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2 IN THE SUPREME COURT OF THE STATE OF NEVADA

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BO DWIGHT HEGGE,

Appellant,

CASE NO.83664

vs.

THE STATE OF NEVADA,

Respondent.

Appeal From The Fourth Judicial District Court
Of The State of Nevada
In And For The County Of Elko

RESPONDENT'S ANSWERING BRIEF

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1 back so he could be seared for weapons. JA 35 - 36. Hegge refused, keeping
2 his right hand inside his hoodie pocket. *Id.* After being forced to comply,
3 officers found in the same pocket a loaded black Smith and Wesson semi-
4 automatic pistol. *Id.*

5 Everyone in the residence was ordered out. *Id.* Three men exited: Kody
6 Holland, Jared Conklin and Serafin Perez. *Id.* Hegge was asked what he was
7 doing at the residence. *Id.* He alleged that Brasher and his twin brother had
8 stolen a valuable coin from him, and he was there to collect it. *Id.* While
9 Pinkham was interviewing Hegge, Kody Holland stated that Hegge had
10 rushed in on them. *Id.* While law enforcement was giving dispatch
11 information Holland was overheard arguing with Hegge about how the
12 situation could have been avoided if Hegge had just let Holland ask Brasher
13 and his brother about the missing coin. *Id.*

14 Dispatch informed law enforcement that Hegge had a prior felony
15 conviction. *Id.* Hegge was officially placed under arrest and searched. In his
16 pocket law enforcement found what they recognized to be methamphetamine.
17 *Id.* Hegge claimed the substance did not belong to him. *Id.* Hegge was given
18 his *Miranda* warnings as he wanted to talk with an officer. *Id.*

19 Hegge then alleged that he had not been at the residence the day before
20 and that he had purchased the firearm early that day. JA 35-36. He explained

1 that he had come to get a coin back that Brasher's brother had stolen. *Id.*
2 Hegge stated that Conklin and Perez had come with him to the residence and
3 that Holland had informed them that Brasher and his brother were at the store.
4 *Id.* Hegge claimed that his wife could vouch for his allegedly not being at the
5 residence the day before. *Id.*

6 Brasher provided a written statement in which he explained that his
7 twin brother owed Hegge eighty dollars (\$80.00). JA 36. Hegge forced his
8 way into the residence and put a gun in Brasher's face and demanded the
9 \$80.00 plus more. *Id.* Hegge's wife was with him. *Id.* Hegge settled down
10 when he was given \$140.00 but demanded another \$500.00 by the end of the
11 next day (the day Brasher called law enforcement). *Id.* Brasher was able to
12 give an accurate description of the firearm just seized from Hegge. *Id.*

13 B. Plea deal and more inculpatory discovery

14 Hegge initially faced six charges: Robbery with a deadly weapon
15 pursuant to NRS 200.380 (category B felony, 2 to 15 years), Burglary with a
16 firearm pursuant to NRS 205.060 (category B felony, 2 to 15 years), Assault
17 with a deadly weapon pursuant to NRS 200.471 (category B felony, 1 to 6
18 years), Possession of a firearm by a prohibited person pursuant to NRS
19 202.360 (category B felony, 1 to 6 years), Carry concealed firearm without a
20 permit pursuant to NRS 202.350 (category C felony, 1 to 5 years), and

1 Possession of a controlled substance pursuant to NRS 453.336 (category E
2 felony, 1 to 4 years). Respondent's Appendix 1-4 (Criminal complaint).

3 Hegge agreed to plead no contest to one count of Possession of a
4 firearm by a prohibited person. JA 4-9. The State agreed to drop the remaining
5 charges and the parties were free to argue at sentencing. *Id.* Hegge signed the
6 written memorandum of the plea agreement on April 1, 2021. JA 7.

7 On March 18, 2021, the State received a handwritten letter from Arthur
8 Brasher. Respondent's Appendix 13-15 (Exhibit filed with Reply to
9 Opposition to Motion to Withdraw). In the letter, Brasher again described
10 what occurred on February 13, 2021, and the day prior. *Id.* Brasher says that
11 he wants "to secure the full prosecution" of Hegge and expresses his
12 willingness to cooperate in anyway needed. *Id.* He explains that he is in jail in
13 Utah and promises to keep in touch with the State upon his release. *Id.* He
14 concludes with a request for a copy of the incident report and a desire to know
15 the outcome of the case. *Id.* Although it clearly contained nothing of
16 exculpatory value, the State had a copy provided to Hegge on June 24, 2021.
17 *Id.*

18 C. Careful canvas at Arraignment

19 On April 12, 2021, the district court arraigned Hegge on his no contest
20 plea to possession of a firearm by a prohibited person. JA 10-24. Hegge was

1 thoroughly canvassed on his no contest plea. *Id.* He affirmed that he had
2 carefully and completely read the plea agreement before signing it. JA 14. He
3 confirmed that he understood the agreement before he signed it and that his
4 attorney answered any questions, he had about the plea agreement before he
5 signed it. JA 15.

6 The district court painstakingly reviewed all the rights Hegge would be
7 waiving if he went forward with entering his no contest plea. JA 16-17. Hegge
8 confirmed that he still wished to give up these rights. JA 17. Despite his
9 affirmative answer, the district court inquired further: “You seem a little
10 reluctant.” JA 17:24. The following exchange is reflected in the transcript of
11 the arraignment:

12 Court: you seem a little reluctant.

13 Hegge: I kind of am, but it’s all right. Yes, Ma’am.

14 Court: **It’s not all right. You have the right to go to trial - -**

15 Hegge: To me, I feel like I want to take it to trial because how it
16 says – I feel like it’s been way long enough time where it should
17 have been off my record, that felony, How does it makes sense it
18 says seven years? I shouldn’t have had a felony on my record.
19 It’s been over ten years, almost ten years since that felony.

20 Court: Have you expressed your concerns with Mr. Woodbury?

Hegge: Yes. But his concerns is, that - -

1 Court: I don't want to get into what you and your attorney have
discussed.

2 Mr. Woodbury (Hegge's trial counsel): I have informed Mr.
3 Hegge that it is possible to have your gun rights restored after
conviction of a felony, but the passage of time doesn't do it.

4 Court: I believe that's a correct recitation of the law.

5 Hegge: And I understand it, but I don't know that. And a lot of
6 people didn't know that, that you have to petition the Court to
get it dropped off your record. I didn't know that.

7 Court: **Sir, I would be happy to set this for trial if you like.**
8 **This is your case, and you determine the direction we go with**
9 **it.** Do you need some more time to discuss it with Mr.
Woodbury?

10 Mr. Woodbury: Please.

11 Court: Okay. Mr. Woodbury, if you would like to use the jury
room.

12 Mr. Woodbury: okay.

13 (Recess.)

14 Court: Mr. Hegge. So, we're back on the record in Case DC-CR-
21-90.

15 Court: Mr. Hegge, did you have an opportunity to speak with Mr.
Woodbury?

16 Hegge: Yes, ma'am.

17 Court: are you prepared to proceed?

18 Hegge: Yes, ma'am.

19 Court: Mr. Woodbury, what is your client's intention?
20

1 Mr. Woodbury: His intention at this time is to continue with the
2 plea agreement.
3 Court: Is that correct, Mr. Hegge?
4 Hegge: yes, ma'am.
5 Court: So, Mr. Hegge, I believe that I reviewed your
6 constitutional rights with you and asked if you understood those
7 rights.
8 Hegge: Yes, ma'am.
9 Court: and are you willing to give those rights up?
10 Hegge: yes, ma'am.
11 Court: Has anybody coerced you, or intimidated you, or placed
12 you in fear to get your plea?
13 Hegge: No, ma'am.
14 Court: Has anyone offered you anything outside of the court to
15 get your plea?
16 Hegge: No, ma'am.
17 Court: Do you think pleading no contest is the best thing to do
18 all things considered?
19 Hegge: Yes, ma'am.
20 JA 17-20. (emphasis added, "Q" replaced with "Court"). Hegge confirmed
that he had reviewed with his attorney any defenses Hegge or Mr. Woodbury
thought might be applicable to the case. JA 21. He also acknowledged that by
going forward with his plea he was giving up the right to present those

1 defenses. *Id.* He was again asked and again verified that he still wanted to go
2 forward with his no contest plea. JA 21:18-21.

3 The district court pointed out that it would be relying on the offer of
4 proof in the plea agreement in determining whether there were sufficient facts
5 to support the plea and made sure Hegge was still okay with the court doing
6 so. JA 22:2-5. This offer of proof is found on the second page of the plea
7 agreement. JA 5. In it Hegge acknowledges that the State could prove beyond
8 a reasonable doubt that he willfully and unlawfully owned or possessed a
9 firearm and that he had been previously convicted of a felony and/or was an
10 unlawful user of or addicted to a controlled substance. JA 5.

11 D. Motion to Withdraw Plea

12 On June 25, 2021, a stipulation to continue sentencing to brief Hegge's
13 desire to withdraw his plea was filed. JA 37-39. On that same date Hegge's
14 motion to withdraw his plea was filed. JA 25. Hegge's motion briefly touched
15 on the law regarding withdrawal of plea before sentencing and primarily
16 focused on issues he wanted to litigate if his motion was granted. JA 25-29.

17 Hegge presented three points he wished to litigate if allowed to
18 withdraw his plea: 1. That he was not willfully in possession of the firearm;
19 2. That defense of others should excuse his possession the firearm and; 3. That
20

1 the pat down search was illegal. JA 25-29. At the end of his first argument
2 about not being in willful possession of the firearm he added:

3 Defendant will also testify that although discussions with trial
4 counsel may have included him being informed of the possibility
5 of an acquittal based on him not having been aware of his mistaken
6 belief that he was entitled to possess a firearm, that if such
7 discussions occurred, he did not understand their significance.

8 JA 26:20-24. Under his second argument regarding defense of others he
9 alleged that two of his brothers had been murdered or that he presumed had
10 been murdered in 2019. JA 26. He then argued that he had found anonymous
11 notes near his residence containing threats to kill him. JA 27. He stated that
12 he purchased a firearm for his spouse to use to protect herself and their
13 children. JA 27. He gave no explanation as to why he now wanted to present
14 this defense.

15 At the end of his third argument (that the pat down search was illegal)
16 the motion states:

17 Defendant will testify that he engaged in discussions with trial
18 counsel regarding the validity of the search by Officer Pinkham
19 and that the questions raised by Defendant concerned whether
20 evidentiary hearsay rules prevented the validity of the search.
Defendant will testify that he never understood that there were
issues about whether officer Pinkham's suspicions that
Defendant was armed were objectively reasonable.

1 JA 28-29. Near the end of Hegge's motion it states: "Defendant will also
2 testify that he has been informed that Mr. Brasher and his brother have moved
3 from the residence and that their location is and has been unknown to law
4 enforcement since before he entered his plea." JA 29:2-5.

5 Hegge attached two exhibits to this initial motion to withdraw his plea.
6 JA 31-36. The first is the probable cause sheet and the second is officer's
7 Pinkham's initial narrative report. *Id.*

8
9 E. State's Opposition to Hegge's Motion

10 Without the benefit of the transcript of the arrangement hearing, the
11 State filed its opposition to Hegge's motion to withdraw his plea. *Compare*
12 JA 24 (transcript of arraignment certified on July 13, 2021), *with* JA 40
13 (opposition filed July 2, 2021). The State's motion focused on: (1) That Hegge
14 had the burden of proving that withdraw of his plea would not reduce the
15 solemnity of his plea to a meaningless formality. JA 41. (2) That the standard
16 of review was abuse of discretion; JA 41. (3) That factual innocence not
17 ignorance of the law was a fair and just basis for allowing withdrawal of a no
18 contest plea. JA 42-44.¹ (4) That the timing and subjectivity of Hegge's

19 ¹ Hegge's opening brief incorrectly represents that the State's opposition
20 argued that factual innocence did not provide a basis for Mr. Hegge to
withdraw his plea. Opening Brief 6:4-7.

1 assertions made them insufficient grounds for allowing withdrawal of his plea.
2 JA 44-45. (5) Finally, that Hegge's claims about not understanding
3 discussions with his attorney before entering his plea implicitly challenged
4 Mr. Woodbury's effectiveness; thus, creating a conflict and even making Mr.
5 Woodbury a necessary witness. JA 45-46. The State's motion did not include
6 any exhibits. *See* JA 40-49.

7 F. Hegge's Reply

8 On July 15, 2021, Hegge filed a reply to the State's opposition. JA 50-
9 54. In it he tried to argue that the State had the burden of showing that it
10 would suffer prejudice if Hegge was permitted to withdraw his plea. JA 50.
11 Without making a substantive point, Hegge accused the State of withholding
12 information about Mr. Brasher. JA 51 (this was in reference to the letter Mr.
13 Brasher wrote asserting his desire to secure the full prosecution of Hegge; it
14 was attached to the reply as an exhibit).

15 As for the State's assertion that Hegge's claims implicitly challenged
16 Mr. Woodbury's effectiveness, Hegge had two responses. First, that he simply
17 does not understand the argument. Second, that he was not arguing against
18 Mr. Woodbury's effectiveness but instead that he simply realizes now that he
19 did not understand Mr. Woodbury's legal conclusions, "in their entirety,
20

1 specifically that he did not fully understand the concept of how fact finders
2 are required and permitted to weigh evidence.” JA 51.

3 Hegge continued to argue the points he wished to challenge if permitted
4 to withdraw his plea, apparently believing this would bolster his motion. JA
5 51-52. He conceded that he entered his plea to avoid the possibility of being
6 convicted of the other offenses charged. JA 51. He concluded the reply by
7 pointing to a three-month gap between when the State received Mr. Brasher’s
8 letter and when it was provided to Hegge but fails to acknowledge that the
9 letter actually strengthens the case against him. JA 53.

10 G. Order Denying Motion to Withdraw Plea

11 On August 9, 2021, the district court entered its order denying Hegge’s
12 motion. JA 57. The district court addressed all three of Hegge’s main
13 arguments from his initial motion. JA 57-59. The district court addressed the
14 ignorance of the law defense and pat-down search first. JA 57-59. With regard
15 to Hegge’s argument that he was not willfully in possession of the firearm due
16 to his ignorance of the law, the district court pointed to the extensive canvas
17 at his arraignment where he brought up this defense. JA 57-59. The district
18 court reminded Hegge that he was not only given the opportunity to change
19 his mind and go to trial but was also given the opportunity to, once again,
20

1 consult with his attorney. *Id.* After taking time to consult with his attorney he
2 understood the problems with this defense and chose to waive it. *Id.* Therefore
3 this did not serve as a justification for withdrawal of his plea. *Id.*

4 With regard to Hegge's claim that the pat-down search was
5 unconstitutional, the district court pointed out that Hegge conceded in his
6 motion that he had opportunities in and out of court to discuss possible
7 defenses and that he had done so prior to entering his plea. JA 58.
8 Consequently, the district court could not see how allowing Hegge to now
9 change his mind would be fair and just. *Id.*

10 Finally, the district court pointed out that Hegge's last remaining
11 argument, defense of others, was belied by the record. JA 58. The exhibits he
12 attached to his motion showed that he was found outside the home of Arthur
13 Brasher. *Id.* His children and their mother were nowhere around. *Id.* Also,
14 Hegge did not allege that Brasher was the originator of the anonymous threats.
15 *Id.* Further, he conceded in his reply to the State's opposition that he was at
16 Brasher's residence looking for a valuable coin stolen from him. JA 58. The
17 district court pointed out that Hegge's argument that he was defending others
18 who were not present while trying to recover stolen property was incoherent.
19 *Id.* As such allowing Hegge to withdraw his plea would not be just and fair.

1 *Id.* Finding that none of the three arguments presented sufficient grounds for
2 granting his motion, the district court denied Hegge's motion. *Id.*

3 H. Sentencing

4 Hegge was sentenced on September 27, 2021. JA 61. The parties were
5 given opportunity to correct the PSI. JA 63-64. Mr. Woodbury did not find
6 any errors of sufficient consequence to bring to the court's attention. *Id.* Mr.
7 Hegge likewise did not see any errors that needed correction. *Id.*

8 The State argued for 30 months in prison with minimum parole
9 eligibility after 12 months was served, with no probation. JA 64. The State
10 essentially covered three areas to support its argument: first, the underlying
11 facts; second, Hegge's criminal history; third, his anticipated argument that
12 his family needs him. JA 64- 66. First the State pointed to the statements of
13 Mr. Brasher regarding Hegge forcing his way into Brasher's residence at gun
14 point. *Id.* Then the State pointed out Hegge's reaction to law enforcement. *Id.*
15 Specifically, that he refused to put his right arm behind his back and had in
16 the pocket where his hand was forcefully removed, a loaded semi-automatic
17 weapon. *Id.*

18 Second, the State walked though, Hegge's extensive criminal history
19 which extended all the way back to 2006. JA 64-66. His history includes 11
20 misdemeanors, one gross misdemeanor and one felony conviction. *Id.* The

1 concern with this felony conviction was his actions once convicted. *Id.* In
2 2009 he was convicted of felony possession of stolen goods. JA 65. He was
3 given probation, but it was eventually revoked. *Id.* Then he was paroled but
4 ultimately was dishonorably discharged. *Id.*

5 Next on his criminal record was his being convicted of violent crimes.
6 *Id.* He was convicted in 2010 of resisting arrest. *Id.* He was arrested and found
7 in contempt of court in that case. *Id.* Another warrant was issued in the same
8 resisting case just three weeks after being found in contempt. *Id.* He was
9 convicted of battery in 2011 and battery on an officer in 2012. *Id.*

10 Third, the State addressed his anticipated argument regarding his family
11 and other potential mitigating facts. *Id.* The State pointed to Hegge's
12 statement, presumably his PSI statement, in which he claims to be a
13 homemaker to his two sons and to having a daily drinking problem. *Id.* The
14 State explained that this was not a mitigating circumstance as it instead raised
15 concerns about the example being set for Hegge's children. *Id.* As for Hegge
16 pointing to the impact on his family if he is sentenced to incarceration, the
17 State pointed out that clearly his family was insufficient motivation to stop
18 him from committing the violent facts in this case. *Id.* Finally the State
19 expressed hope that the Defendant would get sober in prison and be in a better
20 position to enjoy his time with his young children when released. *Id.*

1 As Mr. Woodbury began to present the defense's argument Hegge
2 interrupted the proceedings. JA 66. He cut off Mr. Woodbury and said: "There
3 is an error in the damn paper. There was an error because I was sitting on the
4 side. I didn't go in that house." JA 66:21-23. No doubt recognizing that an
5 outburst detracts rather than supports the defense, Mr. Woodbury turned to
6 Hegge and gave a brief reprimand: "Just quit." JA 66.

7 Hegge's opening brief is conveniently silent on what Mr. Woodbury
8 did next. *See* Opening Brief 9:8-19. Mr. Woodbury called the division of
9 parole and probation's offense synopsis "extraordinarily troubling." JA 67.
10 He pointed out that the rendition of facts was based solely on police reports
11 which provides the defense no opportunity to examine or look further into the
12 facts. *Id.* More concerning to him was that per the agreement all the facts cited
13 to by the State and included in the PSI were in support of charges the State
14 had dismissed. *Id.*

15 Mr. Woodbury pointed out that the victim was himself arrested and
16 spent time in jail in Utah. *Id.* Mr. Woodbury then circled back to Hegge's
17 outburst. "And that's why Mr. Hegge is, of course, extraordinarily upset . . .
18 the fact that the court is now apprised of the facts, which may or may not be
19 facts." JA 67,19:22. Mr. Woodbury pointed out that Hegge had made his
20 appearances, that a prior continuance due to Hegge having COVID had been

1 verified with documentation, and that Hegge had proven that probation would
2 work because he had been out of jail for the last six months without any
3 problems. JA 68 - 72. Mr. Woodbury also referenced Hegge's rough start in
4 life and a letter of support written by his spouse and the dramatic
5 consequences to Hegge's spouse and children if he is not given probation. *Id.*

6 Hegge then addressed the court. JA 71-72. He expressed how
7 heartbreaking it was to tell his boys that he might not be coming home. *Id.* He
8 offered that he would be willing to be on probation for 10 years if it meant he
9 could be there for his children. *Id.*

10 The district court explained that Hegge's sons had weighed very
11 heavily on the court's mind and that the court was very sad for them, but that
12 Hegge had placed himself in this situation. JA 72. The district court then
13 sentenced Hegge to serve 30 months in prison with minimum parole eligibility
14 after 12 months. JA 73. The sentence was not suspended. JA 73.

15 16 SUMMARY OF ARGUMENT

17 Hegge bore the burden of showing that withdrawing his plea would not
18 amount to allowing the solemn entry of a no contest plea to become a mere
19 gesture, a temporary and meaningless formality reversible at his whim. The
20 district court did not abuse its discretion. The record supports the district

1 court's finding that Hegge admitted to discussing the pat-down search with
2 his trial counsel before his arraignment and that he indicated on the record that
3 he understood he was giving up his right to present any defenses. The district
4 court did not commit reversible error by keeping Gary Woodbury as Hegge's
5 counsel. Even if Hegge's assertions about not understanding Mr. Woodbury
6 are true, entering a plea knowingly and intelligently is determined by a
7 defendant's knowledge of the charges, consequences of the plea and his
8 constitutional rights. None of Hegge's alleged misunderstandings affect the
9 validity of his plea. Hegge was sentenced well within statutory guidelines.

10 11 ARGUMENT

12 A. Presumption of validity

13 Guilty pleas are presumptively valid, especially when entered on advice
14 of counsel. *Molina v. State*, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).
15 Defendant bears the burden of showing that, under the totality of the
16 circumstances, permitting him to withdraw his no contest plea would be fair
17 and just. *Stevenson v. State*, 354 P.3d 1277, 131 Nev. 598(2015) (finding
18 Stevenson failed to present a sufficient reason to permit withdrawal of his
19 plea). The Defendant must show that permitting him to withdraw his plea
20

1 would not amount to allowing the solemn entry of a no contest plea to become
2 a mere gesture, a temporary and meaningless formality reversible at the
3 defendant's whim. *See id* at 1282.

4 B. Standard of Review

5 A motion to withdraw a plea of guilty is subject to the discretion of the
6 district court, and the district court's decision thereon will not be set aside on
7 appeal unless an abuse of discretion is apparent. *State v. Adams*, 94 Nev. 503,
8 505, 581 P.2d 868, 869 (1978) (citing *State v. District Court*, 85 Nev. 381,
9 455 P.2d 923 (1969)).

10 Put another way, the reviewing court will presume that the district court
11 correctly assessed the validity of the plea and will not reverse the district
12 court's determination absent a *clear* showing of an abuse of discretion. *Riker*
13 *v. State*, 111 Nev. 1316, 1322, 905 P.2d 706, 710(1995)(quoting *Bryant v.*
14 *State*, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986))(emphasis added).
15 Additionally, the district court may decline to conduct an evidentiary hearing
16 if it finds that the defendant's claim is belied by the record. *Little v. Warden*,
17 117 Nev. 845, 852, 34 P.3d 540, 544-45 (2001); *Hargrove v. State*, 100 Nev.
18 498, 502, 686 P.2d 222, 225 (1984).

1 C. Most Current Legal Standard

2 The most current standard of interpreting NRS 176.165 and the doctrine
3 surround withdraw of a guilty or no contest plea can be found in *Stevenson v.*
4 *State*, 354 P.3d 1277, 131 Nev. 598(2015). Despite having considered federal
5 persuasive authority that suggests leave to withdrawal a plea should be freely
6 allowed, *see id* at 1280, the Nevada Supreme Court not only upheld the district
7 court's decision to not allow Stevenson to withdraw his plea, it ruled that
8 permitting him to do so would have reduced the solemn nature of entering a
9 plea into a meaningless formality. *Id.*

10 The depth of analysis in the *Stevenson* opinion is often overlooked and
11 its precedential value woefully oversimplified. Although *Stevenson* does
12 overrule prior decisions which exclusively focused on the validity of the plea,
13 the Nevada Supreme Court did not require that a district court disregard its
14 own efforts to ensure a plea was made knowingly, intelligently and
15 voluntarily. Rather, the *Stevenson* court mandates consideration of the totality
16 of the circumstances to determine whether permitting withdrawal of a guilty
17 plea before sentencing would be fair and just. *Id* at 1281.

18 A proper application of this controlling case requires an understanding
19 that one of the goals of the fair and just analysis is to allow a hastily entered
20 plea made with unsure heart and confused mind to be undone, not to allow a

1 defendant to make a tactical decision to enter a plea, wait several weeks and
2 then obtain a withdrawal if he believes that he made a bad choice in pleading
3 no contest. *Id* at 1281-82. A no contest plea is not a placeholder that reserves
4 a defendant's right to our criminal system's incentives for acceptance of
5 responsibility unless or until a preferable alternative later arises. *See*
6 *Stevenson*, 354 P.3d at 1282. Rather, it is a grave and solemn act, which is
7 accepted only with care and discernment. *Id*.

8 D. An evidentiary hearing would have been redundant

9 Hegge first asserts that the district court committed reversible error by
10 not permitting him to have an evidentiary hearing on his claim that he was
11 illegally searched. Opening Brief 13:11-15. In reviewing a denial of a motion
12 to withdraw a guilty plea, this court gives deference to the district court's
13 factual findings as long as they are supported by the record. *Sunseri v. State*,
14 495 P.3d 127, 131, 137 Nev. Adv. Rep. 58(2021).

15 The district court found that the defendant stated that he spoke with
16 defense counsel about his concerns about Officer Pinkham's pat-down prior
17 to entering his plea. JA 58:9-10. Further, the district court found that Hegge
18 indicated on the record that he understood he was giving up his right to present
19 any defenses by pleading no contest. *Id*.

1 These findings are supported by the record. Hegge confirmed at
2 arraignment that he had discussed any defenses that he thought, or his attorney
3 thought would be applicable to the case and that he understood that he was
4 giving up the right to present those defenses by pleading no contest. JA 21: 1-
5 5. The arraignment transcript makes clear that the district court was not
6 merely canvassing Hegge in a perfunctory fashion but instead went out of its
7 way to ensure Hegge understood his rights and knowingly waived them. *See*
8 *e.g.* JA 18-19(“Sir, I would be happy to set this for trial if you like. This is
9 your case and you determine the direction we go with it.”) (court then took a
10 recess so Hegge could further consult with his attorney).

11 As to the district court’s finding that the defendant stated that he spoke
12 with his attorney specifically about the pat-down search, this is found in
13 Hegge’s motion to withdraw his plea. JA 28-29. In Hegge’s motion to
14 withdraw his plea it states:

15 **Defendant will testify that he engaged in discussions with trial**
16 **counsel regarding the validity of the search by Officer**
17 **Pinkham** and that the questions raised by Defendant concerned
18 whether evidentiary hearsay rules prevented the validity of the
19 search. Defendant will testify that he never understood that there
20 were issues about whether Officer Pinkham’s suspicions that
Defendant was armed were objectively reasonable.

JA 28-29(emphasis added).

1 The State has two responses to his assertion that he never understood
2 that there were issues about whether Pinkham's suspicions were objectively
3 reasonable. First, such a claim is far too subjective to be considered a reliable
4 basis for allowing Hegge to withdraw his plea. If all defendants could simply
5 claim they "never understood" a particular nuance of fourth amendment law
6 that conceivably applies to their case, only defendants with professional
7 expertise in fourth amendment law would be considered sufficiently qualified
8 to knowingly waive their rights and plead no contest. Second, the record
9 belies there being any issues with Pinkham's search.

10 An Officer need not be absolutely certain that an individual is armed;
11 the issue is whether a reasonably prudent [person] in the circumstances would
12 be warranted in the belief that [his or her] safety or that of others was in
13 danger. *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
14 This is a fact-specific inquiry that looks at the totality of the circumstances in
15 light of common sense and practicality. *Cortes v. State*, 127 Nev. 505, 511,
16 260 P.3d 184, 189(2011). The U.S. Supreme Court has made clear that, in a
17 suppression hearing, the State's burden should be no greater than
18 preponderance of the evidence. *See Nix v. Williams*, 467 U.S. 431, 444 n.5,
19 104 S. Ct. 2501, 2509 (1984).

1 As shown in Officer Pinkham's report, Arthur Brasher explained to
2 Officer Pinkham that on the day prior, someone he knew only as "Bo" had put
3 a gun to Brasher's head and shoving his way into Brasher's residence because
4 Brasher's brother owed "Bo" money. JA 35. Brasher then explained that
5 currently "Bo" was at the residence apparently waiting for Brasher. *Id.*

6 Officer Pinkham approached the residence and, consistent with
7 Brasher's statements, he found a man standing in the driveway who Pinkham
8 knew to be Bo Hegge. JA 35. Hegge confirmed that he did not live at the
9 residence and said he was waiting for a "friend of his." *Id.* Hegge also
10 inadvertently confirmed that he had been in the residence by telling the
11 Officers who was currently inside. *Id.* Before patting him down for weapons,
12 Officers ordered Hegge to put his hands behind his back. *Id.* Hegge refused,
13 keeping his right hand inside his hoodie pocket. *Id.* After being forced to
14 comply, Officers found in the same pocket a loaded black Smith and Wesson
15 semi-automatic pistol. *Id.*

16 Officer Pinkham presents specific articulable facts that justify the pat-
17 down search. Hegge's no contest plea was entered on the advice of counsel.
18 As such it carries a strong presumption of validity. His vague claim that it was
19 error not to hold an evidentiary hearing is unsupported by any specific factual
20

1 allegations that if true would have entitled him to withdraw his plea. *Hargrove*
2 *v. State*, 100 Nev. 498, 686 P.2d 222(1984).

3 E. Trial Counsel's effectiveness was not called into question

4 Hegge next asserts that his trial attorney's effectiveness was called into
5 question and as such it was error for the district court to not appoint conflict
6 counsel and have an evidentiary hearing. *See* Opening Brief 13.

7 This was first alleged by the State in its opposition to Hegge's motion
8 to withdraw his plea. JA 45-46. This argument arises from three quotes. The
9 first two come from Hegge's motion to withdraw and the final quote comes
10 from Hegge's reply to the States opposition. They are as follows:

11 Defendant will also testify that although discussions with trial
12 counsel may have included him being informed of the possibility
13 of an acquittal based on him not having been aware of his
14 mistaken belief that he was entitled to possess a firearm, that if
such discussions occurred, he did not understand their
significance.

15 JA 26:20-24(motion to withdraw plea).

16 Defendant will testify that he engaged in discussions with trial
17 counsel regarding the validity of the search by Officer Pinkham
18 and that the questions raised by Defendant concerned whether
19 evidentiary hearsay rules prevented the validity of the search.
Defendant will testify that he never understood that there were
20 issues about whether officer Pinkham's suspicions that Defendant
was armed were objectively reasonable.

1 JA 28-29(motion to withdraw plea).

2 Defendant admits and will testify that the case, including the
3 anticipated evidence against him, was discussed with counsel. His
4 assertion is that he now realizes that he didn't understand
5 counsel's legal conclusions in their entirety, specifically that he
6 did not fully understand the concept of how fact finders are
7 required and permitted to weigh evidence.

6 JA 51(reply to opposition).

7 Hegge is wrong, as was the State in its Opposition. A no contest plea is
8 not a placeholder for reserving our criminal justice system's incentives for
9 accepting responsibility unless or until a preferable alternative later arises.
10 *Stevenson*, 354 P.3d 1277, 1282(2015). Rather it is a grave and solemn act,
11 which is accepted only with care and discernment. *Id.* One of the goals of the
12 fair and just analysis is to allow a hastily entered plea made with unsure heart
13 and confused mind to be undone, not to allow a defendant to make a tactical
14 decision to enter a plea, wait several weeks, and then obtain a withdrawal if
15 he believes that he made a bad choice in pleading guilty. *Id.* at 1281-1283.

16 At the arraignment on April 12, 2021, the district court was observant
17 of and responsive to Hegge's demeanor: "You seem a little reluctant." JA
18 17:24. The district court would not allow Hegge to go forward with his plea
19 until his non-verbal indications of an unsure heart were resolved: Hegge - "I

1 kind of am, but it's all right. ..." JA 17:25. Court - "It's not all right. You have
2 the right to go to trial." JA 18:1-2.

3 The district court ensured Hegge's mind was neither confused nor that
4 his plea was being hastily entered: Court - "Have you expressed your
5 concerns with Mr. Woodbury?" JA 18:10-11. Court - "Sir, I would be happy
6 to set this for trial if you like. This is your case, and you determine the
7 direction we go with it. Do you need some more time to discuss it with Mr.
8 Woodbury?" JA 18-19. Much different from the situation in *Mitchell v. State*,
9 109 Nev. 137, 848 P.2d 1060(1993), where Mitchell never had an opportunity
10 to speak with her public defender, the district court took a recess during
11 arraignment in addition to canvassing him to ensure he had been given
12 opportunities to his satisfaction to meet with Mr. Woodbury. JA 19(3-16)
13 (takes recess); JA 13:4-5(satisfied and confident), 15:3-5(attorney answered
14 any questions about the agreement), 18:10-11(asked if concerns had been
15 discussed), etc.

16 Continuing its cautious canvas, after the recess, the district court made
17 sure Hegge was completely ready to go forward and that he entered his plea
18 knowingly, intelligently, and voluntarily. JA 19-22. It is not until more than
19 10 weeks later that Hegge feels he made a bad choice and seeks to withdraw
20 his plea. JA 25.

1 This brings us to the statements from Hegge's motion and reply. To
2 state a claim of ineffective assistance of counsel sufficient to invalidate a
3 judgment of conviction based on a no contest plea, a defendant must
4 demonstrate a reasonable probability that, but for counsel's errors, he would
5 not have pled guilty and would have insisted on going to trial. *State v. Gomes*,
6 112 Nev. 1473, 1479 (1996) (internal citations omitted). If a defendant's
7 claims are not supported by facts that would, if true, entitle him to relief, the
8 district court is not obliged to conduct an evidentiary hearing. *See McConnell*
9 *v. State*, 125 Nev. 243, 212 P.3d 307(2009).

10 Hegge's argument relies on his allegation that his trial attorney (Mr.
11 Woodbury) was ineffective. Specifically, that Hegge's no contest plea was
12 not knowingly and intelligently made because he should have (a) been
13 informed of and understood the significance of the possibility of an acquittal
14 based on his mistaken belief that he was entitled to possess a firearm; (b)
15 understood that there were issues about whether Officer Pinkham's suspicions
16 that Hegge was armed were objectively reasonable; (c) fully understood the
17 concept of how fact finders are required and permitted to weigh evidence.

18 This foundational assumption is not supported by what it truly means
19 for a defendant to knowingly and intelligently enter his plea under NRS
20 174.035(2) and related caselaw. Making Hegge's claims, even if true, lacking

1 the ability to entitle him to relief under the doctrine of ineffective assistance
2 of counsel.

3 NRS 174.035(2) reads:

4 If a plea of guilty or guilty but mentally ill is made in a written
5 plea agreement, the agreement must be in substantially the
6 form prescribed in NRS 174.063. If a plea of guilty or guilty
7 but mentally ill is made orally, the court shall not accept such
8 a plea or a plea of nolo contendere without first addressing
the defendant personally and **determining that the plea is
made voluntarily with understanding of the nature of the
charge and consequences of the plea.**

9 NRS 174.035(2). In *Hubbard v. State* the Nevada Supreme Court upheld a
10 district court's finding that Hubbard entered his plea knowingly and
11 intelligently where the district court established that Hubbard understood the
12 charges, the consequences of the plea and his constitutional rights. *Hubbard*
13 *v. State*, 110 Nev. 671, 877 P.2d 519(1994) (district court's denial of motion
14 to withdraw plea upheld).

15 None of the three statements Hegge relies on as evidence that Mr.
16 Woodbury was ineffective address Hegge's ability to understand the charge
17 against him, the consequences of his plea or his constitutional rights. They
18 also do not directly accuse Mr. Woodbury of wrongdoing, but instead focus
19 on what Hegge allegedly understood.

1 Alternatively, Hegge's first statement about not understanding the
2 possibility of an acquittal based on his mistaken belief he could possess a
3 firearm lacks merit. He was counseled on this issue more than once as
4 indicated by the arraignment transcript. One of those discussions happening
5 mid-arraignment. The district court thoroughly canvased him on this very
6 issue. Further, the argument that ignorance of the law negates the element of
7 willfully possessing the firearm is meritless.² Thus it does not follow that
8 Hegge was somehow prejudiced.

9 Also, this initial statement starts the patten followed in the other two
10 statements of Hegge conveniently alleging that he now realizes he did not
11 understand some sophisticated point of law. Given the clear problems with
12 the merit of these three statements it follows that the district court did not grant
13 the motion for a hearing.

14 F. Delayed Discovery and "antagonistic relationship"

15 Similar to the way he addressed it in his reply, Hegge briefly asserts
16 that the State withheld *Brady* material it had prior to his signing of the plea
17

18 ² The word "willful" when used in a criminal statute or information with
19 respect to proscribed conduct relates to an act or omission which is done
20 intentionally, deliberately or designedly, as distinguished from an act or
omission done accidentally, inadvertently, or innocently. *Robey v. State*, 96
Nev. 459, 461, 611 P.2d 209, 210 (1980).

1 agreement. Opening Brief 17:6-14. Hegge fails to adequately support his
2 assertion that the letter from Arthur Brasher was *Brady* material and also fails
3 to explain how, if at all, this letter would have affected his decision. As
4 discussed in the facts, this letter established the location of the victim and the
5 victim's unequivocal desire to see Hegge prosecuted.

6 Hegge also asserts that trial counsel should have been removed from
7 his representation of Hegge because, "there could have been no clearer
8 showing of antagonism between defense attorney and client than the attorney
9 telling his client to "just quit" when the client wanted it clear that the PSI did
10 not have the correct recitation of facts. Opening brief 18:11-16.

11 This assertion loses all its support when Mr. Woodbury's comment is
12 put into the full context of the sentencing hearing. Hegge had spoken out of
13 turn. JA 66. More importantly, Mr. Woodbury then proceeded to forcefully
14 argue the exact point Hegge was so upset about. JA 66-72.

15 G. Hegge was sentenced within the bounds of Nevada Law

16 District courts have wide discretion in sentencing decisions. *See Houk*
17 *v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379(1987). Such decisions are
18 not considered an abuse of discretion "[s]o long as the record does not
19 demonstrate prejudice resulting from consideration of information or

1 accusations founded on facts supported only by impalpable or highly suspect
2 evidence.” *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

3 Hegge does not argue that the district court relied on impalpable or
4 highly suspect evidence. Hegge does argue that the sentence was an abuse of
5 discretion because he only had one prior felony conviction that was over ten
6 years old, and he is a family man with five children including two sons with
7 this live-in girlfriend. Opening Brief 22.

8 Hegge’s 12 to 30 months prison sentence for being a prohibited person
9 in possession of firearm is within the statutory range for that offense. NRS
10 202.360. The district court’s decision to not grant probation for that same
11 offense is also well within its statutorily defined discretion. See NRS
12 176A.100(1)(c). Further, the PSI included Hegge’s extensive criminal history
13 including his 11 misdemeanors, one gross misdemeanor and one felony
14 conviction. JA 64-65. He also had his probation revoked in his felony matter,
15 was paroled but ultimately was dishonorably discharged. JA 65. His
16 misdemeanor convictions included violent offenses and warrants for being
17 found in contempt of court. JA 65. The underlying facts of the case also
18 presented aggravating circumstances consistent with a pattern of violent
19 behavior. JA 64.

The district court did not abuse its discretion in sentencing Hegge to the minimum prison sentence provided for under Nevada law for his offense.

CONCLUSION

Based on the foregoing the State respectfully asks that the district court's order denying Hegge's motion to withdraw his plea be upheld along with his sentence.

RESPECTFULLY SUBMITTED this 27th day of April, 2022.

TYLER J. INGRAM
Elko County District Attorney

By:

JEFFREY C. SLADE
Deputy District Attorney
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1 CERTIFICATE OF COMPLIANCE

2 I hereby certify that this Respondent's Answering Brief complies with
3 the formatting requirements of NRAP 32(a)(4), the typeface requirements of
4 NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6). This
5 Respondent's Answering Brief has been prepared in a proportionally spaced
6 typeface using Microsoft Office Word 2007, in size 14-point Times New
7 Roman font.

8 I further certify that this brief complies with the page or type-volume
9 limitations of NRAP 32(a)(7) because, excluding the parts of the Respondent's
10 Answering Brief exempted by NRAP32(a)(7)(C), because it contains 7453
11 words.

12 I hereby certify that I have read the Respondent's Answering Brief, and
13 to the best of my knowledge, information, and belief, it is not frivolous or
14 interposed for any improper purpose. I further certify that this brief complies
15 with all applicable Nevada Rules of Appellate Procedure, in particular NRAP
16 28(e), which requires every assertion in the brief regarding matters in the
17 record to be supported by appropriate references to the record on appeal.

18
19 ///

20 ///

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

4 DATED this 27th day of April, 2022.

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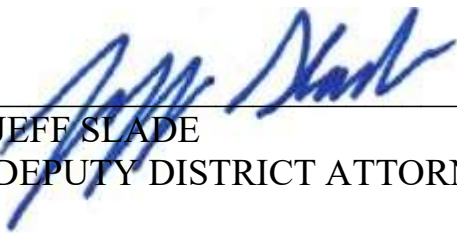
I certify that this document was filed electronically with the Nevada Supreme Court on the 27th day of April, 2022. Electronic Service of the Respondent's Answering Brief shall be made in accordance with the Master Service List as follows:

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