IN THE SUPREME COURT OF THE STATE OF NEVADA

Juhjuan Washington, Appellant	)	Supreme Court Case No.: 83275
vs.	)	
The State of Nevada, Respondent,	)	**APPELLANT'S OPENING BRIEF**

NEVADA APPEAL GROUP
Kelsey Bernstein, Esq.
Nevada Bar No. 13825
714 S. Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 988-2600
Facsimile: (702) 988-9500
kbernstein@defendingnevada.com
Attorney for Appellant

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed.

DATED this 15 day of November, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein

KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

TABLE OF CONTENTS

NRAP 26.1 Disclosure……ii

Table of Contents……iii

Table of Authorities……iv

Jurisdictional Statement……v

NRAP 17 Routing Statement……v

Memorandum of Points and Authorities……1

I. Statement of the Issues……1

II. Statement of the Case……2

III. Statement of Relevant Facts……3

IV. Summary of the Argument……11

Argument……16

A. A Guilty Plea Agreement is Not Binding or Valid Until Filed with the Court, and Appellant was Entitled to Reset Trial……16

B. The District Court Erred by Failing to Appoint Counsel When Appellant Sought to Withdraw His Plea……20

Conclusion……23

Verification……24

Certificate of Compliance……25

Certificate of Service……27

TABLE OF AUTHORITIES

CASES

Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001).....12
Bradley v. State, 109 Nev. 1090 (1993).....14, 19
Brooks v. State, 443 P.3d 552 (Nev. 2019).....13
Div. of Child & Family Servs. v. Eighth Judicial Dist. Court, 120 Nev. 445, 92 P.3d 1239 (2004).....14
Farnham v. Farnham, 80 Nev. 180, 391 P.2d 26 (1964).....15
Fitzharris v. Phillips, 74 Nev. 371, 333 P.2d 721 (1958).....15
Flores v. State, 2016 Nev. App. LEXIS 303 (Nev. 2016).....13
Millen v. Eighth Judicial Dist. Court, 122 Nev. 1245, 148 P.3d 694 (2006).....15
Miller v. Hayes, 95 Nev. 927, 604 P.2d 117 (1979).....18
Musso v. Triplett, 78 Nev. 355, 372 P.2d 687 (1962).....15
Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 747 P.2d 1380 (1987).....15
Stevenson v. State, 131 Nev. 598, 354 P.3d 1277 (2015).....13
Tener v. Babcock, 97 Nev. 369, 632 P.2d 1140 (1981).....15, 16, 17
United States v. Del Muro, 87 F.3d 1078 (9th Cir. 1996).....21

OTHER SOURCES

NEVADA RULE OF CIVIL PROCEDURE 58.....15

JURISDICTIONAL STATEMENT

The Nevada Supreme Court retains jurisdiction as an appeal from a judgment in a criminal case pursuant to NRS 177.015(3). A timely notice of appeal was filed on July 21, 2021.

NRAP 17 ROUTING STATEMENT

This matter may be assigned to the Nevada Court of Appeals as an appeal from a judgment of conviction based upon a plea of guilty pursuant to NRAP 17(b)(1).

MEMORANDUM OF POINTS AND AUTHORITIES

I. Statement of the Issues

1. Did the District Court improperly deny Appellant's Motion to Withdraw Guilty Plea when the Guilty Plea Agreement had not yet been filed at the time Appellant's request to withdraw the plea was made?

2. Did the District Court fail to consider Appellant's Motion to Dismiss Counsel prior to ruling on Appellant's Motion to Withdraw Plea when the basis for the Motion to Withdraw Plea was Defense Counsel's own concerns that Appellant may not been competent the plea when entered?

II. Statement of the Case

On or about March 25, 2021 a settlement conference was held and resulted in a resolution whereby Appellant Juhjuan Washington pled guilty to one count Second Degree Kidnapping, one count Robbery with Use of a Deadly Weapon, one count Attempt Sexual Assault, and one count gross misdemeanor Open or Gross Lewdness (Bates 302; 305; 331). The State agreed to a sentencing range of 3-65 years, and a psychosexual evaluation was waived (Bates 299).

After the plea canvass, sentencing was set on May 11, 2021 (Bates 318). However, one day prior to sentencing, Defense filed a Motion to Withdraw Guilty Plea on May 10, 2021 (Bates 319). Notably, the actual Guilty Plea Agreement was not filed until May 20, 2021 (Bates 331).

Ultimately, the Court denied the Motion to Withdraw Guilty Plea, and sentencing took place on June 22, 2021 (Bates 387). Washington was sentenced to the maximum on all counts, for a total of 312 months to 780 months (26-65 years) in the Nevada Department of Corrections, with 1,139 days credit for time served (Bates 413). The Judgment of Conviction was filed June 25, 2021 (Bates 412). A notice of appeal was timely filed on July 21, 2021 (Bates 419).

III. Statement of Relevant Facts

On August 1, 2018, an Indictment was filed against Appellant Juhjuan Washington, alleging a total of 23 counts including Assault with a Deadly Weapon, Attempt Robbery with Use of a Deadly Weapon, First Degree Kidnapping with Use of a Deadly Weapon, Open or Gross Lewdness, Burglary While in Possession of a Firearm, Coercion with Use of a Deadly Weapon, Robbery with Use of a Deadly Weapon, Grand Larceny Auto, Attempt Sexual Assault, and Attempt Destruction of Evidence (Bates 001-002). At his initial arraignment on August 9, 2018, Washington refused transport, and arraignment was continued (Bates 010). On August 16, 2018, Washington pled not guilty to all charges and invoked his right to a speedy trial within 60 days (Bates 015).

On September 28, 2020, the State filed a Motion to Admit Evidence of Other Crimes, Wrongs or Acts (Bates 020). The State sought to admit, for propensity purposes, prior allegations of sexual misconduct when Washington was a juvenile (Bates 036). The State also sought to admit the prior acts to establish motive, opportunity, intent, plan, and absence of mistake (Bates 037).

At the first calendar call on October 4, 2018, Defense announced not ready, and Washington waived his right to a speedy trial (Bates 054).

On October 24, 2018, Defense filed its Opposition to the State's Motion to Admit Evidence of Other Crimes, Wrongs or Acts (Bates 057). At the hearing set to consider the Motion, on November 15, 2018, Washington again refused transport to Court, and the matter was continued (Bates 072). On December 7, 2018, the Court granted the State's Motion in part, and denied it in part; the Motion was granted to an extent that an evidentiary hearing was granted on two of the three prior bad acts the State sought to admit (Bates 090). A status check on setting the evidentiary hearing was set for January 15, 2019 (Bates 092).

On that day, the State indicated it would like to file a motion to reconsider the single bad act that was previously excluded based on a recent decision issued by the Nevada Supreme Court that permits sexual propensity evidence (Bates 097). A briefing schedule was set on the renewed motion (Bates 094).

The State filed its Renewed Motion to Admit Evidence of Separate Sexual Offense for Propensity Purposes on January 25, 2019 (Bates 104). Defense filed its Opposition thereto on February 26, 2019 (Bates 124), and the State filed its Reply on March 4, 2019 (Bates 134).

At the hearing on March 12, 2019, the Court indicated it was likely to grant the renewed motion by the State for a general propensity to commit

sexual assault: "I probably would let it in, because I think that – for sex – not so much the foot fetish, but the fact that somebody is sexually assaulting someone against their will, that's the propensity I would be looking at" (Bates 159). At the next hearing, the Court again reiterated its position that it would allow all of the prior bad acts under a generalized sexual offense propensity theory, including Washington's juvenile convictions. Specifically, the Court held the propensity that would allow admission of the prior acts was Washington "committing sexual offenses against people," without any further specific analysis:

> MR. BOLEY: --the only differentiation that I drew, was the difference between a juvenile conviction and an adult conviction that's one of the–
> THE COURT: Yes, I – I don't see it.
> MR. BOLEY: Okay.
> THE COURT: I mean, honestly, I think it is so wide open –
> MR. BOLEY: Uh-huh.
> THE COURT: --the way they've done it. I think it's a sexual offense, and I think the fact, quite frankly, that he started as a juvenile and has continued, it's – this case – it's an aberration, so I find that it's very probative in terms of – that's his thing – you know, he's doing sexual offenses against consent, and that's kind of – feet aside, I don't care what body part –
> MR. BOLEY: Sure.
> THE COURT: --it's sexual propensity. It's committing sexual offenses against people, against their will.
> MR. BOLEY: Okay.

> THE COURT: So, I don't know – like Is aid, so my point is I don't know how much argument you want to do. So, do you want to come back at – whenever we're done?
> MR. BOLEY: I mean if that's what the Court – I don't think there's much argument left to have really. If the Court is inclined – I mean that pretty much opens the door for all of the previous bad acts.
> THE COURT: Yes.
> MR. BOLEY: I don't think there's much argument (Bates 165-66).

At the end of the hearing, Washington was referred for a competency evaluation (Bates 174). During the competency hearing on April 12, 2019, Washington was found not competent, and an Order of Commitment was filed (Bates 176; 179). Trial was vacated, and a status check on trial readiness was set (Bates 182). Washington was eventually found competent on September 20, 2019 (Bates 191). At the competency return hearing, trial was set for January 2020, and the evidentiary hearing on the State's bad acts motion was set for November 19, 2019 (Bates 200-201).

After the hearing, the State again renewed its request to permit all prior bad acts of Washington (including those committed as a juvenile and one act that occurred in close proximity to the criminal allegations but was not included in the Indictment), on the theory of a general propensity for sexual crimes: "So, the prejudicial effect the State submits is not substantial when

compared to the probative value because we have the Defendant acting out on a consistent basis over an extended period of time in a sexual manner to isolate and commit sexual crimes on females, that's what we have here; and the State submits for that reason, that evidence should come in" (Bates 240). The Court agreed, finding that propensity evidence is categorically not prejudicial, and the *Franks* case that addressed sexual propensity "change[s] the balance" of the prejudice versus probative analysis (Bates 245).

At the next calendar call on January 14, 2020, Washington again refused transport (Bates 249). Calendar call and trial were continued for one week. At the next calendar call on January 21, 2020, Defense expressed concerns that Washington was again becoming incompetent (Bates 260). The parties stipulated to a trial continuance to address any possible competency concerns as well as potential negotiations (Bates 263). Calendar call and trial were reset to late March (Bates 265).

However, just prior to that date, all jury trials were suspended due to the Covid-19 pandemic (at the time, the initial jury trial suspension was for a period of 30 days, subject to renewal) (Bates 266; 271). A modified offer was also provided to defense (Bates 269). The trial date was vacated, and reset for a

status check on negotiations, entry of plea, and trial setting on May 12, 2020 (Bates 273).

At that hearing, Washington rejected the State's offer and trial was reset, with calendar call on July 7, 2020 (Bates 273). Trial was continued again due to Covid-19, and calendar call set for October (Bates 279). On that day, Defense indicated they would be ready for trial, but there was a new offer from the State (Bates 286). A status check on negotiations and trial setting was set for November 3, 2020 (Bates 287).

At that hearing, Defense indicated they were close a resolution, and would likely be successful with a settlement conference (Bates 290). Trial was also reset to March, 2021 (Bates 292). At calendar call on March 16, 2021 the parties indicated that a settlement conference had been scheduled on March 25, 2021, and requested a status check after that date (Bates 294).

The case did in fact negotiate at the settlement conference on March 25, 2021 (Bates 299); the Guilty Plea Agreement was to be filed electronically, and Washington was arraigned and pled guilty to one count Second Degree Kidnapping, one count Robbery with Use of a Deadly Weapon, one count Attempt Sexual Assault, and one count gross misdemeanor Open or Gross Lewdness (Bates 302; 305; 331). The State agreed to a sentencing range of 3-

65 years, and a psychosexual evaluation was waived (Bates 299). After the plea canvass, sentencing was set on May 11, 2021 (Bates 318).

One day prior to sentencing, Defense filed a Motion to Withdraw Guilty Plea on May 10, 2021 (Bates 319). The Motion argued Washington's limited understanding of court proceedings, having been deemed incompetent, and that it was coercive to hear the State's position of the case (Bates 321).

On May 11, sentencing was vacated and a briefing schedule set on the Motion to Withdraw Guilty Plea (Bates 324). Notably, the actual Guilty Plea Agreement was not filed until May 20, 2021 (Bates 331).

The State also filed its Opposition on May 20, 2021 (Bates 341); Defense filed a Reply on June 1, 2021 (Bates 351). The Reply reiterated Washington's long history of mental health and psychiatric concerns, and as a result "Washington has a reduced ability to understand the consequences of his decisions" (Bates 354). Defense described Washington's mental health issues as a "moving target," and indicated he may not have "had the wherewithal to enter this guilty plea at the time" (Bates 353-54).

During oral argument on the Motion, the Court also noted that a Motion to Dismiss Counsel had been filed (Bates 356). The Court asked if Defense

wished to advance the Motion to Dismiss prior to sentencing, and Defense submitted on the request to the Court's preference (Bates 363).

On the Motion to Withdraw Guilty Plea, Defense indicated that Washington "comes and goes as far as ability to communicate with me and previous counsel," and "when he is lucid [] he comes back and says, okay, I don't want to accept this plea, I want to withdraw it" (Bates 365). The Court noted that during the plea canvass, Washington did seem lucid and sure of his decision (Bates 371). Ultimately, the Court denied the Motion to Withdraw Guilty Plea, finding that nothing that occurred during the settlement conference rises to the level of legal coercion (Bates 374).

After making its ruling, the Court indicated it would hear the Motion to Dismiss Counsel prior to rendition of sentence, and if the Motion to Dismiss Counsel was granted, sentencing would be postponed (Bates 375). However, after reading the Motion, Defense Counsel asked the Motion to Dismiss Counsel be advanced to today (Bates 375). The matter was trailed for the Court to review the Motion (Bates 376).

After hearing brief statements from Washington and Defense Counsel, the Court denied the Motion to Dismiss Counsel (Bates 384). Primarily, the Court narrowed down the time frame of Washington's dissatisfaction with

counsel to the time after the plea agreement was reached to the current date, but counsel had been precluded from going to visit Washington in person at the detention center due to Covid-19 restrictions (Bates 384). Ultimately, the Court found no conflict of interest that would preclude representation (Bates 384).

Sentencing took place on June 22, 2021 (Bates 387). Washington was sentenced to the maximum on all counts, for a total of 312 months to 780 months (26-65 years) in the Nevada Department of Corrections, with 1,139 days credit for time served (Bates 413). The Judgment of Conviction was filed June 25, 2021 (Bates 412). A notice of appeal was timely filed on July 21, 2021 (Bates 419).

IV. Summary of the Argument

Appellant Washington sought to withdraw his plea prior to sentencing, which was denied. However, Washington should have been entitled to withdraw his plea, or at a minimum entitled to the appointment of counsel.

At the time Washington sought to withdraw his plea, no Guilty Plea Agreement had yet been filed with the Court. The Court's oral acceptance of his plea was not binding or valid, as a court's oral pronouncements from the bench are ineffective "for any purpose" until reduced to writing and filed with the

court. Until that occurs, the court is entitled to reconsider its decision. In this case, until the time that the Court's oral ruling accepting the plea is filed with the Court, which requires the filing a written guilty plea agreement, Appellant was likewise entitled to reconsider his decision by moving to withdraw his plea.

Additionally, the Motion to Withdraw Plea claimed the settlement proceedings were uniquely coercive to Appellant Washington specifically because of his severe mental illness and psychiatric history; as trial counsel was basing the motion on his own possibly mistaken belief as to Washington's competency, Washington was entitled to the appointment of independent counsel to review any possible basis to withdraw his plea.

ARGUMENT

A. A Guilty Plea Agreement is Not Binding or Valid Until Filed with the Court, and Appellant was Entitled to Reset Trial

A defendant may move to withdraw his guilty plea prior to sentencing for any reason that is considered "fair and just" under the totality of circumstances. "The Nevada Supreme Court has disavowed the standard previously announced in *Crawford v. State*, 117 Nev. 718, 30 P.3d 1123 (2001), which focused exclusively on whether the plea was knowingly, voluntarily, and intelligently made, and affirmed that 'the district court must consider the

totality of the circumstances to determine whether permitting withdrawal of a guilty plea of a guilty plea would be fair and just.'" *Flores v. State*, 2016 Nev. App. LEXIS 303 (Nev. 2016) (citing *Stevenson*, 354 P.3d at 1281). What presents a "fair and just" reason is determined on a case-by-case basis.

The burden for the defendant on a Motion to Withdraw Plea is significantly lower if raised prior to sentencing, as is the case here; under the totality of the circumstances standard, the Nevada Supreme Court expressly disavowed *Crawford*'s exclusive focus on whether a plea was freely, knowingly and voluntarily entered into. The Court specifically expanded the scope of the analysis to withdraw a guilty plea to *any* fair and just reason considering the totality of *all* applicable circumstances.

"A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and 'a district court may grant a defendant's motion to withdraw his guilty plea before sentencing **for any reason** where permitting withdrawal would be fair and just.' When making this determination, 'the district court must consider the totality of the circumstances.'" *Brooks v. State*, 443 P.3d 552 (Nev. 2019) (citing *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015)) (emphasis added).

This case presents a unique issue, believed to be one of first impression in Nevada, regarding the validity and enforceability of an oral guilty plea and canvass when no written guilty plea agreement is timely filed. Although Appellant's Counsel was unable to find law on the matter of guilty plea agreements specifically, there is established case law that oral orders and rulings of the Court are presumptively *not* valid until reduced to writing and filed with the Court. Similarly, adjudications and sentences do not become final until likewise reduced to writing and filed. See, *Bradley v. State*, 109 Nev. 1090 (1993).

"The Nevada Supreme Court holds that dispositional court orders that are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective… Additionally, oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable." *Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 446, 92 P.3d 1239, 1240 (2004).

"Generally, a 'court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for **any**

purpose.' However, in *State, Division of Child & Family Services v. District Court*, we held that oral pronouncements concerning case management issues, scheduling, administrative matters, or emergencies that do not permit a party to gain an advantage are effective." *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1251, 148 P.3d 694, 698 (2006) (emphasis in original).

In *Rust v. Clark Cty. Sch. Dist*., the Court held that:

> An oral pronouncement of judgment is not valid for any purpose; therefore, only a written judgment has any effect, and only a written judgment may be appealed. The district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose and cannot be appealed. *Rust v. Clark Cty. Sch. Dist*., 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (citing NRCP 58(c); *Tener v. Babcock*, 97 Nev. 369, 632 P.2d 1140 (1981); *Fitzharris v. Phillips*, 74 Nev. 371, 333 P.2d 721 (1958); *Farnham v. Farnham*, 80 Nev. 180, 391 P.2d 26 (1964); *Musso v. Triplett*, 78 Nev. 355, 372 P.2d 687 (1962)).

Although *Rust* relies on the Nevada Rule of Civil Procedure corresponding to entry of judgments and orders, a similar requirement has been imposed in criminal proceedings as well. For example, when examining a judgment granting a petition for writ of habeas corpus, the Supreme Court held that an oral ruling granting the petitioner's discharge is not valid until a written order is signed and filed, and until that occurs, the court further retains the power to

reconsider its ruling. See, *Tener v. Babcock*, 97 Nev. 369, 370, 632 P.2d 1140 (1981) ("Under the statutory provisions for writs of habeas corpus, the discharge of the petitioner is a judgment, NRS 34.570, which must be memorialized in an order, NRS 34.590. Accordingly, we hold that until a written order discharging the habeas corpus petitioner is signed by the judge and filed by the clerk, see NRCP 58(c), the Eureka Bank rule does not apply, and the judge retains the power to reconsider his decision").

A plea canvass is procedurally similar to a court order accepting the plea and negotiations as contained in a written guilty plea agreement; however, without the corresponding written agreement, the District Court's acceptance of the plea is an oral pronouncement that is never reduced to writing.

While the Nevada Supreme Court's requirement of a written order has traditionally relied on Nevada Rule of Civil Procedure 58, upon information and belief there are no similar or corresponding rules in either the Rules of Practice for the Eighth Judicial District Court, nor in the newly adopted Nevada Rules of Criminal Procedure, that would provide a contrary outcome. Additionally, *Div. of Child & Family Servs. v. Eighth Judicial Dist. Court* expressly does *not* rely on the civil rules, but rather holds that the writing requirements depends on the type of oral pronouncement at issue.

Specifically, *Div. of Child & Family Servs* holds that court orders which are not administrative in nature, but deal with the procedural posture or merits of the underlying controversy, must be written, signed, and filed before they become effective. However, oral court orders pertaining to case management issues, scheduling, administrative matters or emergencies that do not allow a party to gain an advantage are valid and enforceable without being reduced to writing. As applied here, acceptance of a guilty plea does in fact deal with the "merits of the underlying controversy," and is not related to case management, schedule, or other administrative matters. Therefore, it is among the class of oral pronouncements that "must be written, signed and filed before they become effective."

The *Tener v. Babcock* case is particularly important here; this case held that when a judgment must be memorialized in a written order, the judge "retains the power to reconsider his decision" until the time when the order is signed and filed by the clerk. *Tener*, 97 Nev. 369, 370, 632 P.2d 1140 (1981).

Similarly, the Nevada Supreme Court has held that an oral pronouncement of sentence is not valid and is subject to modification until reduced to writing and filed. In *Bradley v. State*:

> Bradley's sentence was orally pronounced and imposed at the sentencing hearing held on February 26, 1992. However, the district judge modified the oral sentence by the signed and entered written judgment of conviction. The district judge's subsequent modification of the sentence is effective based upon our earlier decision in *Miller v. Hayes*, 95 Nev. 927, 604 P.2d 117 (1979).
>
> In *Miller,* the defendant pleaded nolo contendere to a felony charge. The district judge orally "pronounced" a judgment and sentence, which was then entered in the court minutes. However, the judgment was neither signed by the judge nor entered by the clerk. Two weeks later the district judge conducted another sentencing hearing, at which time he "withdrew" the existing sentence and "pronounced" a lesser sentence. On appeal, we concluded that an oral pronouncement of a sentence remains modifiable by the imposing judge until such time as it signed and entered by the clerk. We wrote:
>
> [A] district judge's pronouncement of judgment and sentence from the bench is not a final judgment and does not, without more, oust the district court of jurisdiction over the defendant. Only after a judgment of conviction is "signed by the judge and entered by the clerk," as provided by NRS 176.105 does it become final and does the defendant begin to serve a sentence of imprisonment. *Bradley v. State*, 109 Nev. 1090, 1094-95, 864 P.2d 1272, 1275 (1993).

In this particular case, Appellant Washington orally pled guilty and was canvassed regarding his plea on March 25, 2021. After the canvass, sentencing was set on May 11, 2021. However, on May 10, 2021, Washington filed a Motion to Withdraw Guilty Plea. The actual written Guilty Plea Agreement had not been

filed until May 20, 2020 – more than ten days *after* Washington requested to withdraw his plea.

Established Nevada case law holds that substantive orders as well as sentences imposed are not binding or valid until reduced to writing and filed in the case. A guilty plea agreement should be likewise treated, as it is an agreement to plead guilty to specific charges and also itself contains a waiver of important constitutional rights; if a court's oral pronouncement of orders and sentences is not valid until reduced to writing and filed in the case, a defendant's oral pronouncement of guilt and corresponding waivers should also be considered nonbinding until reduced to writing and filed.

If a Guilty Plea Agreement must be filed and entered into the record before it becomes valid, Appellant Washington, like the judge in *Tener*, "retains the power to reconsider his decision." As Appellant Washington moved to withdraw his plea before the Agreement was reduced to writing and entered, he was entitled a trial date because there was not yet a binding plea agreement to withdraw from.

B. The District Court Erred by Failing to Appoint Counsel When Appellant Sought to Withdraw His Plea

On May 10, 2021, Appellant Washington sought to withdraw his guilty plea; this was filed by his trial counsel, who worked with Appellant extensively to negotiate the case on Appellant's behalf, and was present during the entry of plea and plea canvass. Sentencing was continued to address the Motion, and a briefing schedule was set. Additionally, on June 8, 2021 (prior to the hearing on the Motion to Withdraw Guilty Plea), Appellant Washington filed a request in proper person to dismiss his trial counsel. The District Court was aware of the Motion to Dismiss Counsel on the date set to hear the Motion to Withdraw Plea, as the District Court offered to move up the Motion to Dismiss to be heard first; when trial counsel submitted to the District Court on the scheduling, the District Court denied the Motion to Withdraw Guilty Plea before hearing and thereafter denying the Motion to Dismiss Counsel.

In this case, trial counsel's Motion to Withdraw Guilty Plea was based on his own opinion, which he concedes could be mistaken, regarding Appellant Washington's mental competency at the time he entered his plea. Although both trial counsel and the District Court noted that Washington appeared competent and understanding at the time he entered his plea, trial counsel further added

that subsequent lucid conversations with Washington after the fact led to Washington wanting to withdraw his plea; these subsequent conversations caused trial counsel to doubt his original assessment of Washington's competency at the time he entered his plea.

As trial counsel signed the Certificate of Counsel attesting to Washington's competency to enter a plea, a subsequent reconsideration of that conclusion warranted the appointment of new counsel because the only basis to withdraw Washington's plea was trial counsel's belief that he may have been mistaken as to Washington's competency when the plea was entered.

In *United States v. Del Muro*, 87 F.3d 1078, 1081 (9th Cir. 1996), the Ninth Circuit held it was reversible error for a trial court to require trial counsel to represent a defendant in bringing motion for new trial on ground of counsel's own ineffectiveness at trial, and that "Del Muro was entitled to appointment of disinterested substitute counsel to examine the witnesses, develop the evidence, and argue the merits of the motion."

In this case, trial counsel did not allege his own ineffectiveness as a basis for withdrawing Washington's plea, nor was there any finding of such, but a similar conflict arose when trial counsel's only basis to withdraw Washington's

plea was his own potentially mistaken conclusion as to Washington's competency and understanding of the proceedings.

> He's got a very complex set of mental illnesses. You know, there have been times where I've looked at Mr. Washington and said, yeah, he can't participate in his defense and I personally sent him to competency court as a result of that. And there has been times where he's been very lucid and such. Unfortunately, during that particular settlement conference, you know, if he was behind glass, I wasn't able to sit next to him and sort of have the normal attorney/client conversation, but even if I could, you know, I'm not a shrink, I'm not, you know, I don't know the symptoms unless they're just obvious. And I think there's enough nuance here that it could have been something that I didn't see (Bates 370-71).

Although Washington formally moved to withdraw his plea on the basis that the State's recitation of its position was inherently coercive, the record was later clarified that such coercion could have been the result of his inability to comprehend the court proceedings, and that he believed the State's position to be fact that he would assuredly be convicted if he rejected the offer and went to trial. Because trial counsel believed Washington to be competent at the time he entered his plea, but then later tried to withdraw Washington's plea on the basis that his assessment may not have been accurate, Washington was entitled to the appointment of new counsel to determine if any independent basis existed to withdraw his plea.

CONCLUSION

For these reasons, Appellant respectfully requests the matter remanded for Appellant to withdraw his plea and proceed to trial.

VERIFICATION OF KELSEY BERNSTEIN, ESQ.

1. I am an attorney at law, admitted to practice in the State of Nevada.
2. I am the attorney handling this matter on behalf of Appellant.
3. The factual contentions contained within the Opening Brief are true and correct to the best of my knowledge.

Dated this 15 day of November, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein
KELSEY BERNSTEIN, ESQ.
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double spaced Cambria font.

2. I further certify that this brief complies with the page-or-type-volume limitations of NRAP 32(a)(7)(A)(ii) because it is proportionally spaced, has a monospaced typeface of 14 points or more and contains 5,576 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(c), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matte relied on is to be found.

I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of November, 2021.

NEVADA APPEAL GROUP
Respectfully Submitted By:

Kelsey Bernstein

Kelsey Bernstein, Esq.
Nevada Bar No. 13825
714 S. Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 988-2600
Facsimile: (702) 988-9500
kbernstein@defendingnevada.com
Attorney for Appellant

CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 15 day of November, 2021, I served a true and correct copy of the Opening Brief to the last known address set forth below:

Steve Wolfson
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89101

Kelsey Bemster
Employee of Nevada Appeal Group