IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN MARQUETTE GIPSON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 69174

RESPONDENT'S ANSWERING BRIEF

Appeal From Findings of Fact, Conclusions of Law, and Order Denying Appellant's Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is not presumptively assigned to the Nevada Court of Appeals because it is a post-conviction appeal involving a conviction for an offense that is a Category A Felony. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

1. Whether Gipson's Petition Was Untimely

2. Whether the District Court Correctly Rejected Gipson's Claims of Ineffective Assistance of Counsel and Incompetence to Plead Guilty on the Merits

STATEMENT OF THE CASE

On April 28, 2010, Appellant Kevin Marquette Gipson ("Gipson") was charged by way of Indictment with one count of Murder With Use of a Deadly

Weapon (Felony – NRS 200.010, 200.030, 193.165). 1 Appellant's Appendix ("AA") 1-3. On December 7, 2014, the parties informed the District Court that the matter was resolved via negotiations. 1 AA 116. A Guilty Plea Agreement was filed in open court and Gipson entered a plea of guilty to the charge within the Indictment. 1 AA 4-12, 116-23. Within the Guilty Plea Agreement, the parties stipulated to recommend a sentence of 20 years to life in the Nevada Department of Corrections and the State retained the right to argue for a term of not less than 4 to 8 years for use of a deadly weapon. 1 AA 4.

Gipson was present with counsel for sentencing on February 10, 2012. 1 AA 13. The District Court adjudicated him guilty and sentenced him to a term of 20 years to life, plus a consecutive term of 96 to 240 months for use of a deadly weapon, with 686 days credit for time served. 1 AA 13-14. The Judgment of Conviction was filed March 13, 2012. Id. Gipson did not file a timely direct appeal.

Gipson filed a Pro Per Motion to Withdraw Plea on September 5, 2012. 1 AA 15-19. The District Court denied the motion on September 26, 2012. 1 AA 20-21.

On October 15, 2012, Gipson filed a Pro Per "Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing." 1 AA 25-27. The State filed its Opposition on November 2, 2012. 2 AA 28-31. On November 5, 2012, Gipson filed a Pro Per "Memorandum of Points and Authorities Facts of the Case." 1 AA 32-41. That Memorandum sought to file a direct appeal and the Memorandum

was transmitted to the Nevada Supreme Court as a Notice of Appeal. 1 AA 41-42. On December 20, 2012, the Nevada Supreme Court dismissed Gipson's appeal. 1 AA 43-44.

On January 28, 2013, the District Court granted Gipson's Motion for Appointment of Counsel. 1 AA 94. On February 11, 2013, Carmine Colucci, Esq., was confirmed as counsel for Gipson. Id.; 1 AA 75. On June 17, 2013, counsel advised the District Court that all the documents had been received and a briefing schedule was set. 1 AA 94.

Gipson, through counsel, filed his Post-Conviction Petition for Writ of Habeas Corpus ("Petition") and Points and Authorities in support of his Petition on June 6, 2014. 1 AA 45-75. The State filed a Response and Motion to Dismiss on June 13, 2014. 1 Respondent's Appendix ("RA") 28-37. Gipson filed a Reply on August 7, 2014. 1 RA 38-51. The District Court denied the State's Motion to Dismiss and ordered briefing on the merits. 1 RA 52-53.

Gipson filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus and Supplemental Points and Authorities on December 15, 2014. 1 AA 76-87. The State filed its Response on February 24, 2015. 1 RA 54-66.

On September 10, 2015, the District Court held an evidentiary hearing, where Gipson and his former counsel, Christy Craig, Esq., testified. 1 AA 124-72. At the conclusion of the hearing, the District Court denied Gipson's Petition. 1 AA 170-71.

It issued its Findings of Fact, Conclusions of Law, and Order reflecting its oral pronouncement on October 22, 2015. 1 AA 93-102.

Gipson filed a Notice of Appeal from the denial of his Petition on November 12, 2015. 1 AA 188.

STATEMENT OF THE FACTS

A. The Offense

On March 25, 2010, at approximately 5:45 a.m., Robert "Lee" Gilmore and Wade Fleming were leaving Einstein Bagels located at 7541 West Lake Mead Boulevard, Las Vegas, Nevada. 1 RA 1. As they were nearing Fleming's truck they heard what they thought was a woman screaming loudly across the street at the Jack-in-the-Box restaurant located at 7510 West Lake Mead Boulevard, Las Vegas, Nevada. 1 RA 1-2. Gilmore and Fleming then heard the sound of a single gunshot from the Jack-in-the-Box area and immediately called 911. 1 RA 2.

As they approached the area where the gunshot was heard, they were joined by another individual, Christian Benitez, who had been at the Starbucks next to Einstein Bagels. Id. All three noticed what appeared to be a male in a dark hooded sweatshirt running southeasterly down Lake Mead Boulevard. Id. None of the three could identify the individual running away from the Jack-in-the-Box. Id. Fleming approached the victim as she lay in a parking stall at the Jack-in-the-Box. Id. Fleming noticed the victim's Jack-in-the-Box name tag and yelled "Brittney" over and over

to see if she would respond. Id. Fleming got no response and thought she was dead. Id.

Christina Bailey worked at the Vons grocery store located in the same shopping complex as the Jack-in-the-Box. Id. She worked the graveyard shift at Vons and was leaving the store in her vehicle when she heard the scream coming from Jack-in-the-Box. Id. Bailey drove towards the Jack-in-the-Box and noticed a female laying on the ground with a male in a dark hooded sweatshirt standing over her. Id. It appeared to Bailey that the male was helping the female, who appeared drunk, to her vehicle. Id. Bailey did not hear a gunshot and thought everything appeared to be okay. Id.

Bailey proceeded to the stoplight at the intersection of the Vons shopping center and Lake Mead. Id. She was there for approximately 30 seconds when she noticed the same male with the hooded sweatshirt sprint past her vehicle onto Lake Mead Boulevard heading east. Id. Bailey decided to follow the individual as he raced down Lake Mead, but eventually lost him as he darted between buildings. Id. Bailey could not identify the individual beyond that he was African-American. Id.

Homicide detectives arrived to the scene and were notified that the victim had been transported to University Medical Center (UMC) Trauma as she was still showing signs of life. Id. Detectives were able to determine that the victim was Brittney Lavoll, who was on her way into work as an assistant manager at Jack-in-

the-Box. Id. At 6:15 a.m., Dr. Cousins of UMC Trauma pronounced Brittney dead of an apparent gunshot wound to the head. 1 RA 2-3. An autopsy performed by Dr. Telgenhoff on March 26, 2010, revealed that the cause of death was a distant penetrating gunshot wound to the head. 1 RA 3.

At the scene, detectives located two sets of keys belonging to Brittney and a cartridge case bearing the head stamp "25 AUTO CBC." Id. Brittney's 1995 Jeep Grand Cherokee was parked in a stall near Jack-in-the-Box. Id. Inside the vehicle, Detectives located a black jacket with apparent blood stains. Id.

Charles Lavoll, Brittney's father, came to the scene and spoke to detectives. Id. Upon learning that his daughter was shot, Charles immediately advised that the shooter was likely Kevin Gipson. Id. Charles intimated that Gipson and Brittney had been in a dating relationship for several years and had two children together. Id. They broke up because Gipson was abusive towards Brittney and refused to leave her alone. Id. Brittney had to switch Jack-in-the-Box locations due to Gipson harassing her at work, as well as move to a different apartment. Id. According to Mechele Lavoll, Brittney's mother, Gipson was looking for Brittney approximately four to five months before the shooting and had threatened Mechele that he would shoot Brittney. Id.

In an attempt to locate Gipson, detectives went to the Summerhill Apartment Complex at 3630 E. Owens, Las Vegas, Nevada where Gipson's mother Lenda

Jackson resided. Id. While at the apartment, Gipson called his mother. Lenda handed the phone to Detective Long. Id. Gipson denied any involvement in the murder saying that he had spent the night at a friend's house and did not learn of the murder until his mother called and notified him. Id. Gipson stated he would get a ride to the Summerhill Apartment Complex to meet with the detectives. Id. Detective Long informed Gipson that there were numerous relatives of the victim at the complex and therefore they would come meet him. Id. Gipson at first said he didn't want the "cops" to come to where he was. Id. Gipson then asked someone in the background a question and agreed that detectives could come to his location, which was 824 Levy – the home of Denise Nelson. Id. Detectives went to that location and came into contact with Gipson. He then agreed to go to the detectives' offices, known as the ISD building, and was driven there. 1 RA 3-4.

On March 25, 2010 at approximately 3:20 p.m., detectives interviewed Gipson. 1 RA 4. Gipson stated that he dated Brittney for five years and had two children with her, but broke up approximately one year before. Id. The previous night, Gipson had spent the night at Denise Nelson's house located at 824 Levy, Las Vegas, Nevada. Id. Gipson, Denise, and her boyfriend Larry "Mississippi" Glinsey went to a party at a friend's house. Id. During the drive they were stopped by LVMPD and Glinsey was taken in for outstanding warrants. Id. Gipson and Nelson

drank alcohol and played cards until 2:30-3:00 a.m. when they went back to Nelson's place to sleep. Id.

Gipson stated he received a call from his mother at approximately 8:00 a.m. stating that something had happened to Brittney. Id. Eventually, Gipson's cousin, Isaiah Martin, notified Gipson that everyone was looking for him. Id.

According to Gipson, the reason he and Brittney broke up was because he was cheating on her. Id. Gipson denied any kind of abuse towards Brittney during their relationship. Id. After the initial breakup, Gipson unsuccessfully attempted to get back together with Brittney. Id. Gipson said he had no contact with Brittney for five months until he tried to contact her at her work but was informed that Brittney no longer worked at that location. Id. Gipson recently had been trying to get in touch with Brittney to see his son on his birthday on March 23 but was unable to. Id.

Gipson was then asked about taking a polygraph test. Id. Detectives explained it as an investigative tool, and told Gipson even if he failed it they could not arrest him. Id. Gipson agreed to schedule the test. Id. Gipson also agreed to provide a DNA sample and have a Gunshot Residue Kit performed at the same time. 1 RA 4-5.

Detectives Tremmel and Long prepared to do a polygraph examination, but were informed by Officer Geoff Flohr that it would be preferable that Gipson take a Concealed Information Test (CIT). 1 RA 5. On March 26, 2010, Gipson met with Officer Flohr to conduct a CIT. 1 RA 9. Officer Flohr advised Gipson that the CIT

does not test deception but only knowledge of events. 1 RA 10. Officer Flohr then administered the test by asking him a series of questions regarding the murder of which only someone who had distinct knowledge of the murder would be able to answer. Id. Gipson took the CIT and failed, meaning that he had knowledge of the murder that only the killer would know. Id.

Detectives confronted Gipson with the fact that he failed the CIT. Id. Gipson explained that he had been "in and out of the mental hospital" and that he killed Brittney because "she drove me crazy." 1 RA 10-11. Gipson further stated that he would not see his kids for months. 1 RA 11.

Gipson previously had called the Jack-in-the-Box and found out that Brittney worked at the West Lake Mead location. Id. He walked to the Jack-in-the-Box and waited for Brittney to arrive. Id. He hid in the bushes behind a van. Id.

Shortly thereafter, the victim arrived. Id. When she got out of her car, a brown Jeep, Gipson approached her from behind and shot her one time in the head. Id. Gipson did not know where she had been shot but that she collapsed on the ground next to her vehicle. Id. Gipson then stated that he ran across the Vons shopping center intersection as Christina Bailey had described and ran all the way back to the 824 Levy address. Id.

Gipson bought the .25 caliber gun on March 24, 2010, from an individual he knew only as Tramaine. Id. He paid $50 in cash and $50 worth of Marijuana for the

gun. Id. After the shooting, he returned the gun to Tramaine without telling him he had used it in the murder. Id. Gipson also discarded the shoes he was wearing as well as the dark hooded sweatshirt. Id.

B. September 10, 2015, Evidentiary Hearing

During the evidentiary hearing, Gipson and Christy Craig, Esq., testified. Gipson testified that he informed Craig of his mental health issues – specifically, that he was bipolar and schizophrenic. 1 AA 129. He denied that he was ever examined by a psychologist or psychiatrist. 1 AA 130. He testified that he first received the Guilty Plea Agreement when he arrived in court to plead guilty. Id. Also, he said that Craig did not go over the agreement with him and that he was under the influence of anti-psychotic, anti-depressant drugs that were not working. 1 AA 131. He stated that this meant that he was not in the right state of mind to plead guilty. Id. Further, he testified that Craig never provided him with discovery. 1 AA 132. He alleged that he never wanted to plead guilty and always wanted to proceed to trial. 1 AA 133. He stated that he was coerced into his plea, was hearing voices as he was entering his plea, and responded the way he did because Craig told him to. 1 AA 133-35.

In contrast, Craig informed the District Court that she had kept an eye on Gipson's medication and had him evaluated by a doctor for competency. 1 AA 150. She was confident that Gipson was competent at the time of entry of plea. Id. If she

had concerns, she would have stopped the plea and had Gipson evaluated for competency. 1 AA 150, 159. Although she did not recall the discussion she had with Gipson about the Guilty Plea Agreement specifically, she testified that it was her practice to review each part of the Guilty Plea Agreement and, if applicable, explain the significance of it. 1 AA 167-68. Additionally, she always informs her clients about the significance of the appeal-waiver provision of the Guilty Plea Agreement. 1 AA 154. Although sometimes she will help a client through the plea canvass by reminding them what they had spoken about or telling him or her what to tell the court, she would never coerce a client into pleading guilty and would proceed to trial if that was his or her wish. 1 AA 154-55, 158.

SUMMARY OF THE ARGUMENT

The District Court was correct in denying Gipson's Petition, albeit for the wrong reasons. Gipson's Petition was procedurally barred pursuant to NRS 34.726, as he failed to file his Petition within one year of the filing of his Judgment of Conviction. He failed to establish an impediment external to the defense that would constitute good cause to consider the Petition on the merits. Therefore, the District Court should have dismissed the Petition under NRS 34.726, rather than considering it on the merits.

That said, Gipson's allegations of ineffective assistance of counsel and that he was incompetent to plead guilty were meritless. First, the plea canvass, Guilty Plea

Agreement, and the testimony of Craig during the evidentiary hearing on the Petition establish that Gipson's mental health issues were well-investigated and that he entered his plea of guilty without coercion and with adequate advice from counsel. Second, while Gipson contends that a higher standard of competency applies to guilty pleas, the United States Supreme Court has rejected this proposition, and the record shows that Gipson was competent under the constitutional standard.

Accordingly, the State respectfully requests that this Court AFFIRM the District Court's Findings of Fact, Conclusions of Law, and Order denying Gipson's Petition.

ARGUMENT

I

Gipson's Petition Was Untimely, Without Sufficient Good Cause

Gipson's Judgment of Conviction was filed on March 13, 2012; he did not file a timely direct appeal. 1 AA 13-14. Gipson's initial Petition was filed June 6, 2014, approximately 2 years, 2 months, and 24 days after the Judgment of Conviction, making that Petition and the subsequent Supplemental Petitions procedurally barred under NRS 34.726(1). 1 AA 45-75. Instead of dismissing pursuant to the procedural bar, the District Court erroneously considered the Petition on the merits.

The Nevada Supreme Court has held that district courts have a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred, and must not arbitrarily disregard them. State v. Dist. Court (Riker), 121 Nev.

225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id.; see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (parties cannot stipulate to waive, ignore or disregard the mandatory procedural default rules nor can they empower a court to disregard them). Additionally, the Nevada Supreme Court in Riker noted that procedural bars "cannot be ignored [by the district courts] when properly raised by the State." Riker, 121 Nev. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was recently reaffirmed by the Nevada Supreme Court in State v. Greene, 129 Nev. ___, ___, 307 P.3d 322 (2013). There, the Nevada Supreme Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 322–23.

Likewise, this Petition is procedurally barred. The mandatory provision of NRS 34.726(1) states:

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed **within 1 year after entry of the judgment of conviction** or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

(emphasis added).

Per the statutory language, the one-year time bar prescribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur issues from a timely direct appeal. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998); see Pellegrini v. State, 117 Nev. 860, 873, 34 P.3d 519, 528 (2001) (holding that NRS 34.726 should be construed by its plain meaning).

The Nevada Supreme Court demonstrated the strict deadline set by NRS 34.726(1) in Gonzales v. State, 118 Nev. 590, 593, 590 P.3d 901, 902 (2002). There the Court rejected a habeas petition that was filed two days late, pursuant to the "clear and unambiguous" mandatory provisions of NRS 34.726(1). Id. Gonzales reiterated the importance of filing the petition with the District Court within the one-

year mandate, absent a showing of "good cause" for the delay in filing. Id. The one-year time bar is therefore strictly construed.

Gipson's Petition was filed on June 6, 2014, approximately 2 years, 2 months, and 24 days after the Judgment of Conviction on March 13, 2012. 1 AA 13-14, 45-75. Accordingly, NRS 34.726(1) was directly applicable.

To avoid procedural default under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988), superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004).

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 74 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at

595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the defendant. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that, "appellants cannot attempt to manufacture good cause." Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506. Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306; Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Below, Gipson alleged good cause existed to ignore the procedural bar of NRS 34.726 because his counsel, Carmine Collucci, Esq., was unaware of the impeding time bar when Mr. Colucci was appointed approximately 19 days prior to the running of the 1 year time-bar under NRS 34.726(1). 1 AA 60-63. He argued that the setting of a status check past the one-year time-bar date of March 13, 2013, and the filing of stipulations and orders to extend the briefing schedule support his argument and constitute good cause to overcome the procedural bar. Id. However, Gipson failed to mention that in the stipulations and orders filed on January 7, 2014, and February 6, 2014, the State specifically retained the right to assert the procedural time-bar of NRS 34.726(1). 1 RA 23-27. Furthermore, even if there was a stipulation made, the

State is prohibited from waiving the procedural time-bar and district courts are prohibited from disregarding procedural bars even if parties stipulate to do so:

> [W]e hold that the parties in a post-conviction habeas proceeding cannot stipulate to disregard the statutory procedural default rules. We direct all counsel in the future not to enter into stipulations like the one in this case and direct the district courts not to adopt such stipulations.

Haberstroh, 119 Nev. at 181, 69 P.3d at 682. Therefore, the date of the status check and the stipulations and orders, even if they had not reserved the right to assert the time-bar, cannot constitute good cause.

Additionally, Gipson argued in his Reply that he needed to request transcripts from the District Court in order to complete the Petition, and that this constitutes good cause. 1 RA 39-40. It does not. Gipson had a year from the date of the Judgment of Conviction to seek transcripts, and his failure to do so until the last minute is not an impediment external to the defense. Clem, 119 Nev. at 621, 81 P.3d at 525. Nor can any negligence or shortcomings by post-conviction counsel be considered good cause. Brown v. Warden, 130 Nev. ___, ___, 331 P.3d 867, 871–72 (2014) (noting that even ineffective assistance by post-conviction counsel, other than in capital cases, cannot excuse the procedural bars).

Accordingly, Gipson failed to demonstrate good cause to consider his untimely Petition below. Accordingly, Gipson's Petition was time-barred, and the District Court had a duty to dismiss it, rather than consider it on the merits. Riker,

121 Nev. at 231, 112 P.3d at 1074. Thus, the Petition was correctly denied, albeit for incorrect reasons.

II
Gipson's Claims Were Correctly Found to Lack Merit

Even if Gipson's Petition was not untimely, it was properly denied on the merits. Gipson contends now that the District Court erred in denying two claims: (1) a claim that trial counsel was ineffective for failing to adequately advise Gipson before he pleaded guilty, given his mental health issues, and (2) a claim that he was incompetent to plead guilty.[1]

A. Gipson Received Effective Assistance of Counsel

Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

[1] Gipson's Opening Brief does not allege any other error in the District Court's denial of his Petition and Supplement. The State notes that Gipson may not raise new claims in a reply brief. NRAP 28(c).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356. 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Further, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

This Court begins with a 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, 1011-12, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged 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) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, this Court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066). Then, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S. Ct. at 2066).

Counsel's strategic and tactical decisions are "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280. 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." Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977); accord Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). 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. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the "prejudice" prong of the test, the defendant must 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). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

When ineffective assistance of counsel claims are asserted in a petition for post-conviction relief, the claims 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.

Here, Gipson claims that he was entitled to a higher degree of effective assistance of counsel due to his delusional and hallucinatory state. Opening Brief at 13. However, he provides absolutely no support for the proposition that a defendant suffering from mental health problems is entitled to more than Strickland requires.

Further, any allegation that counsel did not adequately investigate Gipson's mental health issues is clearly belied by the record, including the evidentiary hearing testimony of Craig as well as the report prepared by Dr. Slagle, which indicated that,

despite these issues, Gipson was competent to proceed to trial. 1 AA 112-14, 150. Additionally, it is clear based on the plea canvass that Craig had investigated Gipson's mental illness. She requested that the District Court allow Gipson to enter a plea of guilty but mentally ill. 1 AA 116. The District Court acknowledged that both Craig and the State had informed it that it was the intent of Gipson to enter a plea of guilty but mentally ill consistent with NRS 174.035. Id. The parties agreed that the plea canvass would move forward in a typical fashion, and the decision regarding whether Gipson was mentally ill would occur at sentencing with the burden on the defendant. 1 AA 116-17. This is evidence that plea counsel knew of Gipson's alleged mental health issues, and attempted to bring them before the court at multiple junctures.

All of this indicates that counsel was well-aware of Gipson's previous mental health issues and utilized a psychiatrist to ensure that Gipson was competent to proceed to trial. Thus, any claim of a failure to investigate is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Further, Craig was effective in her representation during entry of plea. Gipson claims that (1) he never saw the Guilty Plea Agreement until court commenced, (2) Craig never discussed the Guilty Plea Agreement with him, (3) he was under the influence of anti-psychotic, anti-depressant medication, (4) he was never shown

discovery, (5) he was never informed about his appellate rights, and (6) Craig told him what answers to utter. Opening Brief at 13-15. None of these claims have merit.

The majority of these claims are belied by the record. First, even if Gipson did not see the Guilty Plea Agreement until right before court commenced, he acknowledged on the record that he had read it and understood it, and acknowledged that counsel had spoken to him about to the agreement and that he had no questions for counsel:

> COURT: Okay. Have you received a copy of the – well, frankly, the original charging document that was filed in this case that you indicated you were not guilty of, that's the Indictment, that's attached as Exhibit 1 to a Guilty Plea Agreement. Do you have a copy of that with you right now?
>
> DEFENDANT: Yes.
>
> COURT: Now, you recall when you went—entered your original plea you went through it and you indicated you understood the elements of that offense; that you had a chance to talk to your lawyer. ***Do you need any more time to talk with Ms. Craig*** about those—the elements of the offense and the allegation there before I ask you again whether you've changed your plea.
>
> DEFENDANT: ***No.***

COURT: All right. So how do you plead to that charge, murder with use of a deadly weapon—first degree murder with use of a deadly weapon; guilty or not guilty.

DEFENDANT: Guilty.

COURT: Before I accept your plea of guilty I must be satisfied that the plea is freely and voluntarily entered and that you're doing so knowingly. Are you pleading guilty because in truth and in fact you are guilty?

DEFENDANT: Yes.

COURT: ***Has anyone forced you or coerced you to enter this plea?***

DEFENDANT: ***No.***

. . .

COURT: Now the Guilty Plea Agreement I just referred to – I'm looking at the original of that document. On page five of that Guilty Plea Agreement I see a signature under what I believe to be the signature line for you, Mr. Gipson. Is this your signature on this document?

DEFENDANT: Yes.

COURT: All right. Did you sign it today?

DEFENDANT: Yes.

COURT: Did you sign it after you read it – carefully read it and went through it with your lawyer?

DEFENDANT: Yes.

COURT: ***Did she—when you carefully read this document did you realize you were waiving valuable constitutional and procedural rights by entering this plea?***

DEFENDANT: ***Yes.***

COURT: ***Did you talk to your lawyer about all those rights?***

DEFENDANT: ***Yes.***

COURT: ***Did she explain to you all this important information to your satisfaction?***

DEFENDANT: ***Yes.***

1 AA 118-19 (emphases added). These statements during the guilty plea canvass indicate that Craig provided effective assistance in explaining the Guilty Plea Agreement and the consequences of a guilty plea.

Second, the Guilty Plea Agreement clearly advised Gipson of his waiver of appellate rights:

> WAIVER OF RIGHTS
>
> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges. . . .

> The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

1 AA 7. Craig testified that she always discusses this provision with her clients. 1 AA 148. This indicates that Craig adequately explained this provision to Gipson.

Third, Gipson acknowledged that he was pleading guilty freely and voluntary and was not under the influence of any drug that would impair his ability to understand the nature of his plea of guilty:

VOLUNTARINESS OF PLEA

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> I understand that the State would have to prove each element of the charge(s) against me at trial.
>
> 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 believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
>
> ***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 promises of leniency, except for those set forth in this agreement***.
>
> ***I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.***
>
> 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.

1 AA 7-8 (emphasis added). Thus, even if Gipson was taking psychiatric medication, he acknowledged that it was not affecting him. And the plea canvass reveals nothing that would suggest that Gipson did not understand the nature of the proceedings. 1 AA 118-19.

As for the claim that Craig fed him answers, any allegation that this rendered his plea involuntary is belied by the above, as well as Craig's credible testimony at the evidentiary hearing, where she explained that she will sometimes give her clients encouragement and advice on what to tell the court, but will not coerce them into pleading guilty. 1 AA 155; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Finally, Gipson's claim that Craig did not provide him with the discovery is a bare claim that fails to establish any prejudice, as he does not show that if he had received the discovery, he would not have pleaded guilty. Counsel is responsible for trial strategy, not the defendant, and thus Gipson would benefit little from receiving any discovery. Rhyne, 118 Nev. at 8, 38 P.3d at 167. And he acknowledged in his Guilty Plea Agreement that Craig had discussed defense strategies with him. 1 AA 7-8.

Accordingly, Gipson's claims of ineffective assistance of counsel are bare claims, belied by the record and the evidentiary hearing testimony, and otherwise fail to establish prejudice. Accordingly, the District Court did not err in denying these claims.

B. Gipson's Plea Was Made Competently

Gipson claims that he was incompetent to plead guilty. However, he acknowledges that he was competent to stand trial, as reflected in Dr. Slagle's report. Opening Brief at 15; 1 AA 112-14. However, he claims that there is a separate, higher standard that is required for a defendant to plead guilty.

This is simply not true. A defendant is incompetent to stand trial *or plead guilty* if he lacks sufficient present ability to consult with his lawyer with a reasonable degree of understanding or he lacks a rational or factual understanding of the proceedings against him. Dusky v. United States, 362 U.S. 402, 402, 80 S. Ct.

788, 788 (1960); see also NRS 178.400. In order to require a competency determination, a defendant must demonstrate a reasonable doubt in the mind of the court that they are presently competent. Martin v. State, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980). Such a reasonable doubt is not raised by the bare allegations of a defendant or a history of mental illness alone. Id.; Calambro v. Second Judicial Dist. Ct., 114 Nev. 961, 971-72, 964 P.2d 794, 801 (1998) (finding defendant competent although he was diagnosed schizophrenic and reported hearing voices). A court will consider the interactions with a defendant and his attorney as well as the interactions between the court and the defendant in determining whether a reasonable doubt as to competency exists. Hill v. State, 114 Nev. 169, 176-77, 953 P.2d 1077, 1082-83 (1998).

Gipson cites Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992) for the proposition that "[t]he legal standard used to determine a defendant's competency to stand trial is different from the standard used to determine competency to waive constitutional rights." However, he fails to acknowledge that the United States Supreme Court expressly overruled this proposition on review of the Ninth Circuit's decision:

> The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for "reasoned choice" among the alternatives available to him. How this standard is different from (much less higher than) the Dusky standard -- whether the defendant has a "rational understanding" of the

proceedings – is not readily apparent to us. . . . [E]ven assuming that there is some meaningful distinction between the capacity for "reasoned choice" and a "rational understanding" of the proceedings, ***we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the Dusky standard.***

. . .

In sum, all criminal defendants – not merely those who plead guilty – may be required to make important decisions once criminal proceedings have been initiated. And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. (The decision to plead guilty is also made over a shorter period of time, without the distraction and burden of a trial.) ***This being so, we can conceive of no basis for demanding a higher level of competence for those defendants who choose to plead guilty. If the Dusky standard is adequate for defendants who plead not guilty, it is necessarily adequate for those who plead guilty.***

. . .

A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary. . . . In this sense there is a "heightened" standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence.

Godinez v. Moran, 509 U.S. 389, 397-401, 113 S. Ct. 2680, 2686-87 (1993) (emphases added). The Supreme Court clarified its prior decision in Westbrook v. Arizona, 384 U.S. 150, 86 S. Ct. 1320 (1966), noting, "[w]e think the Ninth Circuit has read too much into Westbrook, and we think it errs in applying two different competency standards." Godinez, 509 U.S. at 397, 113 S. Ct. at 2685. Thus, contrary to Gipson's citations to antediluvian precedent, there is no higher standard of competency that is required for pleading guilty. All that is required is (1) that a defendant satisfies the Dusky standard of competence and (2) he pleads guilty freely, knowingly, and voluntarily.

Here, Gipson was found competent to stand trial by Dr. Slagle, and Craig testified at the evidentiary that she was confident Gipson was competent and monitored him to ensure he was competent throughout the proceedings. 1 AA 112-14, 150. Craig also testified that if she had competency concerns during the plea canvass, she would have stopped the proceedings and sent Gipson to Dr. Slagle for another competency evaluation. 1 AA 159. The Court found this testimony to be credible. 1 AA 171.

This testimony contravenes Gipson's testimony that he was not in the right state of mind to plead guilty and that he answered questions during the canvass only based on what Craig told him to say. 1 AA 131-35. Further, as discussed *supra*, Gipson's claim that he could not competently plead guilty or did not do so

voluntarily is belied by the plea canvass and the Guilty Plea Agreement, which reflect that Gipson knew what he was doing by pleading guilty and that he made a knowing and voluntary choice to waive his right to trial. 1 AA 4-9, 116-23; Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 367 (1986) (validity of a guilty plea depends on the totality of the circumstances).

Accordingly, the District Court assessed Gipson's claim that he was incompetent to plead guilty under the correct standard and correctly found that Gipson was competent and knowingly and voluntarily pleaded guilty.

CONCLUSION

Based upon the foregoing, the State respectfully requests this Court order that the District Court's Findings of Fact, Conclusions of Law, and Order be AFFIRMED.

Dated this 7th day of July, 2016.

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 7,439 words.
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 7th day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 7th day of July, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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