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 REPLY BRIEF**

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The State spends considerable time addressing an argument that was not made: that the Court incorrectly heard the *order* of the Motion to Withdraw Plea and Motion to Dismiss Counsel. The entire §I of the State's Argument as well as §2(C) is dedicated to the position that the District Court did not err in considering the Motion to Withdraw Plea before the Motion to Dismiss Counsel (see State's Answering Brief, 5-6). However, Appellant never argued the District Court erred in deciding the order of the Motions to be heard, so the State's argument on this is inapposite to the issue raised: that Defense Counsel sought to withdraw Mr. Washington's plea on his own potentially mistaken belief as to Mr. Washignton's competency and understanding of the proceedings. The order of motions heard is not relevant to the substance of the Motion to Withdraw Plea.

The law is clear that an attorney is not obligated to allege his own ineffectiveness, *see United States v. Del Muro*, 87 F.3d 1078, 1081 (9th Cir. 1996). However, when a Motion to Withdraw Plea is made based on grounds which could create a legal conflict with his counsel, the movant is entitled to the appointment of new counsel to explore potential bases to withdraw the plea.

In this case, Defense Counsel attested in the Guilty Plea Agreement that he believed Mr. Washington "[i]s competent and understands the charges and the consequences of pleading guilty as provided in this agreement, [e]xecuted this agreement and will enter all guilty pleas pursuant hereto voluntarily…" (Bates 338). As a basis to then move to withdraw Mr. Washington's plea, Defense Counsel argued "He has a long history of mental illness and has been sent to competency court twice during these proceedings. His understanding of the court proceedings has been limited as a result… Faced with the State's argument, Washington took a plea he would not normally have taken" (Bates 321).

The grounds presented to the district court when seeking to withdraw Mr. Washington's plea would have created a conflict, and as a result, Mr. Washington was entitled to the appointment of counsel to explore further grounds to withdraw his plea – including mental health and competency evaluations – to determine if he was in fact competent at the time the plea was taken. It was improper for the district court to summarily deny the request to withdraw his plea and find that he was competent when the individual who had the longest and closest relationship to Mr. Washington – his own attorney – professed doubt as to that very conclusion.

In order to set forth a valid basis for Mr. Washington to withdraw his plea, Defense Counsel would have to argue that his client was incompetent or failed to understand when the plea was entered; this is an inherent conflict, as it would be ineffective for counsel to enter a plea with a client who was not fully competent or understanding. Defense Counsel is not required to attest that he was affirmatively ineffective as a basis to withdraw his client's plea, but in this case, Defense Counsel set forth a basis which *may* have resulted in such a finding if the grounds to withdraw Mr. Washington's plea were true (that he was not competent or fully understanding). The potential for such a finding created an inherent conflict that required the appointment of independent counsel. The State acknowledges that *Del Muro* "found a conflict arose when counsel was forced to argue his own ineffectiveness," and this situation warrants the same conclusion.

The issue regarding appointment of counsel for Mr. Washington is further distinct and independent from the other argument raised by Appellant, that he should have been permitted to withdraw the plea because it was nonbinding and had not yet been formalized in writing. The State's opposition to this argument is legally flawed, as it relies on a fundamental premise that is no longer good law.

Specifically, the State opens §II(B) of its Answering Brief – the one and one-half page argument section dedicated to this issue – by stating "Only issues relating to the validity of the plea are pertinent to a motion to withdraw plea" (State's Answering Brief, 10) (citing *Hart v. State*, 116 Nev. 558, 563-64, 1 P.3d (2000). This is simply incorrect. There are infinite number of potential issues, outside the validity of the plea, which may constitute a "fair and just reason" to permit withdrawal. *Stevenson v. State*, 131 Nev. 598, 354 P.3d 1277 (2015).

The State argues that "[a] guilty plea is an agreement between the parties, not an order or ruling of the court, so *Bradley* and the other cited case law are irrelevant" (State's Answering Brief, 11). The State fails to acknowledge a critical aspect of any plea canvass – the entire purpose of the canvass itself is to assure the court that the plea is being freely and voluntarily made. After a plea canvass, the district court accepts the plea, and makes a finding that the plea is freely and voluntarily entered. The rationale in *Bradley v. State*, 109 Nev. 1090 (1993) and similar rulings apply: there is no plea that is accepted or freely and voluntarily entered until the plea is reduced to writing and filed with the court. It is for this reason that Mr. Washington should have been permitted to be set his case for trial. When he sought to withdraw his plea (independent of any grounds actually stated in the motion), there was not yet a valid plea to

withdraw. Mr. Washington was not bound to the guilty plea because, with nothing memorialized in writing and filed, there was no formal plea to bind him.

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 Reply Brief are true and correct to the best of my knowledge.

Dated this 28 day of January, 2022.

NEVADA APPEAL GROUP
Respectfully Submitted By:

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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 1,393 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 28 day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d), I hereby certify that on the 28 day of January, 2022, I served a true and correct copy of the Opening Brief to the last known address set forth below:

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