ms. Brown can check out together. As employee #2 rung up the merchandize [sic], he set the bags behind the counter to prevent either defendant from walking out of the store before paying. Ms. Brown and Ms. Gonzalez drank PowerAid that was from the stores [sic] coolers and left them unfinished at the register.

Ms. Brown told employee #3 she wanted to look at the shoes to make sure they were the right sizes. Employee #2 became suspicious and showed the shoes to her without allowing her to take control of the property. Ms. Brown complained and requested employee #1 finish the transaction. As employee #1 began re-ringing all the items, the bags were set on the counter. Prior to the items being paid for, Ms. Gonzalez told him she also wanted to buy a pellet gun and the items were brought back inside Big 5. An additional co-defendant, identified as Mark Anthony Fink, aka, Mark Anthony Finks Jr, entered the store following Ms. Gonzalez and the victim. He then asked the victim if he could look at the pellet/BB guns. The victim and employee #2 showed Mr. Finks some of the guns until he chose a display model. Employee #2 put

the gun and pellets into a plastic bag and the victim took the items to the register.

Once at the register, Mr. Finks and Ms. Gonzalez gathered a few items that were rung up and exited the store, without paying, with Ms. Brown following behind them. The victim yelled at the defendant to stop; however, Ms. Brown threw a debit card, that was not in her name, at him saying "here take this. [sic] The victim saw the defendants in a vehicle along with a fourth person. The victim attempted to retrieve one of the bags of property from Ms. Brown who was in the driver's side rear passenger. Mr. Finks pulled a gun on the victim which caused him to let go and the vehicle fled. Employee #1 noted the license plate while the victim called emergency services. The officers were informed a total $2,251.91 worth of merchandise was stolen.

During the officer's investigation, the victim provided them with surveillance and the PowerAde drink bottles that were left. One of the officers located the vehicle used and noted Mr. Fink was in the driver's seat. A second male was handing shoes to a child who was trying them on. They then saw Ms. Gonzalez enter the passenger side. While they were arresting Ms. Gonzalez, she stated she had a gun in her bra and that Ms. Brown was in apartment 311. Additionally, officers observed Big 5 bags in the vehicle. The officers were able to recover $481.34 worth of merchandise.

Officers went up to the third floor to locate Ms. Brorvn who was in the apartment; however. she was using an alias of Mia Jones. The stolen items recovered were retumed to Big 5. After being transported to the Las Vegas Metropolitan Police Department Headquarlers, Ms. Brown was interviewed. She admitted she was the person at Big 5 and knew the other defendants. She observed Ms. Gonzalez and Mr. Finks nearby and entered the vehicle to go to Big 5 due to Ms. Gonzalez stating she had coupons. Once in the store, Ms. Brown picked out several shirts and handed them to Ms. Gonzalez who then began bagging up a large amount of clothing, along with the other

> merchandise before proceeding past all points of entry. Ms. Brown followed Mr. Finks out of the store and the employees followed after them. Mr. Finks then pointed a handgun at the employees. She admitted she never attempted to pay for the items she gave Ms. Gonzalez, nor did she make any attempts to notify police of lhe crime. Additionally, Ms. Brown admitted she was involved in another robbery of a Champs store on June 4, 2019, after being shown surveillance of that incident. When the officers interviewed Mr. Finks, he admitted he pointed a gun at the victim and told him to get the fuck away from the car due to him pulling on Ms. Brown. Ms. Gonzalez stated Ms. Brown told her she could pick out whatever she wanted, and she would pay for it. She stated she had a feeling Ms. Brown was going to use a fake check and a debit card that would not work to pay for the items. When the commotion started at the car, Ms. Gonzalez stated that Ms. Brown told Mr. Finks to just drive.

Presentence Investigation Report, at 8-9.

SUMMARY OF THE ARGUMENT

First, the district court correctly exercised its discretion in denying Appellant's claim due to his inability to demonstrate "manifest injustice." The terms of the negotiations were clearly stated to Appellant. The record shows that after Appellant declined to move forward with the plea, she requested to continue negotiations. At no point did the State, the district court, or Appellant's counsel apply "undue pressure" on Appellant to accept the plea. Furthermore, Appellant's claims regarding counsel signing for her and not being able to acquire a copy of the GPA due to COVID-19 protocols somehow place pressure upon her to accept the

plea. Accordingly, Appellant failed to establish "manifest injustice." As such, this Court should affirm the district court's ruling.

Second, the district court did not err in denying Appellant's ineffective assistance of counsel claim. The record is very clear that counsel thoroughly reviewed Appellant's case. She then spoke with Appellant on multiple occasions, for multiple hours, to explain her available options. Furthermore, in her guilty plea agreement, Appellant agreed that counsel answered all her questions and that she was satisfied with the services provided by her attorney. Ultimately, with full knowledge of the consequences, Appellant decided to forgo withdrawing her plea. This is precisely the type of decision left for a defendant to determine. Accordingly, Appellant failed to establish ineffective assistance of counsel. Thus, this Court should affirm the district court's denial of Appellant's Petition and Supplemental Petition.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT APPELLANT FAILED TO DEMONSTRATE MANIFEST INJUSTICE

This Court "will not overturn the district court's determination on manifest injustice 'absent a clear showing of an abuse of discretion." Rubio v. State, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008) (quoting Barajas v. State, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999)). Pursuant to 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). The law in Nevada establishes that a plea of guilty is presumptively valid, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

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. 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.

Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)). 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 at the time he enters his plea in order 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. 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).

In this case, Appellant alleges that the circumstances surrounding her entry of plea constitute "manifest injustice," such that she should be allowed to withdraw her guilty plea. Opening Brief, at 8-13. Each of Appellant's proposed qualms with her underlying case are expressly belied by the record and cannot entitle Appellant to relief. See Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) ("bare" and "naked" allegations are not sufficient for relief, nor are allegations belied and repelled by the record). While Appellant represents simply that the initial offer in Appellant's case "were eventually revoked on December 5, 2019," the record demonstrates clearly that on November 19, 2019, the State placed the offer on the

record, and advised all parties that the offer would expire on December 5, 2019. I AA 118. Appellant rejected that offer, and therefore the State withdrew it.

Thereafter, on January 3, 2020, Appellant rejected negotiations yet again; however, the transcript of that proceeding provides context, which is not at all "confusing," as Appellant entreats this Court to believe. Opening Brief, at 10. To begin, Appellant's claim that contingent negotiations, based on Appellant's procurement of house arrest, occurred is patently false. At the January 3, 2020, hearing, Appellant made an oral request for release on house arrest or electronic monitoring, providing the following explanation:

> If I could get the ankle monitor to get my affairs in order and pack up my house and put stuff in storage and I'm willing to sign for the deal today and then come back for sentencing, if that's not the case I feel like I'm losing everything so I might as well just go to trial and just [indiscernible].

I AA 137. However, the district court rejected Appellant's request, explaining that such requests must be made in writing, and explaining:

> I don't want anyone to enter negotiations just to get out of custody because then people come back and say, well, I only did it just to get out of custody. I didn't really mean it. I didn't do it. I was pressured, coerced into entering the negotiations. So, I don't allow that to occur. I mean if you're going to plead guilty, if you're taking responsibility, that's fine. If you don't want to take responsibility, then that's fine as well. Then we go to trial on all the charges. So, I don't want you – like I said, it – I'm not going to have my hands tied to say I'll only take a

> deal if you let me out today. That – I'm not – I don't work that way.

I AA 138. Having been unsuccessful in her attempt, Appellant reneged on the agreed-upon plea agreement. I AA 139. Therefore, the record demonstrates that release from custody was *Appellant's* condition – not a term of negotiations – and therefore is completely irrelevant to Appellant's claim of manifest injustice.

While Appellant attempts to frame the re-opening of plea negotiations as "confusing," the circumstances of those negotiations were placed on the record at the January 3, 2020, hearing:

> [STATE]: The offers that are currently on the table today have already been revoked previously. When *Mr. Arnold told us that Ms. Brown was interested in the offer*, since I was going to be out of town next week for my honeymoon, I decided to re-extend that offer just for this instant based upon the circumstances, but if the offers aren't being entered into today it will again be revoked.

I AA 141 (emphasis added). Therefore, the record makes clear that *Appellant* came back to the negotiating table and initiated discussions; as such, there is nothing "manifestly unjust" about the State being willing to engage with *Appellant's request*.

Appellant also incorrectly frames the State's filing of a Notice of Intent to Seek Punishment as a Habitual Criminal as intended "[t]o punish Brown." Opening Brief, at 11. However, Appellant points to nothing in the record to support her claim of some nefarious purpose. See id. Rather, a review of that Notice shows that the

convictions to which the State referred were from California.[1] I AA 145-46. Thus, it is more likely that the State was simply waiting for those certified judgments, and confirming the status of potential negotiations, before proceeding with filing such a notice because it appeared the case was proceeding to trial.

Appellant further asserts that the State placed undue pressure on Appellant by claiming that the State would not give Appellant time to contemplate an offer. Opening Brief, at 11. However, the transcript of the entry of plea hearing on March 12, 2020, belies Appellant's assertion. The beginning of that hearing demonstrates that Appellant's counsel indicated that Appellant was ready to proceed with negotiations. I AA 148-49. However, Appellant requested additional time to "think about it." I AA 150. Thereafter, the State explained its situation:

> Your Honor, at this point, the State's going to revoke the offer. We have a pre-trial at 2:00 o'clock, We've already pre-trialed several people. If she wants to take it now, like I told Mr. Arnold earlier, she can have it now, otherwise it's going to be revoked and there won't be any other offers made.

I AA 150. The district court proceeded to assure Appellant that it was not biased between a plea or trial but did note Appellant's back-and-forth throughout the

[1] Appellant also submits that the State filed its Notice "despite one of the priors being for drugs." Opening Brief, at 11. However, Appellant does not challenge the habitual criminal statute, nor does she suggest that her drug conviction did not expressly qualify under that statute. See id.; see also NRS 207.010(1)(a) (including "[a]ny felony"). Therefore, this aside is irrelevant to Appellant's claim of manifest injustice.

proceedings. I AA 151-52. Thereafter, Appellant changed her decision and decided to proceed with the guilty plea:

> THE COURT: Okay, you have a right to go to trial. I will not rush you into negotiations.
> DEFENDANT BROWN: Well, when I was –
> THE COURT: If you don't want them that's –
> DEFENDANT BROWN: -- here last time and I said I needed time you asked me, you asked me [emphasis added] –
> THE COURT: Okay, do you want to accept this negotiation?
> DEFENDANT BROWN: Yes.
> THE COURT: Okay. Are you absolutely certain?
> DEFENDANT BROWN: Yeah.
> THE COURT: Is that a yes?
> DEFENDANT BROWN: Yes.

I AA 152.

During that March 12, 2020, plea canvass, the issue regarding the "deadly weapon" charge arose. I AA 156. However, the parties agreed to modify negotiations so that Appellant would only be pleading to the use of a deadly weapon in a single case. I AA 157-58. After the parties had agreed to modify negotiations, the district court had proceeded, yet again, with a plea canvass, Appellant began to quibble about the *second* deadly weapon charge. I AA 159. However, the district court explained to Appellant how that charge could apply to her:

> THE COURT: Were you working with these people to steal things?

> DEFENDANT BROWN: Yes.
> THE COURT: Okay. Do you – because as an aider and abettor, you understand that you're liable for everything they do and they're liable for what you do as well as part of the conspiracy to commit this crime? Do you understand that?
> DEFENDANT BROWN: Yeah.

I AA 160. Before the district court took a recess to allow the State to make the modifications, the court asked a final time if Appellant was certain of her decision:

> THE COURT: Okay, are you going to enter these pleas today, ma'am? I don't have time to play games here. They'll redo the paperwork. They're only going to allege a robbery here, robbery with use in the other case, 4 to 10 on each case, consecutive. Do you understand that?
>
> DEFENDANT BROWN: Yes.
>
> THE COURT: Do you want to go forward? It's not Mr. Arnold's decision, its [sic] not mine, its [sic] yours.
>
> DEFENDANT BROWN: Yes.
>
> THE COURT: Are you sure?
>
> DEFENDANT BROWN: Yes.
>
> THE COURT: Okay. They're going to get the paperwork fixed and then Mr. Arnold will go over those again with you. And if not, like I said, I'm ready for trial Monday on 19 charges and if you're found guilty I'll sentence you on 19. If you're found guilty on one, I'll sentence you on one, or any combination thereof. If you're found not guilty, then you walk out the door. Do you understand that?
>
> DEFENDANT BROWN: Yeah.

I AA 160-61. Therefore, the district court did *not* "express frustration" as Appellant seeks now to represent – instead, it was making sure the situation was clear, so that the matter could progress (whether to trial or to a guilty plea). As such, there was nothing "manifestly unjust" about this exchange.

Appellant concludes her analysis of the March 12, 2020, hearing by asserting that she was "pressured by her attorney and the judge." Supplemental Brief, at 12. This assertion is belied by the transcript of the plea canvass. When the district court asked Appellant to confirm the factual basis for her plea, Appellant equivocated. I AA 165. Appellant's attorney then submitted that there was video evidence that Appellant had "used her forearm to move [a clerk] out of the way to get out the door." I AA 165-66. When asked to confirm that submission, Appellant agreed. I AA 166. However, Appellant disagreed that her action constituted force. I AA 166. The district court then attempted to clarify the situation and specify which facts Appellant would admit. I AA 166-68. The State then offered that Appellant had told the clerk to "back off, or you know, I'll stab you, or something like that, and that was the threat or force that was used in this case…" I AA 168-69. After Appellant again equivocated, the district court ended its canvass and intended to proceed to trial. I AA 169-70. Again, *Appellant's counsel* called the district court back to proceed with the plea. I AA 170. Appellant then admitted to the factual basis of the charge:

> THE COURT: What did you do? Did you walk out, have a nice day, hug your kids? Did you see the TV show last night? Was that the conversation you had with this clerk?
> . . .
> MR. ARNOLD: What force did you use –
> THE COURT: Or fear?
> MR. ARNOLD: -- to get out of there?
> DEFENDANT BROWN: I used force.
> THE COURT: How?
> DEFENDANT BROWN: I told her if she touched me – I said if she touched me when she come I'll beat her ass. That's what –
> THE COURT: Okay, isn't that sort of scaring someone, putting them in fear?
> DEFENDANT BROWN: Yes.
> THE COURT: Are you sure you did that?
> DEFENDANT BROWN: Yes.

I AA 170-71. While *co-defendant's counsel* may have interjected something to which Appellant did not agree,[2] the transcript shows that Appellant volunteered this element of robbery, without any coercion whatsoever. I AA 171. Because the context shows that the district court and Appellant's counsel each *clarified* the elements of the crime with which Appellant was charged, and because Appellant failed to offer any specific instance of pressure or coercion, this assertion likewise failed to meet Appellant's burden.

Appellant next raises concerns about the Amended GPA, asserting that it was filed "without first withdrawing from the prior plea or agreement" and that it was

[2] I AA 171

"signed by counsel Nguyen rather than by Brown herself." Opening Brief, at 12. Appellant also raises her representation at her entry of plea that "she had not received a copy of the amended guilty plea agreement. Opening Brief, at 12-13. However, these claims are easily dispensed with, as the record refutes each claim. First, the transcript of the hearing on June 16, 2020, shows that that the extraneous Henderson case had been contemplated as part of the original plea agreement, and that the GPA was amended simply "for clarity and conformity." I AA 228. Appellant affirmed her understanding of the clerical change. I AA 231. Thus, because the GPA was amended for a *clerical* change, and did not substantively change the negotiations, there was no "manifest injustice" in the district court proceeding with the Amended GPA.

Likewise, there is no "manifest injustice" to Appellant's counsel having signed the Amended GPA, as the practice was mandated by COVID-19 procedures, and because the signature was affixed at Appellant's direction. As the district court recognized:

> [I]n Administrative Order 20-10, the Chief Judge set out that a "guilty plea shall be signed by counsel in the following manner: 'Signature affixed by (insert name of defense counsel) at the direction of (insert name of defendant).

II AA 426. Moreover, Appellant specifically affirmed that she authorized counsel to sign on her behalf. II AA 250. Therefore, Appellant cannot point to the signature on the Amended GPA as warranting relief.

Finally, there was no "manifest injustice" from Appellant's lack of possession of a physical copy of her Amended GPA prior to her plea canvass. When Appellant indicated that she had not yet received such a copy, counsel indicated that she had left one with CCDC, but that the COVID-19 protocols were making it difficult for physical copies to get to inmates. II AA 247-48. Counsel also made clear that she had reviewed the Amended GPA "word for word" with Appellant. II AA 253. The district court verified that with Appellant:

> THE COURT: Is that correct, Ms. Brown?
> DEFENDANT BROWN: Yes.
> THE COURT: She read everything to you?
> DEFENDANT BROWN: Yes, she did.
> THE COURT: Do you wish to go forward today?
> DEFENDANT BROWN: Yes.

II AA 248. The district court later reaffirmed counsel's review of the Amended GPA:

> THE COURT: …again we had previously mentioned that she did read the entire Guilty Plea Agreement to you; is that correct, ma'am?
> DEFENDANT BROWN: Yes.

II AA 250. Therefore, because the district court simply wanted Appellant to have copies to prevent any misunderstandings, and because Appellant had affirmed that she had been read – and had no questions about – the Amended GPA, there was no "manifest injustice" from Appellant's lack of possession of a physical copy.

In sum, Appellant failed to demonstrate manifest injustice. Accordingly, the district court correctly exercised its discretion and denied Appellant's claim. Thus, this Court should affirm the district court's ruling.

II. THE DISTRICT COURT DID NOT ERR BY FINDING THAT COUNSEL DID NOT PROVIDE INEFFECTIVE ASSISTANCE OF COUNSEL

This Court reviews "a claim of ineffective assistance of counsel de novo, as a mixed question of law and fact." Rubio, 124 Nev. at 1039, 194 P.3d at 1229. However, this Court gives deference to a district court's factual findings in habeas matters "if not clearly erroneous and supported by substantial evidence." Rubio v. State, 124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008). "Under the *de novo* standard of review, [the reviewing court does] not refer to the lower court's ruling but freely consider[s] the matter anew, as if no decision had been rendered below." U.S. v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988).

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the

same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have *insisted* on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

In this case, Appellant claims counsel's representation fell below an objective standard of reasonableness due to not having enough time to review the file and "talking their client back into accepting basically the same negotiation that Brown had already repeatedly rejected." Opening Brief, at 16. Here, Appellant initially pled guilty, but then requested new counsel be appointed to investigate withdrawing Appellant's plea. I AA 202-05. New counsel was confirmed on May 7, 2020. I AA 206-09. Even before speaking with Appellant, counsel began to review her file:

> Q: Very good. Do you remember anything about her interactions with Mr. Arnold that caused him to be withdrawn as counsel?

> A: Prior to my appointment and prior to speaking with her, you could tell from the court records that she had questions even during the plea, just from the minute. I saw some minutes that indicated that she would only take a deal if there was house arrest and the Judge, even in the minutes, said something about how he wasn't going to let her take a deal just to get out of custody.

II AA 355. After reviewing her file, counsel spoke with Appellant regarding what previously occurred in the case. II AA 356-57. Afterwards, counsel spoke with Appellant on multiple occasions regarding the plea and what her options were:

> A: I spoke with Ms. Brown on several occasions.
> . . .
> So, I did talk to her several times over the telephone. Probably multiple hours, honestly, if I'm being honest. I obviously got some information about her communication with Mr. Arnold. My first intent when I talked to her was – how could we seek to withdraw her plea? What kind of ineffective assistance of counsel claims did we have against Mr. Arnold? Which I honestly believe that they did exist. And I was prepared to go forward filing that motion to withdraw a plea.

II AA 358. During these conversations, counsel explained the ramifications of withdrawing a plea:

> A: I did talk to her about what it meant to withdraw her plea because I thought it was very important for her to have that full understanding that withdrawing her plea and if she was successful, she would have to go to trial on all of the pending charges which were quite voluminous. And so, while she may not have received effective assistance of counsel from her prior attorney, I wanted to make sure that we went over all of her facts and details surrounding her case.

> Going forward, if she was successful in withdrawing her plea, to see in fact if she wanted to withdraw her plea. So, we did have those conversations. And at the end of those conversations, it was clear that while she may not have had her questions answered by her prior attorney, that I had answered all of her questions going forward and that she still wanted to accept a negotiation because it was still in her best interest to go forward with the plea negotiation now that she understood all the facts and circumstances, if that makes sense.

II AA 358. At no point in the conversation, did counsel attempt to convince Appellant to not withdraw her plea:

> Q: Considering the size of the cases involved, the number of counts and different incidents involved, do you feel like you had enough time to really get up to speed with the case before you talked to her out of withdrawing the plea and proceeding with basically the same plea agreement again?
> A: Well, I didn't talk her out of withdrawing her plea. I just explained to her her [sic] options. I wanted to make sure that she was having all of the information before her before making a decision.
> In talking with her it was super clear the Mr. Arnold had not had that level of communication prior to my appointment, either when the initial offer was accepted -- or rejected, that the 6 to 15 that you referenced. You know, I did see from the history with Mr. Arnold that it had gone back and forth and the offer had gotten worse as they had proceeded through the process. By the time I was, you know, appointed to represent Ms. Brown -- habitual notice had already been filed. The offer had previously been rejected. Her plea was there and I wanted to make sure she had all of that information.

II AA 360-61. Counsel then read the entire guilty plea agreement to Appellant:

> A: [A]nd – but furthermore, I remember going specifically line for line with Ms. Brown. I know that she was coming from a position where she had poor representation or inadequate representation and communication from Mr. Arnold, so I wanted to make sure that I went over everything extremely, like thoroughly with her.

II AA 363.

Additionally, in her guilty plea agreement, Appellant agreed that she discussed the case with counsel and was satisfied with her services:

> I have discussed the elements of all the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
> . . .
> I have discussed with my attorney any possible defenses, defense strategies, and circumstances which might be in my favor.
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.
> . . .
> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promised of leniency, except for those set forth in this agreement.
> . . .
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

I AA 239.

At the status check on Appellant's plea withdrawal, counsel represented that she had spoken with Appellant, and that Appellant was instead "prepared to go

forward with sentencing." I AA 214. Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendants. Rhyne, 118 Nev. at 8, 38 P.3d at 163. According to Counsel's testimony, she reviewed the record and advised Appellant of her options. Appellant chose to continue with the plea agreement with full knowledge of the consequences. Counsel fulfilled their obligations to advise Appellant. Accordingly, Counsel's excellent representation fell within an objective standard of reasonableness.

Furthermore, on June 16, 2020, the district court confirmed with Appellant that she no longer wished to withdraw her plea but wished "to go forward with the negotiations for [her] two cases." I AA 228. Therefore, because Appellant affirmed that *she* wished to forego her efforts to withdraw her guilty plea, Appellant cannot demonstrate prejudice. Kirksey, 112 Nev. at 998, 923 P.2d at 1107.

Appellant failed to demonstrate ineffective assistance of counsel. As such, the district court did not err when it denied Appellant's claim. Thus, this Court should affirm the district court's ruling.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Petition for Writ of Habeas

Corpus and Supplemental Brief in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 4th day of May, 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 7,046 words and 29 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 4th day of May, 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 4th day of May, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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