EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

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Steven D. Grierson
Clerk of the Court

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Court Division Administrator

November 3, 2020

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: CHRISTOPHER R. KELLER vs. STATE OF NEVADA
S.C. CASE: 81988
D.C. CASE: A-19-800950-W

Dear Ms. Brown:

In response to the e-mail dated November 3, 2020, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed November 2, 2020 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

FFCO
STEVEN B. WOLFSON
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DISTRICT COURT
CLARK COUNTY, NEVADA

CHRISTOPHER ROBERT KELLER, #1804258

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-800950-W

DEPT NO: XIX

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: October 1, 2020
TIME OF HEARING: 8:30 a.m.

THIS CAUSE having come before the Honorable WILLIAM D. KEPHART, District Court Judge, on the 1st day of October, 2020, Petitioner being present, not being represented by counsel, Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, through MICHAEL DICKERSON, Deputy District Attorney, and the Court having considered the matter, including the briefs, transcripts, testimony of Kenneth Frizzell, Esq. and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:.

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On February 17, 2016, Christopher Robert Keller (hereinafter "Petitioner") was charged by way of Information with Counts 1 and 2 - Trafficking In Controlled Substance

(Category A Felony - NRS 453.3385.3 - NOC 51160); Count 3 - Possession Of Controlled Substance, Marijuana (Category E Felony - NRS 453.336 - NOC 51127); Counts 4, 5, 6, and 7 - Possession Of Controlled Substance With Intent To Sell (Category D Felony - NRS 453.337 - NOC 51141); and Counts 8 and 9 - Ownership Or Possession Of Firearm By Prohibited Person (Category B Felony - NRS 202.360 - NOC 51460). On February 18, 2016, Petitioner entered a plea of not guilty and invoked his constitutional right to a speedy trial.

On March 24, 2016, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. At Calendar Call on April 13, 2016, Petitioner's counsel, Michael Sanft, Esq., announced he had a conflict for the trial date due to the upcoming trial. Petitioner stated he wanted to go to trial on the original date, and due to counsel's conflict, the Court ordered the trial date reset. On this date, the State also extended a plea offer to Petitioner for one count of Low-Level Trafficking in a Controlled Substance and one count of Possession of a Firearm by a Prohibited Person, with Petitioner stipulating to small habitual treatment and a stipulated maximum sentence of twelve and a half (12.5) years. The trial date was reset to May 2, 2016 ("First Continuance").

At Calendar Call on April 20, 2016, Petitioner stated he wanted to go to trial and was willing to represent himself if need be. On April 29, 2016, the State filed an Amended Information, charging Petitioner with the same charges as the original Information. On April 29, 2016, Mr. Sanft requested to withdraw due to a conflict of interest. The Court granted the request and appointed Kenneth Frizzell, Esq. to represent Petitioner. On May 4, 2016, Mr. Frizzell confirmed as counsel. Due to the change in counsel, the trial date was vacated and reset to June 27, 2016 ("Second Continuance").

On June 10, 2016, Petitioner filed a Motion to Suppress. The State filed an Opposition on June 17, 2016. On June 20, 2016, Petitioner requested more time to file a Reply to the State's Opposition, and the Court vacated the trial date of June 27, 2016, and ordered Calendar Call on July 20, 2016, and a Jackson v. Denno Hearing on July 21, 2016 ("Third Continuance"). On June 13, 2016, Petitioner filed a Pro Per Motion to Dismiss Counsel and

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Appoint Alternate Counsel. The District Court denied the Motion on July 21, 2016, after hearing from Petitioner.

On July 18, 2016, the State filed a Notice of Intent to Seek Habitual Treatment. On July 21, 2016, the State also informed the Court that it had extended a new plea offer for one count of Mid-Level Trafficking and one count of Possession of a Firearm by a Prohibited Person, with the State retaining the right to argue at sentencing but having no opposition to the counts running concurrently. Petitioner rejected the State's offer. On July 21, 2016, the Court also denied Petitioner's Motion to Suppress after the Jackson v. Denno hearing. The Court denied Petitioner's Pro Per Motion to Dismiss Counsel and Appoint Alternate Counsel. The Order denying the motions was filed on August 18, 2016. On July 21, 2017, Defense counsel requested another continuance, stating that due to the Motion to Suppress, he had not been able to prepare for trial ("Fourth Continuance"). The Court granted the continuance and reset the trial date for September 19, 2016. At Calendar Call on September 14, 2016, Petitioner waived his speedy trial right and requested a continuance ("Fifth Continuance"). The Court granted the continuance and reset the trial to March 6, 2017.

Both Petitioner and the State announced ready for the March 6, 2017 trial date, which was the sixth trial setting in the case. On March 6, 2017, the day trial was due to begin, Amy Feliciano, Esq., appeared in Court and attempted to substitute in as trial counsel. Ms. Feliciano informed the Court that she had been retained by Petitioner's mother sometime in early February but had not moved to substitute in as counsel until March 6, 2017 due to multiple medical and personal problems. As Ms. Feliciano was unprepared for trial without a sixth continuance being granted, the Court denied Petitioner's request for a continuance and ordered trial to proceed with Mr. Frizzell as trial counsel.

On March 6, 2017, the State filed a Second Amended Information as the State chose to bifurcate Counts 8 and 9 from the first seven (7) counts. The Second Amended Information was filed in open court on March 6, 2017, charging Petitioner with Counts 1 and 2 - Trafficking in Controlled Substance (Category A Felony - NRS 453.3385.3 - NOC 51160); Count 3 - Possession of Controlled Substance, Marijuana (Category E Felony - NRS 453.336 - NOC

51127); and Counts 4-7 - Possession Of Controlled Substance With Intent To Sell (Category D Felony - NRS 453.337 - NOC 51141). Petitioner's jury trial commenced on March 7, 2017, and concluded on March 10, 2017, when the jury returned a verdict of guilty on all seven (7) counts. A Third Amended Information was subsequently filed in open court which added Counts 8 and 9 - Ownership or Possession of Firearm by Prohibited Person (Category B Felony - NRS 202.360 - NOC 51460). The jury also returned verdicts of guilty on Counts 8 and 9.

On April 29, 2017, Ms. Feliciano substituted as counsel of record, and Mr. Frizzell withdrew from his representation. Ms. Feliciano requested that sentencing be continued three (3) times: on May 8, 2017, June 5, 2017, and June 19, 2017. On July 24, 2017, Ms. Feliciano requested a fourth sentencing continuance, and Petitioner requested that she be dismissed as counsel of record. The District Court granted Petitioner's request, and re-appointed Mr. Frizzell as Petitioner's counsel. On July 31, 2017, the Court granted Mr. Frizzell a continuance to allow him to retrieve Petitioner's file from Ms. Feliciano.

On August 7, 2017, Petitioner was sentenced as follows: as to Count 1- LIFE in the Nevada Department of Corrections (NDC) with a minimum parole eligibility after ten (10) years in NDC; as to Count 2 – LIFE in the NDC with a minimum parole eligibility after ten (10) years in the NDC; Count 2 to run concurrent with Count 1; as to Count 3 – a minimum of twelve (12) months and a maximum of forty-right (48) months in the NDC; Count 3 to run concurrent with Count 2; as to Count 4 – to a minimum of twelve (12) months and a maximum of forty-eight (48) months in the NDC; Count 4 to run concurrent with Count 3; as to Count 5 – a minimum of twelve (12) month and a maximum of forty-eight (48) months in the NDC; Count 5 to run concurrent with county 4; as to Count 6 - to a minimum of twelve (12) months and a maximum of forty-eight (48) months in the NDC; Count 6 to run concurrent with Count 5; as to Count 7 - to a minimum of twelve (12) months and a maximum of forty-right (48) months in the NDC; Count 7 to run concurrent with Count 6; as to Count 8 – Petitioner sentenced under the large habitual criminal statute to LIFE in the Nevada Department of Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count 8 to run CONSECUTIVE to Counts 1, 2, 3, 4, 5, 6, and 7; and as to Count 9, Defendant

sentenced under the large habitual criminal statute to LIFE in the Nevada Department of Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count 9 to run concurrent with Count 8; for a total aggregate sentence of LIFE in the NDC with a minimum parole eligibility of TWENTY (20) years in the NDC, and five-hundred fifty-nine (559) days credit for time served.

Petitioner's Judgment of Conviction was filed on August 10, 2017. On August 24, 2017, Petitioner filed a Notice of Appeal. On November 14, 2017, Petitioner filed a Motion for Appointment of Counsel and a Motion for Withdrawal of Attorney of Record. On December 6, 2017, this Court granted Defendant's Motion for Withdrawal of Counsel and denied Defendant's Motion for Appointment of Counsel.

An Amended Judgment of Conviction was filed on December 12, 2017, correcting the statute to NRS 435.337 for Possession of Controlled Substance with Intent to Sell for Counts 4, 5, 6 and 7.

On March 22, 2018, Petitioner filed another Motion for Appointment of Counsel and a Motion to Dismiss Attorney of Record. On April 13, 2018, the State filed its Opposition to Petitioner's Motion to Appoint Counsel and Motion to Dismiss Attorney of Record. On April 16, 2018, the Court denied the motion as Petitioner's appeal was still pending before the Nevada Supreme Court.

On October 15, 2018, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction. Remittitur issued on November 9, 2018.

On August 26, 2019, Petitioner filed the instant Pro Per Petition for Writ of Habeas Corpus. The State filed its Response on January 21, 2020. On February 12, 2020, Petitioner filed a "Supplemental Response to State's Response to Defendant's Pro Per Petition for Writ of Habeas Corpus." Thereafter, on September 16, 2020, Petitioner filed a Motion to Appoint Counsel.

Petitioner's Motions came on for evidentiary hearing before this Court on October 1, 2020, with trial counsel Kenneth Frizzell, Esq. called to testify. After the hearing, this Court made the following findings and conclusions:

STATEMENT OF FACTS

On January 28, 2016 at approximately 2:25 a.m., Officer D. Lopez P#9806 with the Las Vegas Metropolitan Police Department (hereinafter "LVMPD") conducted a vehicle stop on a 2002 silver Dodge Stratus later found to be driven by Petitioner. Officer Lopez observed the vehicle travelling over 300 feet in a double-yellow left-hand turn lane, making a U-turn, making an abrupt turn into a residential area, travelling at a high rate of speed, and having a broken taillight. Officer Lopez testified that it was obvious to him that the Dodge was trying to put distance between them. Once the vehicle entered the residential area, it parked and Petitioner quickly left the vehicle after Officer Lopez turned on his siren and lights. Officer Lopez observed Petitioner quickly jump out of the vehicle, appearing as though he wanted to avoid him. Officer Lopez was able to smell the odor of marijuana coming from Petitioner's person as well as from the inside of the vehicle. Officer Lopez initiated a traffic stop.

Petitioner consented to allow Officer Lopez to remove his wallet from his pocket to see Petitioner's identification. Upon removing the wallet, Officer Lopez noted that Petitioner was carrying what appeared to be a large amount of cash. The cash was right outside of Petitioner's wallet, with multiple denominations, among which sixty-eight $20 bills separated in groups of five (5) bills and folded in alternating directions. The amount of cash was determined to be $2,187.00. Based upon the manner in which the cash was situated, and the amount of cash that Petitioner carried, Officer Lopez determined that the cash was, in his training and experience, consistent with the sale of narcotics. Officer Lopez based this conclusion, in part, on the denominations of the cash, the way the cash was specifically folded, the fact that $20 bills were folded in increments of $100, the direction the bills were facing, and the fact that a "wad of cash" was made up of mostly smaller denominations, such as $20, $5 and $10 bills.

During the vehicle stop and pat down, there were approximately five (5) shots fired within the apartment complex, so Officer Lopez placed Petitioner in handcuffs and into the patrol vehicle not only for Petitioner's safety, but also so that Officer Lopez would be able to safely address any issues stemming from the shots fired. Additionally, Officer Lopez believed that Petitioner would be a flight risk based upon his attempts to avoid the officer, his

nervousness, the fact that he was so upset about being stopped, and Defendant's behavior while Officer Lopez conducted the pat down for weapons. Afterward, while standing outside the driver's door, Officer Lopez noticed a green leafy residue on the floorboard of the driver's side vehicle in plain view. Based upon the vehicle, the odor of marijuana emanating from Petitioner and the vehicle, and the green leafy residue in plain view, Officer Lopez conducted a probable cause search of Petitioner's vehicle. During the probable cause search, Officer Lopez located a clear sealable plastic bag containing multiple smaller clear plastic bags underneath the driver's seat, as well as another large sealable plastic bag between the driver's seat and the center console. At that point, based on the size of the bags found in Petitioner's car, as well as the amount of cash found on Petitioner's person, Officer Lopez called for a K-9 narcotics dog.

The K-9 narcotics dog alerted to the glove box, wherein Officer Lopez located a concealed compartment. Officer Lopez testified he put his hand inside the hole and could feel a bag with something solid inside. At that point in time, Officer Lopez stopped his search and obtained a search warrant. Pursuant to the search warrant, Officer Lopez located several items of evidence. Officer Lopez, Officer Henry, and Crime Scene Analyst Stephanie Thi searched the vehicle. In the secret compartment, they found a black mesh bag, within which they found two gold colored plastic bags. One of the gold bags contained a nylon drawstring bag within which a loaded Beretta model 950, .22 caliber handgun was found. Moreover, Officer Lopez also found several packages of a white crystal substance, plastic wrappers with a brown substance, and a plastic bag with an off white powdery substance. Officer Lopez believed these substances, based on his training and experience, to be various controlled substances, respectively. Forensic Scientist Jason Althnether tested the substances and determined that the white crystal substance was methamphetamine with a net weight of 344.29 grams, that the brown substance was indeed heroin with a net weight of 33.92 grams, and that the white powdery substance was indeed cocaine with a weight of 0.537 grams. Officer Lopez testified he also found a blue powdery substance in the secret compartment. Mr. Althnether tested the

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substance and determined it was a combination of methamphetamine, amphetamine, and cocaine with a weight of 0.795 grams.

Based on what was discovered in the car, Officer Lopez obtained a search warrant for Petitioner's house located at 265 North Lamb, Unit F, the unit in front of which Petitioner had parked the car. Officer Lopez, Officer Steven Hough, Detective Chad Embry and Detective Michael Belmont searched Petitioner's residence. While searching the bedroom, Officer Lopez found used smoking pipes, four (4) scales, a box of 9mm ammunition, and two (2) bags containing a white crystalline substance. This substance was later tested by Mr. Althnether, who determined the substance was methamphetamine. The first bag weighed 3.818 grams and the second bag weighed 2.357 grams. Officer Lopez also found in the bedroom a brown substance he also believed was heroin. Upon testing, Mr. Althnether confirmed the substance was heroin, weighing .895 grams. In the storage closet, Detective Embry found .22 short ammunition. In the bedroom, police also discovered a Ruger 9mm handgun and a pay stub with Petitioner's name on it, which was impounded by Officer Lopez. Upon searching the kitchen, Detective Belmont also found a glass jar containing a green leafy substance believed to be marijuana, which was confirmed as such by Mr. Althnether, finding the marijuana to weigh 175 grams. Officers also found balloons, clean pipes, syringes and elastic bands in Petitioner's residence. Moreover, Crime Scene Analyst Thi testified that the Nevada DMV registration found in the car listed Petitioner as the owner of the Dodge.

During trial, the State introduced a jail call wherein Petitioner told a woman to move into his house and make it her home. Petitioner was placed under arrest and brought to Northeast Area Command. While there, Officer Hough, who was watching Petitioner in an interview room on a monitor, observed Petitioner pull out a small baggie from inside his pants, and by the time he and another officer arrived in the room, Petitioner had a white powdery substance on his nose and mouth. Upon searching Petitioner, Officer Hough found another small bag of white powder attached to the left side of Petitioner's scrotum.

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ANALYSIS

I. PETITIONER WAIVED HIS SUBSTANTIVE GROUNDS ONE (1) THROUGH SEVEN (7) BY FAILING TO RAISE THEM ON DIRECT APPEAL

Pursuant to NRS 34.810:

> 1. The court shall dismiss a petition if the court determines that:
>
> …
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
>
> (3) Raised in any other proceeding that the petitioner has taken to secure relief from the petitioner's conviction and sentence,
>
> unless the court finds both good cause for the failure to present the grounds and actual prejudice to the petitioner.
>
> …
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

The Nevada Supreme Court has held that "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… [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be ***considered waived in subsequent proceedings***." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court ***must*** dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

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Furthermore, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); see also, Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

"To establish good cause, [a petitioner] must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 275 P.3d 91 (2012).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

Moreover, a proper petition for post-conviction relief must set forth specific factual allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, "[Petitioner] must allege specific facts supporting the claims in the petition [he] file[s] seeking relief from any conviction or sentence. Failure to raise specific facts rather than just conclusions may cause the petition to be dismissed." "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).

In this case, this Court finds that Petitioner's first seven (7) grounds are all substantive claims that could and should have been raised on direct appeal: 1) Ground One: Illegal sentence; 2) Ground Two: Not allowed to question K-9 about dog's reliability; 3) Ground Three: No exigency to search Petitioner's vehicle; 4) Ground Four: No probable cause existed to search Petitioner's vehicle; 5) Ground Five: Extended stop violation of NRS 171.123(4); 6) Ground Six: Destroyed or lost body camera evidence; and 7) Ground Seven: False testimony of Officer D. Lopez. Each of these claims were available at the time Petitioner filed his direct appeal. Therefore, this Court concludes, pursuant to Evans, these issues were substantively waived due to Petitioner's failure to raise them earlier. This Court further concludes Petitioner's substantive claims are beyond the scope of habeas. NRS 34.724(2)(a).

Petitioner does not argue good cause or prejudice to overcome these procedural bars. Indeed, this Court finds that Petitioner could not successfully do so, as all of the facts and information needed to raise these issues were available at the time Petitioner filed his direct appeal, and Petitioner does not allege that there was any external impediment to his raising of these issues at that time. In fact, Petitioner raised four (4) issues on direct appeal: 1) Whether the District Court abused its discretion in denying Appellant's sixth continuance request on the day trial was set to start; 2) Whether the District Court abused its discretion in denying Appellant's pretrial motion to suppress the evidence discovered in Appellant's residence pursuant to a search warrant; 3) Whether the District Court erred in admitting the jail calls introduced by the State; and 4) Whether there was cumulative error. This Court concludes that Petitioner cannot demonstrate good cause to ignore his procedural defaults because all of the necessary facts and law were available for a timely appeal and he has not alleged an impediment external to the defense prevented raising these claims at the appropriate time. Therefore, these additional substantive claims are waived.

II. PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL DO NOT ENTITLE HIM TO RELIEF

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the 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, 103 P.3d 25, 32 (2004). "Effective 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, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). 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." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of 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). This analysis does not mean 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." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). 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.

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and 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) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief 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. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

The decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S. Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Likewise, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065). A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S.Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk or burying good arguments… in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S.Ct. at 3313. "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every

'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S.Ct. at 3314.

In the instant Petition, Petitioner argues that his counsel, Kenneth Frizzell, Esq., was ineffective for the following reasons: (1) for not raising the issues Petitioner relayed to him prior to the suppression hearing; 2) for not appealing the suppression hearing issues; 3) for not using another investigator because his investigator knew Petitioner's mother and stepfather; 4) for never visiting him except after he paid for a different lawyer; 5) for failing to subpoena or return calls of certain unnamed witnesses and failing to cross-examine about the passenger door being closed when officers first encountered him; 6) for failing to call family and witnesses to speak on his behalf at the penalty phase; 7) for never asking for the testimony of the dog handler or K-9 records; and 8) for never relaying his mental health history or the fact that he was on and off different medications during the pre-trial process.

First, Petitioner claims that his counsel was ineffective for not raising the issues Petitioner relayed to him prior to the suppression hearing. This Court finds that Petitioner has failed to demonstrate that trial counsel's representation fell below a reasonable standard, as trial counsel not only filed a Motion to Suppress evidence obtained during the vehicle stop, he conducted an evidentiary hearing on July 21, 2016 where Officer Daniel Lopez testified. Exhibits were presented as well as arguments by counsel. The Court denied the Motion to Suppress. Therefore, this Court finds that trial counsel appropriately raised the suppression issues and properly conducted the evidentiary hearing. Further, Petitioner fails to show how, but for counsel's errors, the outcome of the suppression proceedings would have been different. As such, this Court concludes that Petitioner's first claim of ineffective assistance does not entitle Petitioner to relief.

Second, Petitioner alleges that counsel was ineffective for not appealing the suppression hearing issues. This Court finds that this claim likewise fails to demonstrate how counsel's performance fell below a reasonable standard, as Appellate counsel did raise several meritorious issues on appeal, including the denial of Petitioner's Motion to Suppress evidence from Petitioner's residence. The Nevada Supreme Court determined that the District Court did

not abuse its discretion by denying Petitioner's motion to suppress evidence obtained from his condo through a search warrant. Order of Affirmance at page. 6. Further, Petitioner provides no evidence and only makes bare and naked allegations that he was prejudiced. Such bare and naked allegations are not sufficient to warrant relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. This Court finds that Petitioner cannot demonstrate that the omitted issue would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See Aguirre, 912 F.2d at 560 (citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065). As Petitioner has only made bare and naked allegations, this Court concludes he cannot overcome the strong presumption of counsel's reasonableness and, therefore, relief is not warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Third, Petitioner alleges that trial counsel was ineffective for not using another investigator because his investigator knew Petitioner's mother and stepfather. On July 21, 2016, Defendant told the Court that he cannot get any investigation done and the investigator used by Mr. Frizzell is the same investigator Mr. Sanft used and he has filed a bar complaint against the investigator. Counsel is expected to conduct legal and factual investigations when developing a defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538.

Using investigators in trial preparation and investigation is both encouraged and common practice. Wilson v. State, 105 Nev. 110, 771 P.2d 583 (1989). Duties of investigators are "subject to the reasonable judgment of defense counsel in light of the facts of any particular

case." Love, 109 Nev. at 1143-44, 865 P.2d at 327 (*quoting* U.S. v. Weaver, 882 F.2d 1128 (7th Cir.), cert. denied,493 U.S. 968, 110 S.Ct. 415, (1989)). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328. For example, the Nevada Supreme Court in Love, 109 Nev. at 1145, 865 P.2d at 328, held that trial counsel was not ineffective simply because they sent their investigator to interview potential witnesses and did not to call certain alibi witnesses at trial after adequate investigations led to that conclusion.

In this case, this Court finds that Petitioner cannot show trial counsel fell below a reasonable standard for not using another investigator simply because Petitioner was apparently dissatisfied with this one. A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. It necessarily follows that Petitioner is not entitled to a particular relationship with his attorney's investigator, who is either also court appointed or who has a longstanding working relationship with that particular attorney. Therefore, this Court concludes that the choice of investigator was a reasonable decision to make and does not amount to deficient representation under Strickland. Further, this Court finds that Petitioner fails to demonstrate how the employment of a different investigator would have benefitted the outcome of Petitioner's case. Therefore, this Court concludes that Petitioner is not entitled to relief.

Fourth, Petitioner contends that trial counsel was ineffective for never visiting him except after he paid for a different lawyer. This Court finds that there is no requirement for a specific number of visits every case necessitates, nor is that a basis for ineffective assistance of counsel. Further, Defendant has provided no legal authority to support this claim. Counsel also communicates with defendants in the courtroom during routinely long court calendars. "There are countless ways to provide effective assistance in any given case. Even the best

criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. Therefore, this Court concludes that Petitioner has failed to demonstrate trial counsel's representation fell below a reasonable standard. Further, this Court finds that Petitioner fails to demonstrate how more jail visits would have changed the outcome at trial. Therefore, this Court concludes that Petitioner is not entitled to relief on this claim.

Fifth, Petitioner claims that trial counsel was ineffective for failing to subpoena or return calls of unnamed witnesses to testify that another female resided in the townhouse he owned and switched vehicles with him, and that there was a strong probability the drugs in the purse in Petitioner's car belonged to the female. He further claims that trial counsel was ineffective for failing to cross-examine about the passenger door being closed when officers first encountered him and they opened the door to allow K-9 access to the interior of the vehicle. 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." Rhyne, 118 Nev. at 8, 38 P.3d at 167. Further, "[s]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953. Petitioner fails to specifically name any of these alleged witnesses. This Court finds that Petitioner fails to establish if trial counsel even had sufficient information to locate these unnamed witnesses. Moreover, a review of the record demonstrates that trial counsel was, in fact, not given timely information about the witness Petitioner describes as having to wait so long she left the trial. This witness, a woman named Mary Silva who cleaned Petitioner's residence a few times, was discussed on the record on the fourth day of the trial:

> MR. FRIZZELL: -- what happened here. While you were probably walking down the hallway to come in, I was on the phone with the witness that you said you would allow to testify, Mary Silva, who was on the road ostensibly heading home, she told me. I asked her -- I said, we're ready and it's now time and the judge isn't going to wait. How long was it going to take you to get back? And she said she could be back here by 3:00 o'clock, when I told her it was 1:55.

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Transcript of Jury Trial - Day 4, p. 132. Earlier in the day, the Court indicated it would allow her to testify despite the fact that she had not been properly noticed by Petitioner:

> THE COURT: Okay. Notwithstanding the fact that the State was not put on notice of these witnesses, I'm going to allow you to call her if you choose to. But you need to make her available to the State to give them an opportunity to question her to see what, if anything, she's going to be offering.
> MR. FRIZZELL: And that is fine, Your Honor. I actually just learned of her potential as a witness yesterday evening from an e-mail, which I received.
> THE COURT: Okay. So --
> MR. FRIZZELL: And --
> THE COURT: -- she wasn't even somebody that defendant was telling you previously that we discussed before we started the trial?
> MR. FRIZZELL: No, Your Honor.
> THE DEFENDANT: I didn't know. I thought the witness –

Transcript of Jury Trial - Day 4, p. 7-8. Additionally, at Petitioner's insistence, trial counsel called Officer Jacob Henry with the Las Vegas Metropolitan Police Department to testify in the defense case-in-chief. See Transcript of Jury Trial - Day 4, p. 145-164. Moreover, trial counsel cross examined all of the State's witnesses, including Officer Daniel Lopez, who stopped Petitioner's vehicle. Transcript of Jury Trial - Day 3, p. 127-164. Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, and strategic decisions such as which witnesses to call or not call are virtually unchallengeable. As such, this Court concludes that Petitioner cannot demonstrate deficient performance and Petitioner's claim therefore fails.

Sixth, Petitioner alleges that trial counsel was ineffective for failing to call family and witnesses to speak on his behalf at the penalty phase. Defendants have no right to call witnesses during sentencing hearings unless they are convicted of First Degree Murder. NRS 176.015; NRS 175.552. Therefore, this Court finds that counsel cannot be deemed ineffective for failing to call family and witnesses to speak on his behalf at his sentencing, as Petitioner was not entitled to this under Nevada law.

Seventh, Petitioner claims that trial counsel was ineffective for never asking for the testimony of the dog handler or K-9 records. The State has the burden of proving its case beyond a reasonable doubt and can call any witnesses it deems necessary to meet that burden of proof. Based on the evidence presented, the jury convicted Petitioner and his Judgment of

Conviction was affirmed on appeal. As previously stated, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S. Ct. 770, 791, 578 F.3d. 944 (2011). Thus, this Court finds that neither the State nor trial counsel was required to call the K-9 officer, as his participation was fully covered during the direct and cross-examination of Officer Lopez' testimony. Transcript of Jury Trial - Day 3, p. 44-147. Consequently, this Court concludes that Petitioner's claim fails.

Finally, Petitioner alleges that trial counsel never relayed his mental health history or the fact that he was on and off different medications during the pre-trial process. However, this Court finds that Petitioner does not properly allege that trial counsel was aware of any mental health or medication issues. Petitioner does not even specify exactly what mental health history or medications he is referring to in the one sentence he includes on this issue. As such, this Court finds Petitioner's argument amounts to a bare and naked allegation under Hargrove. Petitioner does not point to any instances in the record that demonstrate evidence of insanity or incompetence. Further, this Court finds that Petitioner fails to argue how any mental health or medication issues would have ultimately changed the outcome of the instant case. Therefore, this Court concludes that Petitioner fails to meet his burden under Strickland.

III. CUMULATIVE ERROR DOES NOT CONSTITUTE A COGNIZABLE CLAIM FOR HABEAS RELIEF

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Further, Petitioner'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).

As the Nevada Supreme Court found in affirming Petitioner's convictions:

> The totality of the circumstances supports finding probable cause to search Keller's home. Inside Keller's car, officers found 344.29 grams of methamphetamine, 33.92 grams of heroin, .537 grams of cocaine, a mixture of the three controlled substances, and a gun. The quantity of methamphetamine and heroin exceed personal use levels, and the discovery of 1-inch by 1-inch baggies, a large amount of cash, as well as a gun, fairly indicated to the officers that Keller was trafficking in drugs. Further, when Officer Lopez initiated the traffic stop, Keller tried to exit the car parked in front of his condo, which in conjunction with Keller's evasive driving, Officer Lopez took as an attempt to escape. Taken as a whole, these circumstances supported a finding of probable cause that Keller was a drug dealer and that more drugs and guns would be found inside his condo.

Order of Affirmance at page 5.

The Nevada Supreme Court has also determined that the issue of guilt was not close in this case. In addressing Petitioner's claim of cumulative error on appeal, the Nevada Supreme Court further found that there was overwhelming evidence of guilt:

> *There is no cumulative error*
> Keller summarily argues that cumulative error requires reversal. But, Keller fails to establish any error on appeal, and the evidence presented at trial against him was overwhelming. *See Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985) (considering "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged" in determining cumulative error). We therefore, ORDER the judgment of the district court AFFIRMED.

Order of Affirmance at pages 8-9.

Finally, even if any of Petitioner's allegations had merit, this Court finds that Petitioner has failed to establish that, when aggregated, those errors deprived him of a reasonable likelihood of a better outcome at trial. This Court further finds that, even if Petitioner had made such a showing, he has failed to show that the cumulative effect of the supposed errors was so prejudicial as to undermine this Court's confidence in the outcome of Petitioner's case. Because the issue of guilt was not close, and because Petitioner failed to sufficiently undermine confidence in the outcome of his case, this Court concludes that Petitioner's claim of cumulative error is without merit.

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ORDER

THEREFORE, IT IS HEREBY ORDERED, Petitioner Christopher Keller's Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and is, DENIED.

IT IS FURTHER ORDERED, Petitioner's Motion to Appoint Counsel shall be, and is, DENIED as Defendant is not entitled to counsel at this point.

DATED this _____ day of October, 2020.

Dated this 2nd day of November, 2020

DISTRICT JUDGE

12A EB1 1B70 A32A
William D. Kephart
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY _____ for _____
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this _____ day of _____, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. KELLER, BAC #81840
LOVELOCK CORRECTIONAL CENTER
1200 PRISON ROAD
LOVELOCK, NV, 89419

BY_____
C. Garcia
Secretary for the District Attorney's Office

cg/L2

November 3, 2020

UNITED STATES OF AMERICA DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT COUNTY OF CLARK STATE OF NEVADA

CERTIFIED COPY
ELECTRONIC SEAL (NRS 1.190(3))

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Christopher Keller, Plaintiff(s)	CASE NO: A-19-800950-W
vs.	DEPT. NO. Department 19
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.