IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMIE NUNN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80121

RESPONDENT'S ANSWERING BRIEF

Appeal From Revocation of Probation
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1), as it includes an appeal from a judgment of conviction based on a plea of guilty.

STATEMENT OF THE ISSUE(S)

1. Whether the district court properly denied Appellant's attempt to withdraw his guilty plea.
2. Whether the district court did not abuse its discretion by accepting Appellant's stipulation.
3. Whether Appellant fails to demonstrate cumulative error.

STATEMENT OF THE CASE

On November 14, 2018, Sammie Nunn (hereinafter, "Appellant") was charged by way of Indictment, as follows: Count 1 – BATTERY WITH USE OF A

DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481) and Count 2 – BATTERY WITH USE OF A DEADLY WEAPON (NRS 200.481); for actions on or between May 27, 2018 and June 3, 2018. Appellant's Appendix, Volume 1 ("1AA") at 001-003.[1] On April 16, 2019, Appellant pled "not guilty" to the charges in the Indictment and invoked his right to a speedy trial. Id. at 014.

On June 6, 2019, Appellant executed a Guilty Plea Agreement ("GPA"), in which he agreed to plead guilty to Count 2 of the Indictment. 1AA at 024-031. Pursuant to negotiations, the State agreed not to oppose a term of probation, and the parties stipulated to an underlying sentence of two (2) to five (5) years in the Nevada Department of Corrections ("NDOC"). Id. at 024. By executing the GPA, Appellant agreed that, while he was eligible for probation, he was subject to a sentence of two (2) to ten (10) years in NDOC. Id. at 025. Appellant further recognized, "I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the Court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the Court, the Court is not obligated to accept the

[1] The State would note that, while the respective pages of Appellant's Appendix appear to have handwritten BATES numbers, the pages actually appear out of order. The State, rather than relying on the actual order of the pages, instead relies on the handwritten numbers affixed to the pages, consisted with Appellant's Index (pp. 226-27 of the document).

recommendation." Id. at 026. Appellant also acknowledged the voluntariness of his guilty plea, declaring:

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> …
> 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.
> …
> 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.

Id. at 027-028. The district court canvassed Appellant regarding the GPA and his entry of plea, and accepted Appellant's guilty plea. Id. at 023, 146-151.

On June 11, 2019, Appellant appeared for sentencing. 1AA at 032-033. Appellant was adjudged guilty of the single remaining count, and was sentenced to forty-eight (48) to one hundred twenty (120) months in NDOC, suspended; Appellant was placed on a term of probation not to exceed five (5) years. Id., 1AA at 034-037. Appellant's Judgment of Conviction was filed on June 20, 2019. Id. at 034-037.

On July 15, 2019, Appellant filed a pro per Motion to Dismiss Counsel and Appoint Alternate Counsel. 1AA at 038-049. Thereafter, on July 19, 2019, the Department of Parole and Probation filed a Probation Violation Report, reporting that Appellant had violated his curfew and had consumed controlled substances.

Respondent's Appendix ("RA") at 1-2. On July 23, 2019, Appellant was brought before the district court to consider revocation of his probation. 1AA at 053. At that hearing, the State requested to address Appellant's counsel before considering revocation. Id. At a later hearing on that issue, Appellant asserted that he had been coerced into pleading guilty, and asked to withdraw his guilty plea. Id. at 054. The district court then appointed outside counsel to review Appellant's claims to verify if grounds existed to withdraw Appellant's plea. Id. at 055.

On October 10, 2019, Appellant, through outside counsel, filed a Post-Conviction Petition for Writ of Habeas Corpus, seeking to withdraw his guilty plea. 1AA at 064-070. The State filed its Return to that Petition on October 16, 2019. Id. at 071-075. That Petition came before the district court on November 5, 2019, and was denied. Id. at 076. The district court filed its Findings of Fact, Conclusions of Law and Order on November 20, 2019. Id. at 080-084.

On November 14, 2019, Appellant appeared for consideration of his probation status. 1AA at 077. The district court asked Appellant if he stipulated to the facts giving rise to the revocation proceedings, and Appellant responded, "Yes, ma'am." Id. at 228. After hearing the arguments of counsel, the district court revoked Appellant's probation, and modified Appellant's underlying sentence to impose a sentence of thirty-six (36) to one hundred twenty (120) months in NDOC, with five hundred ten (510) days credit for time served. Id. at 077, 078-079. The Order

revoking Appellant's probation and Amended Judgment of Conviction was filed on November 18, 2019. Id. at 078-079.

On November 21, 2019, Appellant noticed the instant appeal. 1AA at 086-087. Appellant filed his Opening Brief on June 26, 2020. The State now responds thereto:

STATEMENT OF THE FACTS

On June 20, 2019, Appellant's Judgment of Conviction was filed, including the following relevant terms of probation:

> 4. Controlled Substances: You shall not use, purchase or possess any illegal drugs, or any prescription drugs, unless first prescribed by a licensed medical professional. You shall immediately notify P&P of any prescription received. You shall submit to drug testing as required by the Division or its agent.
>
> …
>
> 3. Deft. to remain on House Arrest until interstate compact to California to live with his mother.
>
> …
>
> 6. Abide by any curfew imposed.

1AA at 035-037. During the sentencing hearing, the district court explained these terms to Appellant. Id. at 171-172. Appellant, thereafter, agreed that he wanted the opportunity at probation, and asserted that he would "do what [he was] supposed to do." Id. at 177.

On July 19, 2019, the Department of Parole and Probation filed a Probation Violation Report, asserting the following violation of the terms of Appellant's probation:

> On June 26, 2019, Mr. Nunn was transported from the Clark County Detention Center (CCDC) to the Day Reporting Center and was placed on electronic monitoring pending his transfer to the state of California. Mr. Nunn was explained the rules and requirements of electronic monitoring, including curfew. He was then transported to his residence of One Day at a Time (Transitional Living) at 1960 Saylor Way, Las Vegas, Nevada 89108.
>
> On July 3, 2019, at approximately 5:00pm, the Division was notified by Sentinel, the electronic monitoring service provider, that Mr. Nunn's GPS battery had died 4 hours prior. During the review of his last known location, it was noted that Mr. Nunn was not home. The Division contacted One Day at a Time (Transitional Living, [sic] via phone call and spoke with Ashliegh, who stated that Mr. Nunn had not returned to the residence in a couple of days.
>
> On July 3, 2019, at approximately 11:23pm, the Division was notified by Sentinel that Mr. Nunn had returned to his residence and was charging his GPS unit, since the battery had been dead. On July 4, 2019 at approximately 9:50am, the Division responded to Mr. Nunn's residence of 1960 Saylor Way, Las Vegas, Nevada 89108. Mr. Nunn was located and was drug tested. Mr. Nunn's urinalysis tested presumptive positive for Cocaine, Methamphetamine and THC. Mr. Nunn admitted to leaving his residence approximately a day and a half ago to see a girlfriend and that he had consumed Ecstasy. He further stated that the Cocaine and Methamphetamine must have been in the Ecstasy pill he took. Mr. Nunn was placed into custody and transported to CCDC. During transport, Mr. Nunn stated "I'm not going to lie, I thought I'd be clean by Monday" in regards to the ecstasy/molly. Mr. Nunn signed an admission form for the consumption of controlled substances. Mr. Nunn was booked on probation violation.

RA at 1.

At the hearing on Appellant's revocation, the parties represented to the district court that they intended to stipulate to the violations contained in the Probation Violation Report. 1AA at 227. The district court then asked Appellant if he agreed that the State could prove those violations. Id. at 228. Appellant responded, "Yes,

ma'am." Id. Appellant then conceded that events "spiral[ed] out of control." Id. at 229. Counsel for Appellant acknowledged, "I understand why the Court wouldn't think he's supervisable anymore so I'm not gonna argue for reinstatement. I just request a modification, Your Honor." Id. Appellant did not object to this strategy at the revocation proceedings. See generally, id. at 227-232.

After hearing the arguments of counsel, the district court revoked Appellant's probation and imposed a modified, lessened sentence of imprisonment. 1AA at 230.

SUMMARY OF THE ARGUMENT

Appellant fails to demonstrate that he is entitled to relief on his claims. First, the district court properly denied Appellant's attempt to withdraw his guilty plea, as Appellant's singular argument before the district court revolved around a new witness for his theory of self-defense. However, Appellant waived that defense theory by freely and voluntarily pleading guilty. Second, Appellant cannot argue that his revocation of probation was improper, as he concedes that revocation of probation is squarely within the district court's discretion, and further concedes that he elected to stipulate to his violations of the terms of his probation. Further, Appellant fails to provide any relevant legal authority in support of his assertions. Finally, Appellant's failure to demonstrate or substantiate any instance of error renders his "cumulative error" baseless and insufficient to warrant relief.

/ / /

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S ATTEMPT TO WITHDRAW HIS GUILTY PLEA

A. Appellant failed to properly notice an appeal from the district court's denial of his Petition for Writ of Habeas Corpus

The State respectfully submits that the first argument of Appellant's Opening Brief ("AOB") is not properly before this Court, as Appellant failed to properly notice that he was appealing the district court's denial of his Petition for Writ of Habeas Corpus (Post-Conviction). See, Appellant's Appendix ("AA") at 086-87. Therefore, this Court should conclude that it lacks jurisdiction to review Appellant's first argument, and should decline to consider the same.

The Nevada Rules of Appellate Procedure ("NRAP") are clear: "an appeal…may be taken only by filing a notice of appeal with the district court clerk[.]" NRAP 4(a)(1). A notice of appeal "*shall*…designate the judgment, order or part thereof being appealed[.]" NRAP 3(c)(1)(B) (emphasis added). The Nevada Supreme Court has likewise been explicit: "a judgment of order which is not included in *the notice of appeal* will not be considered on appeal." Collins v. Union Fed. Sav. & Loan Ass'n, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981) see also, Abdullah v. State, 129 Nev. 86, 294 P.3d 419 (2013) (notice of appeal citing post-conviction petition for writ of habeas corpus could not be construed as a challenge to the judgment of conviction).

Further, a notice of appeal is not simply a procedural or technical document – the Nevada Supreme Court has made it clear that a notice of appeal is necessary to vest jurisdiction in that Court. See, e.g., Jordon v. Director, Dep't of Prisons, 101 Nev. 146, 696 P.2d 998 (1985) (a notice of appeal that did not comply with statutory guidelines failed to vest jurisdiction in the Nevada Supreme Court); see also, Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994) (overturned on other grounds by Rippo v. State, 134 Nev. 411, 423 P.3d 1084 (2018)) ("We have consistently held that an untimely notice of appeal fails to vest jurisdiction in this court.").

Appellant's Notice of Appeal is specific – he intended to appeal the district court's decision on November 14, 2019. AA at 086-87. The district court minutes from that date reflect that it was a "Revocation of Probation" proceeding, at which time the district court accepted Appellant's stipulation to his violation of probation, revoked Appellant's probation, and imposed a modified prison sentence. Id. at 077. However, Appellant includes in his Opening Brief the argument that "THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED *DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA*." AOB at 11 (emphasis added). Likewise, Appellant's third argument in his Opening Brief makes reference to his "attempt to withdraw his invalid plea." Id. at 18, 19 (alleging "[t]he denial of the Motion to Withdraw the Guilty Plea led to the revocation"). In so arguing, Appellant admits, however, that the decision on his postconviction petition

was made on November 5, 2019, thereby making it a separate decision and order from that referenced in Appellant's Notice of Appeal. AOB at 11; AA at 078-79 (Order for Revocation of Probation and Amended Judgment of Conviction, resulting from proceedings on November 14, 2019). Appellant does not acknowledge this procedural default, much less attempt to justify his inclusion of this improper argument and reference in his Opening Brief. See generally, AOB at 11-16.

Because Appellant's Notice of Appeal specifically references the revocation of probation as the only issue which he intended to appeal, any issues not implicated in that decision must not be considered in the instant appellate proceedings. Collins, 97 Nev. at 89-90, 624 P.2d at 497; see, AA at 077 (district court minutes dated November 14, 2019, including no reference to Appellant's Petition for Writ of Habeas Corpus (Post-Conviction)).

Because Appellant's Notice of Appeal did not properly vest jurisdiction in this Court to consider the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction), this Court should decline to consider Appellant's first argument in his Opening Brief.[2]

[2] Appellant's third argument asks this Court to find cumulative error based on his first and second arguments. AOB at 18. Therefore, in the event this Court declines to consider Appellant's first argument, the State submits that the grounds for a "cumulative error" argument would necessarily fail, as only one alleged error would remain. See, McKenna v. State, 114 Nev. 1044, 1060, 968 P.2d 739, 749 (1998) ("a sole error…does not, by itself, constitute cumulative error.").

B. Appellant raises new arguments in support of his Petition for Writ of Habeas Corpus that were not raised before the district court

Even if this Court deems appropriate to evaluate the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction), Appellant includes, as the bulk of his argument, new claims that were not raised in support of that Petition before the district court. Therefore, these claims should be deemed to be waived for Appellant's failure to raise them in the first instance before that court.

The Nevada Supreme Court has been clear: "Generally, failure to raise an issue below bars consideration on appeal." State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998). While the Taylor Court acknowledged that it would address certain constitutional issues raised for the first time on appeal, it had previously been clear that certain claims must necessarily be raised in a post-conviction petition for writ of habeas corpus in the first instance. See, Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) ("challenges to the validity of a guilty plea…*must first be pursued in post-conviction proceedings*" (emphasis added)).

A review of Appellant's Petition demonstrates that it was grounded *entirely* on allegedly new evidence in the form of an alibi witness that would testify to Appellant's self-defense. See, AA at 64-70. Rather than argue the merits of that Petition, Appellant now seeks to argue multiple other theories regarding the validity

of his guilty plea. See AOB at 11 (arguing ineffective assistance of plea counsel), 13-14 (arguing competency).

C. Appellant failed to meet the standard for post-conviction withdrawal of his guilty plea

Pursuant to NRS 176.165, after sentencing, a defendant must demonstrate a "manifest injustice" warranting withdrawal of his guilty plea. See also, Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). Nevada law establishes that guilty pleas are presumptively valid, and that the burden is on a defendant to show that his guilty plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (*citing* Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.[3]

To determine voluntariness, a reviewing court must review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. A proper plea canvass should reflect:

[3] Further, the State would note that post-conviction motions to withdraw a guilty plea must be challenged by a post-conviction petition for writ of habeas corpus, so NRS 34.720 *et seq.* apply. Specifically, the State references NRS 34.810(1)(a), which narrows the scope of a post-conviction habeas petition from a judgment of conviction based on a guilty plea to allegations "[1] that the plea was involuntarily or unknowingly entered or [2] that the plea was entered without effective assistance of counsel." Therefore, pursuant to that statute, the district court properly dismissed Appellant's Petition, as it was based on "new evidence," rather than any cognizable ground in such a petition. Moreover, Baal and its progeny negate what Appellant now seeks to argue for the first time on appeal. See, 106 Nev. at 73, 787 P.2d at 394.

> [T]he defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; (3) the defendant understood the consequences of his plea and the range of punishments; and (4) the defendant understood the nature of the charge, i.e., the elements of the crime.

Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (*citing* Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)). The Nevada Supreme Court has determined that the presence and advice of counsel is a significant factor in determining the voluntariness of a guilty plea. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107, 107 (1975). "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Below, Appellant asserted to the district court that he had a new alibi witness that would testify to a theory of self-defense. AA at 068-69. However, the district court determined that a theory of self-defense was available to Appellant at the time he entered his guilty plea; therefore, the fact that a new witness had come forward would not rise to a level of "manifest injustice" because Appellant could have raised the argument of self-defense, but instead voluntarily chose to plead guilty. Id. at 083. The district court considered the totality of the circumstances present at Appellant's

entry of his guilty plea: that he had an attorney, executed a Guilty Plea Agreement, and was canvassed on the negotiations. Id. Having considered those circumstances, the district court concluded that Appellant had failed to provide an adequate basis for withdrawal of his guilty plea. Id.

On appeal, Appellant has done nothing to undermine the district court's evaluation of the circumstances. See, AOB at 14. Instead, Appellant relies on the conclusory statement that he "has a 'credible factual innocence' claim."[4] It is Appellant's burden to present cogent argument to support his claims; the State submits that a simple conclusory statement does not meet this burden. See, Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (issues lacking such argument "need not be addressed" by this Court).

Indeed, the record supports the district court's evaluation of the circumstances surrounding Appellant's guilty plea: Appellant would, necessarily, know *at the time he entered his plea* that he had acted in self-defense. Therefore, Appellant had the opportunity to present that defense at trial, but instead made the decision to plead

[4] Appellant also includes a reference to "allegations of involuntariness" and "lack of full understanding at his plea." AOB at 14. These claims were not raised before the district court in Appellant's Petition for Writ of Habeas Corpus. See, AA at 64-70. Therefore, Appellant should be deemed to have waived these claims for his failure to raise them in his original post-conviction proceedings. See, e.g., McCleskey v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991) (new evidence cannot constitute good cause for failure to raise a claim "if other known or discoverable evidence could have supported the claim in any event.").

guilty. See, AA at 027 (Appellant's affirmance that he had "discussed with [his] attorney any possible defenses, defense strategies and circumstances that might be in [his] favor"). Therefore, any evidence that would bolster a defense theory would not constitute a "manifest injustice," as Appellant clearly had the opportunity to pursue such a theory and voluntarily gave up that chance.

Because Appellant submits a conclusory statement, rather than cogent argument, to support his claim regarding his new alibi witness, and because the record demonstrates that Appellant voluntarily forwent the presentation of a self-defense defense, the district court correctly declined to allow Appellant to withdraw his guilty plea.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ACCEPTING APPELLANT'S STIPULATION

Appellant's single, noticed, issue relies on two naked assertions: first, Appellant posits that his plea should have been found to be invalid, which would have undone Appellant's probation and underlying prison term. AOB at 18. Second, Appellant suggests that the district court had some duty to have "a meaningful hearing where witnesses could present evidence." Id. Appellant fails to demonstrate that his assertions warrant review, much less that the same provide grounds for relief. Further, even if addressed on the merits thereof, Appellant's assertions fail.

A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden

Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca, 103 Nev. at 673, 748 P.2d at 6 (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Further, claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Appellant does not cite to any relevant legal authority supporting either of his theories. See, AOB at 18. To the contrary, Appellant outright concedes that the district court had the discretion to revoke his probation, and that review of the same is under an "abuse of discretion" standard. Id. at 16-17 (quoting Lewis v. State, 90 Nev. 436, 529 P.2d 796 (1974)). Appellant likewise concedes that he "*chose* to stipulate to the facts" that gave rise to the revocation proceedings. Id. at 17 (emphasis added). In spite of his concessions, Appellant simply claims that the district court

erred. Id. at 18. Such assertions are clearly naked, lacking any relevant legal support, and should be rejected simply on their face. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Further, a review of the record demonstrates that Appellant's claims of error are belied by the record. First, Appellant's claim that his guilty plea should have been found invalid was raised before, and rejected by, the district court during the pendency of the revocation proceedings. See, 1AA at 080-084, 218. That district court Order is not subject to this Court's review, as Appellant is specifically appealing from his revocation, not the district court's denial of his Petition. Id. at 086.

Second, Appellant's claim that the district court failed in some duty to conduct a hearing with witness testimony is unsupported by the record. The district court did, in fact, conduct a "hearing" for the sole purpose of evaluating Appellant's probation status. See, 1AA at 77. The district court further *invited* insight and argument on the topic at that hearing. See, id. at 228 (asking the State and/or a representative of P&P for argument), 229 (asking Appellant, then his counsel, for argument). The record does not demonstrate that the district court had any reason to inquire beyond what the parties themselves had represented, especially with Appellant and his counsel conceding to the violations. See, id. at 227 ("MR GOLDSTEIN: We're going to stip and argue…"), 228 (Appellant agreeing that the State could prove the allegations in

the Probation Violation Report), 229 ("THE DEFENDANT: …I didn't mean for this to spiral out of control the way that it do…"), 230 ("MR. GOLDSTEIN: …I understand why the Court wouldn't think he's supervisable anymore so I'm not gonna argue for reinstatement. I just request a modification, Your Honor."). In sum, Appellant provides no grounds for the district court to reject the stipulation of the parties, especially where Appellant had been extremely vocal on his own behalf throughout proceedings, yet remained silent during the revocation hearing. See, e.g., id. at 126-33, 187-201. Contrary to Appellant's current assertions, the record is clear: Appellant had the opportunity to present any evidence and witnesses to aid his cause; Appellant simply chose not to avail himself of that opportunity.

Appellant does not allege, much less demonstrate, that counsel was ineffective in his representation of Appellant. See generally, AOB. Appellant could not successfully do so in the instant forum, as claims of ineffective assistance of counsel must first be brought in post-conviction habeas proceedings. Franklin, 110 Nev. at 752, 877 P.2d at 1059 (emphasis added) (disapproved of on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)) ("challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…"). Therefore, Appellant cannot demonstrate any reason why a finding that he was in violation of his probation was an abuse of the district court's discretion.

Because Appellant provides no relevant legal authority to support his assertions, and because the assertions themselves are without merit, Appellant cannot demonstrate that the district court abused its discretion in revoking Appellant's probation.

III. APPELLANT FAILS TO DEMONSTRATE CUMULATIVE ERROR

Appellant finally asserts that "the multiple errors" in the underlying case warrant relief. AOB at 18. However, Appellant's argument on appeal is without merit, as only one claim of error is properly before this Court. See, Section I(A), *supra*.; see also, fn. 2, *supra*. Even if this Court were to consider Appellant's improper arguments, it is the State's position that cumulative error should not apply on post-conviction review. See, Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S.Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test."). Further, even if cumulative error were applicable in the instant context, it would be of no moment, as Appellant has failed to substantiate any single instance of error in Appellant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error not the cumulative effect of non-errors.").

Moreover, Appellant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Here, the issue of guilt was not close, as Appellant freely and voluntarily pled guilty to the charges. Further, although crimes categorized as Category B felonies are indeed serious, Appellant has failed to meet his burden of proof to show any error amid his numerous assertions. Accordingly, Appellant's mere invocation of "cumulative error" is insufficient to warrant relief.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court AFFIRM Appellant's Amended Judgment of Conviction.

Dated this 24th day of September, 2020.

Respectfully submitted,

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BY *<u>/s/ John Niman</u>*
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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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 4,825 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of September, 2020.

Respectfully submitted

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BY */s/ John Niman*
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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on September 24, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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/s/ E. Davis
Employee, Clark County
District Attorney's Office

JN/Joshua Judd/ed