

Electronically Filed
Mar 02 2021 11:52 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

NOA
BRET O. WHIPPLE, ESQ
Nevada Bar Number 6168
JUSTICE LAW CENTER
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Las Vegas, Nevada 89104
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DISTRICT COURT

CLARK COUNTY, NEVADA

GERALD ALLEN,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

Case No.:

A-19-794024-W / C-17-325743-1

DEPT. No: XVII

NOTICE OF APPEAL

TO: THE STATE OF NEVADA,

TO: THE CLARK COUNTY DISTRICT ATTORNEY, and to THE EIGHTH
JUDICIAL DISTRICT COURT, COUNTY OF CLARK, STATE OF NEVADA.

NOTICE IS HEREBY GIVEN that GERALD ALLEN hereby appeals to the SUPREME
COURT OF NEVADA from this Court's Findings of Fact and Conclusions of Law and Order,
field February 25, 2021, which denied Allen relief on his Post-Conviction Petition for Writ of
Habeas Corpus and associated briefs in support of that Petition.

DATED this 25th day of February, 2021.

JUSTICE LAW CENTER

/S/ Bret Whipple
Bret O. Whipple, Esq.
Nevada Bar No. 6168
1100 S. Tenth Street
Las Vegas, Nevada 89104

DECLARATION OF MAILING

I, an employee of Bret O. Whipple, Esq., of JUSTICE LAW CENTER, hereby declares that the herein described mailing took place, a citizen of the United States, over 21 years of age, and not a party to, nor interested in, the within action; that on the 19th day of June, 2017, Declarant deposited in the United states Mail at Las Vegas, Nevada, a copy of the Notice of Appeal in the above case enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to:

Clark County District Attorney
Attn:
200 Lewis Avenue
Las Vegas, Nevada 89155

Aaron D. Ford
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717

Furthermore, Declarant states that there is a regular communication by mail between the place of mailing and the places addressed.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 25th day of February, 2021.



Employee of Justice Law Center

CASE SUMMARY

CASE NO. A-19-794024-W

Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

§
§
§
§
§

Location: **Department 17**
Judicial Officer: **Villani, Michael**
Filed on: **05/01/2019**
Case Number History:
Cross-Reference Case Number: **A794024**

CASE INFORMATION

Related Cases
C-17-325743-1 (Writ Related Case)
Statistical Closures
02/25/2021 Other Manner of Disposition

Case Type: **Writ of Habeas Corpus**
Case Status: **02/25/2021 Closed**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number A-19-794024-W
Court Department 17
Date Assigned 01/12/2021
Judicial Officer Villani, Michael

PARTY INFORMATION






Plaintiff	Allen, Gerald	Whipple, Bret O <i>Retained</i> 702-731-0000(W)
Defendant	Dzurenda, James	Wolfson, Steven B <i>Retained</i> 702-455-5320(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX



EVENTS

05/01/2019	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff Allen, Gerald <i>Petition for Writ of Habeas Corpus</i>
05/01/2019	 Motion Filed By: Plaintiff Allen, Gerald <i>Motion for Production of Documents, Papers, Pleadings and Tangible Property of Defendant</i>
05/01/2019	 Notice of Motion Filed By: Plaintiff Allen, Gerald <i>Notice of Motion</i>
05/01/2019	 Motion Filed By: Plaintiff Allen, Gerald <i>Moiton to Withdraw Plea</i>
05/01/2019	 Notice of Motion Filed By: Plaintiff Allen, Gerald <i>Notice of Motion</i>

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CASE NO. A-19-794024-W

05/10/2019	 Order for Petition for Writ of Habeas Corpus <i>Order for Petition for Writ of Habeas Corpus</i>
05/10/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
06/13/2019	 Response <i>State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)</i>
07/03/2019	 Notice of Appearance <i>Notice of Appearance</i>
10/01/2019	 Supplement Filed by: Plaintiff Allen, Gerald <i>Supplement</i>
01/10/2020	 Response <i>State's Response to Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Evidentiary Hearing</i>
07/30/2020	 Order for Production of Inmate <i>Order for Production of Inmate Gerald Allen, BAC #1199686</i>
01/22/2021	 Order <i>ORDER FOR TRANSCRIPT</i>
02/16/2021	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing: Evidentiary Hearing Petition for Writ of Habeas Corpus Heard on October 2, 2020</i>
02/16/2021	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing: Evidentiary Hearing; Petition for Writ of Habeas Corpus Heard on October 16, 2020</i>
02/25/2021	 Findings of Fact, Conclusions of Law and Order Filed By: Defendant Dzurenda, James <i>Findings of Fact, Conclusions of Law and Order</i>
02/25/2021	 Notice of Appeal (criminal) <i>Notice of Appeal</i>
03/01/2021	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Dzurenda, James <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
<u>HEARINGS</u>	
07/16/2019	 Petition for Writ of Habeas Corpus (8:30 AM) (Judicial Officer: Villani, Michael) 07/16/2019, 02/28/2020, 10/02/2020, 10/16/2020 <i>Petition for Writ of Habeas Corpus</i> Matter Continued; Matter Continued; Matter Continued;

CASE SUMMARY
CASE NO. A-19-794024-W

	<p>Denied; Matter Continued; Matter Continued; Matter Continued; Denied; Matter Continued; Matter Continued; Matter Continued; Denied; Journal Entry Details: <i>Mr. Whipple requested the matter be set for an Evidentiary Hearing, advising that he would want Mr. Treffinger's testimony to complete the record. Court noted the original petition alleged that the Defendant was not advised of his right to appeal and issue of improper representation of taking the plea agreement versus taking the case to trial. Mr. Wiman argued that the Guilty Plea Agreement itself delineated the appellate rights and that there would be no need for an evidentiary hearing on the claim. Further arguments by the State. Court FINDS that on the issue of the appeal, it was not alleged that the Defendant asked for an appeal, so the record would not need to be expanded as to that. With respect to the issue of actual innocence relating to discovery performance and investigation, Court GRANTED Mr. Whipple's request for an Evidentiary Hearing. Colloquy regarding scheduling. Court instructed counsel to advise Mr. Treffinger as to specific areas that will be heard at the Evidentiary Hearing so he can review his notes. Mr. Whipple stated he would issue a subpoena outlying the specific areas. NDC 04/17/2020 10:00 AM PETITION FOR WRIT OF HABEAS CORPUS...EVIDENTIARY HEARING;</i> Matter Continued; Matter Continued; Matter Continued; Denied;</p>
07/16/2019	<p>Motion for Production of Transcript (8:30 AM) (Judicial Officer: Villani, Michael) <i>Motion for Production of Documents, Papers, Pleadings and Tangible Property of Defendant</i> Matter Heard;</p>
07/16/2019	<p>Motion to Withdraw Plea (8:30 AM) (Judicial Officer: Villani, Michael) <i>Motion to Withdraw Plea</i> Matter Heard;</p>
07/16/2019	<p> All Pending Motions (8:30 AM) (Judicial Officer: Villani, Michael) Matter Heard; Journal Entry Details: <i>PETITION FOR WRIT OF HABEAS CORPUS...MOTION FOR PRODUCTION OF DOCUMENTS, PAPERS, PLEADINGS AND TANGIBLE PROPERTY OF DEFENDANT...MOTION TO WITHDRAW PLEA Upon Court's inquiry, Mr. Whipple advised he had been retained and requested to supplement the briefing. COURT ORDERED, Briefing Schedule SET as follows: Defendant's reply due by September 17, 2019, State's response due by November 18, 2019 and Hearing SET. NDC 12/13/19 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS;</i></p>
10/02/2020	<p>Evidentiary Hearing (10:15 AM) (Judicial Officer: Villani, Michael) 10/02/2020, 10/16/2020 pursuant to Admin Order 20-1 et. seq. (re COVID-19) Matter Continued; Matter Heard; pursuant to Admin Order 20-1 et. seq. (re COVID-19) Matter Continued; Matter Heard;</p>
10/02/2020	<p> All Pending Motions (10:15 AM) (Judicial Officer: Villani, Michael) Matter Heard; Journal Entry Details:</p>

CASE SUMMARY

CASE NO. A-19-794024-W

EVIDENTIARY HEARING... PETITION FOR WRIT OF HABEAS CORPUS William Flinn Esq. present on behalf of the State. Court noted the Plaintiff Gerald Allen is present via Blue Jeans from the Clark County Detention Center. Gerald Allen sworn and testified. Colloquy regarding the scope of the hearing, Court advised the parties the evidence should pertain to the investigation completed by Mr. Treffinger and what was discussed between Mr. Allen and Mr. Treffinger. Mr. Whipple confirmed with Mr. Allen that he had waived his attorney client privilege to allow Mr. Treffinger to testify. Matter trailed. Matter recalled. Mr. Flinn cross examined Mr. Allen. Colloquy regarding scheduling. COURT ORDERED, matter CONTINUED. COURT FURTHER ORDERED the Defendant to be transported to the Clark County Detention Center for the next hearing. CONTINUED TO: 10/16/2020 9:00 AM;

10/16/2020



All Pending Motions (10:15 AM) (Judicial Officer: Villani, Michael)

Matter Heard;

Journal Entry Details:

EVIDENTIARY HEARING...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS Testimony and exhibits presented. (See worksheets). Arguments by counsel. COURT ORDERED, matter taken UNDER ADVISEMENT and will issue a written decision. NDC;

01/14/2021



Minute Order (3:00 AM) (Judicial Officer: Villani, Michael)

Petition for Writ of Habeas Corpus

Minute Order - No Hearing Held; Petition for Writ of Habeas Corpus

Journal Entry Details:

Petitioner filed a Pro Per Petition for Writ of Habeas Corpus. The Court appointed private counsel before ruling on the merits. Private counsel filed a Supplemental Petition for Writ of Habeas Corpus. After which, an evidentiary hearing was held. The Court's reasoning and pertinent information from said hearing follows: (1) Petitioner testified the Judge said Petitioner would only sentence him [Petitioner] to 6 to 15 years in prison instead of the 9 to 25 years Petitioner received. Petitioner goes on to say that he was not expecting a 9 to 25 sentence. However, such a claim is belied by the record. The Court canvassed the Petitioner, and the guilty plea agreement put Petitioner on notice of the possibility of receiving a 10 to Life sentence, due to Petitioner's prior felonies. This Court sentenced Petitioner to 9 to 25, which is well within the maximum and minimum possible for Petitioner. (2) Petitioner testified he did not understand the negotiations. Petitioner testified that he would not have filed the petition if he [Petitioner] had received the requested sentence. However, later on, Petitioner testified that he would still assert the instant allegations. However, The Court thoroughly canvassed Petitioner. At no time did Petitioner advise the Court that Petitioner did not understand the negotiations. Additionally, Petitioner signed the guilty plea agreement. Moreover, this Court notes that the instant guilty plea agreement was a part of a global negotiation involving Petitioner entering into a guilty plea in C-17-323049-1. There, Petitioner has not filed a similar Petition. (3) Petitioner testified his trial counsel failed to consult with him, that he [Petitioner] only received part of the discovery, that an expert was never retained regarding cocaine use, and that a diagram of the crime was not utilized. Mr. Treffinger testified that he met with Petitioner numerous times and that he [Mr. Treffinger] spoke with various tenants and Petitioner's girlfriend in preparation for trial. According to Mr. Treffinger, the global negotiations were in Petitioner's best interests based upon Petitioner's charges. Mr. Treffinger represented Petitioner in C-17-323049-1 and the instant case. Petitioner was charged by way of Grand Jury Indictment with 1 count of burglary while in possession of a firearm, 2 counts of attempt murder with use of a deadly weapon, 2 counts of battery with a deadly weapon resulting in substantial bodily harm, 1 count discharge of a firearm from or within a structure, 1 count child abuse, neglect or endangerment resulting in substantial bodily harm with use of a deadly weapon and 1 count ownership or possession of a firearm by a prohibited person. In case C-17-323049-1, Petitioner was charged with 1 count of ownership or possession of firearm by a prohibited person and 1 count of possession of stolen property. Further, the negotiations provided Petitioner to plea to battery with use of a deadly weapon resulting in substantial bodily harm and burglary. In Case C-17-323049-1, Petitioner plead to ownership or possession of firearm by prohibited person instead of the original charge of ownership or possession of firearm by prohibited person possession of stolen property. Here, State retained the right to argue for a consecutive sentence for the 2 counts but no opposition to concurrent time between the two cases. Furthermore, State would not seek habitual treatment Petitioner at time of sentencing had 3 prior felony convictions. The Court sentenced Petitioner to concurrent time in C-17-323049-1. Mr. Treffinger testified that he discussed discovery with Petitioner. Mr. Treffinger explained to Petitioner that discovery established that Petitioner's firearm struck the child. Mr. Treffinger recalls going over the ballistic report with Petitioner as well as the issue of self-defense. Moreover, Mr. Treffinger testified that he discussed at length with Petitioner regarding Petitioner's claim of self-defense. However, he

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-19-794024-W

[Mr. Treffinger] was concerned with Petitioner's version of events since Petitioner went to the location of the shooting to confront the victim. Based on the above, Mr. Treffinger determined that a jury would likely not believe Petitioner's self-defense claim. Mr. Treffinger was aware of Petitioner's education issues. However, Petitioner did not indicate a lack of understanding of the facts of the case or entry of plea. In both cases, the Court conducted a thorough canvass found Petitioner's plea to be freely and voluntarily entered. This Court notes that Petitioner has not made a similar claim based upon the above, in C323049. **THIS COURT FINDS Mr. Treffinger's testimony to be credible.** (4) Petitioner claims Mr. Treffinger's was ineffective in recommending that Petitioner accepts the plea agreement. However, It is important to acknowledge that Petitioner was charged with 8 felonies in the instant case, 2 in C-17-323049-1. Petitioner faced possible habitual felony treatment. In the instant case, Petitioner signed a guilty plea agreement. Here, the Court found Petitioner's plea to be freely and voluntarily entered. The Court asked Petitioner if he was pleading guilty because he was, in fact, guilty. Petitioner answered in the affirmative. Furthermore, Petitioner stated that Mr. Treffinger answered all of his questions and that he [Petitioner] was satisfied with the services of Mr. Treffinger. Therefore, **THIS COURT FINDS** Petitioner failed to establish how a better investigation would have established Petitioner's innocence of the burglary while in possession of a firearm charge and the validity of Petitioner's self-defense claim. Further, **THIS COURT FINDS** Petitioner speculates about the exonerating effect that an ordered ballistic test would have. **THIS COURT FINDS** all other claims are bare and naked allegations. Therefore, **THIS COURT FINDS** that neither prong of the Strickland standard has been met for all of the above. Further, the errors, if any, do not rise to the level of cumulative error. Therefore, **COURT ORDERED**, Petition for Writ of Habeas Corpus **DENIED**. **COURT ORDER'S** State is directed to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. Status check for January 28, 2021, regarding filing of the order. That date to be vacated if the Court receives the order prior to January 28, 2021. **CLERK'S NOTE:** The above minute order has been distributed to: Bret Whipple, admin@justice-law-center.com; John T. Niman, john.niman@clarkcountydca.com.;

01/28/2021



Status Check (8:30 AM) (Judicial Officer: Villani, Michael)

01/28/2021, 02/18/2021

Status Check: Order

Matter Continued;

Matter Continued;

Order filed

Journal Entry Details:

Defendant not present. Court noted the State had filed an Order for various transcripts. Upon Court's inquiry, Mr. Stanton had no note in his file regarding the status of the Order. Court Recorder advised two of the transcripts had already been prepared. **COURT ORDERED**, matter **CONTINUED** for 3 weeks. **NDC CONTINUED TO: 3/11/2021 10:00 AM;**

Matter Continued;

Matter Continued;

Order filed

Journal Entry Details:

Defendant not present. Court noted the State was to file the Order. Ms. Cole stated she would contact Appeals to get the Order filed. **COURT ORDERED**, matter **CONTINUED**. Court advised the Status Check would be vacated if the Order was filed. **NDOC CONTINUED TO: 2/18/2021 8:30 AM;**

DATE

FINANCIAL INFORMATION

Plaintiff Allen, Gerald

Total Charges

7.00

Total Payments and Credits

7.00

Balance Due as of 3/1/2021

0.00

DISTRICT COURT CIVIL COVER SHEET

A-19-794024-W

Dept: XVII

County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Gerald Allen # 1199686 P.O. Box 650 Indian Springs, NV 89070	Defendant(s) (name/address/phone): James Dzurenda
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

May 1, 2019

Date

Prepared by Clerk #27
 Signature of initiating party or representative

See other side for family-related case filings.

Heather S. Linn

CLERK OF THE COURT

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Chief Deputy District Attorney
Nevada Bar #014408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GERALD ALLEN,
#7032275

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-794024-W

C-17-325743-1

DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: JANUARY 14, 2021

TIME OF HEARING: 3:00 AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 14th day of January, 2021, the Petitioner present, being represented by BRET O. WHIPPLE, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through WILLIAM FLINN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On August 16, 2017, the Grand Jury returned an Indictment, charging ALLEN
4 GERALD (“Petitioner”) with COUNT 1 – BURGLARY WHILE IN POSSESSION OF A
5 FIREARM (Category B Felony - NRS 205.060); COUNTS 2 & 3 – ATTEMPT MURDER
6 WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030,
7 193.330, 193.165); COUNTS 4 & 5 – BATTERY WITH USE OF A DEADLY WEAPON
8 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481);
9 COUNT 6 – DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR
10 VEHICLE (Category B Felony - NRS 202.287); COUNT 7 – CHILD ABUSE, NEGLECT,
11 OR ENDANGERMENT WITH SUBSTANTIAL BODILY HARM WITH USE OF A
12 DEADLY WEAPON (Category B Felony - NRS 200.508(1), 193.165) and COUNT 8 –
13 OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B
14 Felony - NRS 202.360).

15 Petitioner was arraigned, pled not guilty, and invoked the 60-day rule on August 24,
16 2017. On August 25, 2017, the State filed a Notice of Intent to Seek Punishment as a Habitual
17 Criminal.

18 On March 20, 2018, pursuant to negotiations, Petitioner entered into a written Guilty
19 Plea Agreement (“GPA”), wherein both parties would retain the right to argue, including for
20 consecutive or concurrent time between the counts; the State also agreed to not seek habitual
21 criminal treatment in either case, and Petitioner agreed to pay full restitution and to forfeit the
22 firearm seized.¹ The same day, the State filed an Amended Indictment charging Petitioner with
23 COUNT 1 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
24 SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481) and COUNT 2 –
25 BURGLARY (Category B Felony - NRS 205.060), and Petitioner pled guilty to those charges.
26

27
28 ¹ This GPA also laid out negotiations in case C323049, wherein both parties would retain the
right to argue but the State would not oppose concurrent time with the instant case.

1 On May 29, 2018, Petitioner was sentenced to an aggregate total of one hundred eight
2 (108) to three hundred (300) months in the Nevada Department of Corrections, with three
3 hundred thirty-nine (339) days credit for time served. The Judgment of Conviction was filed
4 on June 1, 2018.

5 On May 1, 2019, Petitioner filed a Motion to Withdraw Plea. Petitioner also filed a
6 Petition for Writ of Habeas Corpus (“Petition”) that same day. On June 13, 2019, the State
7 filed its Response. Subsequently, on October 1, 2019, counsel filed a Supplement to
8 Petitioner’s Post-Conviction Petition for Writ of Habeas Corpus (“Supplemental Petition”).
9 The State filed its Response on January 10, 2020. On October 2, 2020 and October 16, 2020,
10 the Court held an evidentiary hearing and took the matter under advisement. On January 14,
11 2021, the Court denied Petitioner’s Petition by way of Minute Order. The Court’s findings
12 follow.

13 **ANALYSIS**

14 **I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW**

15 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
16 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
17 defense.” The United States Supreme Court has long recognized that “the right to counsel is
18 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
19 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
20 (1993).

21 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
22 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
23 Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865
24 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
25 representation fell below an objective standard of reasonableness, and second, that but for
26 counsel's errors, there is a reasonable probability that the result of the proceedings would have
27 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
28 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).

1 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
2 inquiry in the same order or even to address both components of the inquiry if the defendant
3 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

4 The court begins with the presumption of effectiveness and then must determine
5 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
6 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
7 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
8 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
9 537 P.2d 473, 474 (1975).

10 Counsel cannot be ineffective for failing to make futile objections or arguments. See
11 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
12 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
13 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
14 (2002). Further, a defendant who contends his attorney was ineffective because he did not
15 adequately investigate must show how a better investigation would have rendered a more
16 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). If
17 counsel and the client understand the evidence to be presented by the State and the possible
18 outcomes of that evidence, “counsel is not required to unnecessarily exhaust all available
19 public or private resources.” Id. Further, “strategic choices”—such as choice of witnesses—
20 “made after thorough investigation of law and facts relevant to plausible options are virtually
21 unchallengeable.” Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38
22 P.3d at 167.

23 Based on the above law, the role of a court in considering allegations of ineffective
24 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
25 whether, under the particular facts and circumstances of the case, trial counsel failed to render
26 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
27 (1978). This analysis does not mean that the court should “second guess reasoned choices
28 between trial tactics nor does it mean that defense counsel, to protect himself against

1 allegations of inadequacy, must make every conceivable motion no matter how remote the
2 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
3 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
4 cannot create one and may disserve the interests of his client by attempting a useless charade.”
5 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

6 “There are countless ways to provide effective assistance in any given case. Even the
7 best criminal defense attorneys would not defend a particular client in the same way.”
8 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
9 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
10 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
11 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's
12 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
13 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

14 Even if a defendant can demonstrate that his counsel's representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that, but for counsel's errors, the result of the trial would have been
17 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
18 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
19 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
20 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the
21 convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v.
22 State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). For a guilty plea, a defendant “must
23 show that there is a reasonable probability that, but for counsel's errors, he would not have
24 pled guilty and would have insisted on going to trial.” Kirksey, 112 Nev. at 988, 923 P.2d at
25 1107 (quoting Hill, 474 U.S. at 59).

26 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
27 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
28 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,

1 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
2 be supported with specific factual allegations, which if true, would entitle the petitioner to
3 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
4 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
5 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
6 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
7 petition to be dismissed.” (emphasis added).

8 The Court finds that neither prong of the Strickland standard has been met for each of
9 Petitioner’s claims and any errors, if any, do not rise to the level of cumulative error.

10 **II. PETITIONER’S PRO PER PETITION CLAIMS FAIL**

11 **A. Alleged Failure to Correct Criminal Complaint**

12 In Ground One, as part of a due process claim that is otherwise waived, Petitioner
13 claims counsel should have had the “fatally flawed” criminal complaint corrected. Petition at
14 8–10. This claim is meritless. First, the document referenced is an Indictment, not a Criminal
15 Complaint. Petition, Exhibit D. Moreover, the Indictment does, in fact, reference the correct
16 Nevada Revised Statutes. Petitioner was originally charged with Attempt Murder With Use of
17 a Deadly Weapon. Id. Attempt crimes are charged by indicating the attempt statute, NRS
18 193.330, along with the statute governing the underlying crime. Id. This is precisely how the
19 crime was charged in Petitioner’s Indictment: “Attempt” (NRS 193.330) “Murder” (NRS
20 200.010 and 200.030) “With Use of a Deadly Weapon” (NRS 193.165). Id. Because there was
21 no error in the Indictment, counsel was not ineffective for not challenging it.

22 Further, Petitioner seems to misunderstand that the operative charging document is the
23 Amended Indictment, wherein pursuant to negotiations, Petitioner was charged with: COUNT
24 1 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL
25 BODILY HARM (Category B Felony - NRS 200.481) and COUNT 2 – BURGLARY
26 (Category B Felony - NRS 205.060). Amended Indictment, filed March 20, 2018. Even if there
27 had been a charging error in the original Indictment, this Amended Indictment is what controls.
28 Thus, Petitioner’s complaint that he is “actually innocent” of murder is irrelevant. Petition at

1 8. Petitioner was only originally charged with Attempt Murder—which, regardless, was not
2 reflected in the Amended Indictment and to which he did not plead guilty. Petition, Exhibit D;
3 Amended Indictment, filed March 20, 2018.

4 Finally, Petitioner seems to allege an issue with the Burglary charge as listed in the
5 Indictment. Petition at 9. This crime was also charged in the Amended Indictment. But
6 Petitioner pled guilty to that crime. He has not specifically alleged how counsel was ineffective
7 such that Petitioner’s plea was involuntary. He baldly states “that counsel misled him into an
8 unnecessary, unwholesome plea bargain” without providing any supporting facts. In fact,
9 when entering his guilty plea, Petitioner specifically “confirmed he wished to accept the
10 negotiations and did not feel rushed or pressured.” Court Minutes, March 20, 2018. Thus, his
11 claim is both bare and naked as well as belied by the record and is denied. Hargrove, 100 Nev.
12 at 502.

13 **B. Alleged Failure to Conduct a Proper Investigation**

14 In Grounds Two, Three, and Seven, Petitioner claims counsel failed to conduct a proper
15 investigation by not investigating: the “fatally flawed” complaint; Shaledra Givens; cocaine
16 found in the apartment; and the details of the shooting. Petition at 11–12, 14–15. However,
17 there is no merit to any of these claims. Because Petitioner pled guilty, he would have to show
18 how a better investigation would have led to a more favorable outcome—that is, that he would
19 not have pled guilty if counsel had investigated. Molina, 120 Nev. at 192, 87 P.3d at 538.
20 Petitioner fails to do so.

21 As discussed, Petitioner’s complaints about the “fatally flawed” complaint are
22 misguided. See Section I(A), *supra*; Petition at 11.

23 Next, Petitioner speculates that his “alibi” witness, Givens, would have revealed that
24 Petitioner could not have shot the victim from his position in the home. Petition at 12.
25 However, his Petition merely advances bare and naked allegations. Hargrove, 100 Nev. at 502.
26 His hand-sketched “blueprint” is not an indication that Givens would have provided the same
27
28

1 information. Petition, Exhibit F. Even Givens' affidavit² fails to mention any information
2 regarding Petitioner's position. Petition, Exhibit A(1). Moreover, this claim is in fact belied
3 by Petitioner's own Petition, wherein he admits that "the shoot out was between Gerald Allen,
4 and Keith Manning" and that "Gerald's gun wounded the gunman Keith." Petition at 7. He
5 also raises a "self-defense" argument on several occasions. Petition at 12, 13, 47 ("Affidavit
6 of Gerald Allen"). Thus, despite any protestations about the possible positions of the parties,
7 Petitioner admits that there was a shooting between himself and the victim and that Petitioner
8 shot the victim. Thus, any investigation by counsel in terms of positioning would have been
9 fruitless.

10 Next, Petitioner's complaint that police allegedly failed to impound cocaine found in
11 the apartment is irrelevant. Petition at 12. Petitioner does not explain how counsel's
12 investigations into this alleged failure would have led to a more favorable outcome for him.

13 Finally, the complaints in Ground Seven are in no way cogent. Petition at 14–15.
14 Petitioner seems to offer argument about issues with the evidence and the police investigation.
15 But he does not provide any evidence whatsoever to demonstrate that he is entitled to relief—
16 let alone that, had these claims been investigated, he would have chosen to go to trial rather
17 than plead guilty. These claims are bare and naked claims. Hargrove, 100 Nev. at 502.
18 Accordingly, Petitioner cannot establish ineffective assistance of counsel due to a failure to
19 conduct a proper investigation regarding police procedure.

20 Petitioner fails to establish that counsel's investigations into any of these issues would
21 have led to information that would have led to a better outcome—that is, that Petitioner would
22 not have pled guilty. Thus, all three of these claims are denied.

23 **C. Alleged Failure to Present a Defense**

24 In Ground Four, Petitioner claims counsel was ineffective in that he failed to present an
25 affirmative self-defense argument. Petition at 13. However, even when counsel advises
26 Petitioner to enter a guilty plea while Petitioner believes he has a "viable self-defense argument

27
28 ² Assuming this document is, in fact, genuine. It is not notarized, and the handwriting bears a
striking similarity to Petitioner's own.

1 does not render . . . the advice deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL
2 366896, at *3 (Jan. 10, 2018). Thus, even if the complaint is that counsel advised Petitioner to
3 plead guilty rather than go to trial and affirmatively claim self-defense, there was no ineffective
4 assistance. Moreover, Petitioner is not entitled to present a defense when he pleads guilty: that
5 is, admits to his crimes. Thus, counsel was not ineffective for not presenting an affirmative
6 defense. This claim is denied.

7 **D. Alleged Failure to Present a Defense**

8 In Ground Four, Petitioner claims counsel was ineffective in that he failed to present an
9 affirmative self-defense argument. Petition at 13. However, even when counsel advises
10 Petitioner to enter a guilty plea while Petitioner believes he has a “viable self-defense argument
11 does not render . . . the advice deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL
12 366896, at *3 (Jan. 10, 2018). Thus, even if the complaint is that counsel advised Petitioner to
13 plead guilty rather than go to trial and affirmatively claim self-defense, there was no ineffective
14 assistance. Moreover, Petitioner is not entitled to present a defense when he pleads guilty: that
15 is, admits to his crimes. Thus, counsel was not ineffective for not presenting an affirmative
16 defense.

17 **E. Alleged Failure to File the Proper Motions**

18 In Ground Five, Petitioner claims counsel failed to file the proper motions. Petition at
19 13. However, Petitioner fails to include any information regarding what motions counsel
20 should have filed or how they would have led to a more favorable outcome. Petitioner’s failure
21 to support his claim with specific facts constitutes a bare and naked allegation. Hargrove, 100
22 Nev. at 502. Consequently, this claim is denied.

23 **F. Alleged Failure to Provide Discovery**

24 Also in Ground Five, Petitioner claims counsel failed to provide him with discovery.
25 Petition at 13. Again, this claim is bare and naked. Hargrove, 100 Nev. at 502. Petitioner only
26 includes a conclusory sentence that counsel did not provide discovery. Petitioner also cites no
27 authority supporting an argument that he was entitled to discovery. Moreover, in the written
28 plea agreement, Petitioner acknowledged he had discussed the charges and “any possible

1 defenses, strategies and circumstances which might be in [his] favor” with counsel, that
2 counsel had “answered all [his] questions regarding this guilty plea agreement and its
3 consequences to [his] satisfaction,” and that he was “satisfied with the services provided by
4 [his] attorney.” See GPA, filed March 20, 2018, at 5–6. Accordingly, Petitioner fails to
5 demonstrate his counsel acted in an objectively unreasonable manner in his treatment of
6 Petitioner’s discovery. Further, Petitioner fails to establish a reasonable probability he would
7 have refused to plead guilty and insisted on proceeding to trial had he further reviewed the
8 evidence against him. Therefore, he cannot establish ineffective assistance of counsel and his
9 claim is denied.

10 **G. Alleged Failure to Conduct a Gun Ballistics Test**

11 In Ground Six, Petitioner claims counsel failed to conduct a gun ballistics test or to
12 investigate the police handling of evidence. Petition at 13. This claim is without merit because
13 Petitioner once again does not demonstrate how such an investigation would have rendered a
14 more favorable outcome. Molina, 120 Nev. at 192. He does not even include what a gun
15 ballistics test would have revealed. Thus, his claim is bare and naked. Hargrove, 100 Nev. at
16 502. As is his claim that there was cocaine in the apartment, to begin with. Id. Petitioner does
17 not and cannot make a showing of what counsel should have discovered that would have
18 caused him not to plead guilty. Indeed, neither a ballistics test or a failure to impound cocaine
19 provides support to suggest that Petitioner did not fire at the victim—because Petitioner
20 admitted that he did. Petition at 12, 13. Thus, Petitioner cannot establish ineffective assistance
21 of counsel. Further, this Court finds that Petitioner has merely speculated about the exonerating
22 effect that an ordered ballistic test would have. Thus, his claim fails.

23 **H. Alleged Failure to Inform Petitioner of Ability to Appeal**

24 In Ground Eight, Petitioner claims that counsel failed to inform him of his ability to
25 appeal as a result of an Alford plea. Petition at 16. However, Petitioner did not enter an Alford
26 plea. In addition, his claim is not only bare and naked but belied by the record. Hargrove, 100
27 Nev. at 502. Petitioner does not provide any evidence, beyond a conclusory statement, that
28 counsel failed to inform him regarding the details of his plea deal. And in his Guilty Plea

1 Agreement, Petitioner specifically agreed that he understood he was “unconditionally waiving
2 [his] right to a direct appeal of this conviction, including any challenges based upon reasonable
3 constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as
4 stated in NRS 177.015(4).” See GPA, filed March 20, 2018, at 4–5. Most importantly,
5 Petitioner did not allege that he asked for an appeal. Toston v. State, 127 Nev. 971, 267 P.3d
6 795 (2011) (stating the duty to inform “arises in the guilty-plea context only when the
7 defendant inquiries about the right to appeal or in circumstances where the defendant may
8 benefit from receiving advice about the right to a direct appeal, such as the existence of a direct
9 appeal claim that has reasonable likelihood of success”). Thus, Petitioner’s claim is denied.

10 **I. Alleged Failure to Provide Mitigating Evidence**

11 In Ground Nine, Petitioner alleges his counsel was ineffective for failing to
12 allow Petitioner the opportunity to provide mitigating evidence. Petition at 9. Again, this claim
13 is bare and naked. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner does not
14 articulate how counsel failed to provide him with such opportunity or how such failure was
15 objectively unreasonable. Further, Petitioner fails to adequately show the existence of a
16 reasonable probability that any alleged mitigating evidence would have resulted in a different
17 outcome. In fact, Petitioner spoke on his own behalf at not one, but two sentencing hearings,
18 and Petitioner specifies no particular mitigation information that counsel allegedly denied him
19 the ability to present in those statements. Court Minutes, May 29, 2018, May 31, 2018. Thus,
20 this claim is denied.

21 **J. Alleged Legal Malpractice Claim**

22 In Ground Ten, Petitioner claims that his counsel, Timothy Treffinger, Esq., was on
23 probation for a drug conviction, committing legal malpractice. Petition at 9. The assertion that
24 Petitioner’s counsel was and/or is on probation is not only legally and factually insignificant,
25 but also a bare and naked claim unsupported by specific facts. Hargrove, 100 Nev. at 502, 686
26 P.2d at 225. Petitioner does not explain how counsel’s alleged probation led to deficient
27 performance or prejudice. Thus, this claim is denied.

28 //

III. Petitioner's Supplemental Petition Claims Fail

In Petitioner's Supplemental Petition, he alleged that his counsel was ineffective for failing to: (1) investigate exculpatory evidence, (2) consult with and advise Petitioner prior to entry of plea, and (3) advise Petitioner of his right to appeal.

A. Alleged Failures to Investigate Exculpatory Evidence

Petitioner asserts that had counsel properly investigated certain exculpatory evidence, counsel would not have incorrectly advised Petitioner to take a plea. Supplemental Petition, filed October 1, 2019, at 6–7. At Petitioner's evidentiary hearing, Petitioner testified his trial counsel failed to consult with him, that he only received part of the discovery, that an expert was never retained regarding cocaine use, and that a diagram of the crime was not utilized. Petitioner's claims are meritless.

In his Supplemental Petition, Petitioner claimed that a proper investigation would have revealed that he was "actually innocent" of burglary. Supplemental Petition, filed October 1, 2019, at 6. Petitioner's claim fails for several reasons. To begin, his claim is bare and naked without any supported facts. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner fails to support his claim with specific facts that if true, would have entitled him to relief. Petitioner's own self-serving affidavit is hardly evidence, insufficient to show that he had permission to be in the home and thus that no reasonable jury would have convicted him. Petition, filed May 1, 2019, Exhibit H. Moreover, Petitioner pled guilty to burglary. By signing the GPA, and by confirming his wish to accept the negotiations during his plea canvass, Petitioner indicated that he understood the nature of his plea and admitted that he was not, in fact, innocent. See GPA, filed March 20, 2018; Court Minutes, March 20, 2018. Thus, he cannot meritoriously argue that his plea was coerced and involuntary.

Second, Petitioner alleges that had counsel properly investigated, he would have discovered evidence which would have revealed that he did not commit Battery with Use of a Deadly Weapon. Supplemental Petition, filed October 1, 2019, at 6. Specifically, had counsel investigated that Petitioner was behind a wall or conducted a gun ballistics test at the time of the shooting, he would have been able to establish that Petitioner could not have fired the shot

1 that killed the victim. Id. However, Petitioner does not demonstrate how such an investigation
2 would have rendered a more favorable outcome. Molina, 120 Nev. at 192. Petitioner does not
3 show whether a ballistics test would have had favorable results, or that he would have elected
4 not to plead guilty in light of those uncertain results. Indeed, a ballistics test could not provide
5 support to suggest that Petitioner did not fire at the victim—because Petitioner admitted that
6 he did. Petition, filed May 1, 2019, at 12, 13.

7 Third, Petitioner argues that counsel failed to investigate his claims of self-defense,
8 which would have been bolstered by the victim’s cocaine use prior to the shooting.
9 Supplemental Petition, filed October 1, 2019, at 7. Further, he argues that expert testimony to
10 support this theory would have been available. Id. He also believes that had counsel
11 investigated, he would have discovered evidence relating to the victim concealing or
12 destroying evidence and the fact that the victim was seeking to buy guns in order to kill
13 Petitioner. Id. Regardless of these alleged facts, Petitioner still fails to state that counsel’s
14 investigations into any of these issues would have led to information that would have led to a
15 better outcome—that is, that Petitioner would not have pled guilty. Molina, 120 Nev. at 192,
16 87 P.3d at 538. Moreover, even when counsel advises a defendant to enter a guilty plea while
17 the defendant believes he has a “viable self-defense argument does not render . . . the advice
18 deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL 366896, at *3 (Jan. 10, 2018).
19 Thus, even if the complaint is that counsel advised Petitioner to plead guilty rather than go to
20 trial and affirmatively claim self-defense, there was no ineffective assistance. Regardless,
21 Petitioner is not entitled to present a defense when he pleads guilty: that is, admits to his
22 crimes. Petitioner provides no expert report, or evidence that the victim concealed or destroyed
23 evidence, or that the victim was buying guns, or that the victim was doing so to kill Petitioner.
24 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

25 In sum, Petitioner has failed to argue how these facts, assuming they were true, would
26 have caused him to alter his course, let alone would have resulted in a more favorable outcome.
27 Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 192, 87 P.3d at 538.
28 Therefore, his claim is denied.

1 Mr. Treffinger testified at Petitioner's evidentiary hearing that he met with Petitioner
2 numerous times and that he spoke with various tenants as well as Petitioner's girlfriend in
3 preparation for trial. Additionally, according to Mr. Treffinger, the global negotiations were
4 in Petitioner's best interests based upon Petitioner's charges. Mr. Treffinger represented
5 Petitioner in C-17-323049-1 as well as the instant case. Petitioner was charged by way of
6 Grand Jury Indictment with one count of BURGLARY WHILE IN POSSESSION OF A
7 FIREARM, two counts of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, two
8 counts of BATTERY WITH A DEADLY WEAPON RESULTING IN SUBSTANTIAL
9 BODILY HARM, one count DISCHARGE OF A FIREARM FROM OR WITHIN A
10 STRUCTURE, one count CHILD ABUSE, NEGLECT OR ENDANGERMENT
11 RESULTING IN SUBSTANTIAL BODILY HARM WITH USE OF A DEADLY WEAPON,
12 and one count OWNERSHIP OR POSSESSION OF A FIREARM BY A PROHIBITED
13 PERSON. In Case C-17-323049-1, Petitioner was charged with one count of OWNERSHIP
14 OR POSSESSION OF FIREARM BY A PROHIBITED PERSON and one count of
15 POSSESSION OF STOLEN PROPERTY. Pursuant to negotiations, Petitioner pled guilty to
16 one count of BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
17 SUBSTANTIAL BODILY HARM and one count of BURGLARY. In Case C-17-323049-1,
18 Petitioner pled guilty to OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
19 PERSON instead of the original charge of one count of OWNERSHIP OR POSSESSION OF
20 FIREARM BY PROHIBITED PERSON and one count of POSSESSION OF STOLEN
21 PROPERTY. In both cases, the State retained the right to argue for a consecutive sentence for
22 the two counts but no opposition to concurrent time between the two cases. Furthermore, the
23 State would not seek habitual treatment as Petitioner, at the time of sentencing, had three prior
24 felony convictions. The Court sentenced Petitioner to concurrent time in C-17-323049-1.

25 Moreover, Mr. Treffinger testified that he discussed discovery with Petitioner. Mr.
26 Treffinger explained to Petitioner that discovery established that Petitioner's firearm struck the
27 child. Mr. Treffinger recalls going over the ballistic report with Petitioner as well as the issue
28 of self-defense.

1 Mr. Treffinger further testified that he discussed at length with Petitioner his claim of
2 self-defense. However, Mr. Treffinger was concerned with Petitioner's version of events since
3 Petitioner went to the location of the shooting to confront the victim. Based on the above, Mr.
4 Treffinger determined that a jury would likely not believe Petitioner's self-defense claim.
5 Therefore, Petitioner has failed to establish how a better investigation would have established
6 Petitioner's innocence of the burglary while in possession of a firearm charge and the validity
7 of Petitioner's self-defense claim.

8 Mr. Treffinger was aware of Petitioner's education issues. However, Petitioner did not
9 indicate a lack of understanding of the facts of the case or entry of plea. In both cases, the
10 Court conducted a thorough canvass found Petitioner's plea to be freely and voluntarily
11 entered. This Court notes that Petitioner has not made a similar claim based upon the above,
12 in C323049. The Court finds Mr. Treffinger's testimony to be credible. Thus, Petitioner's
13 claims fail.

14 **B. Alleged Failure to Consult with and Advise Petitioner Prior to Entry of Plea**

15 Petitioner argues that counsel was ineffective for failing to consult with him and for
16 failing to provide him with his case file or discovery. Supplemental Petition, filed October 1,
17 2019, at 7.

18 First, this claim is bare and naked. Hargrove, 100 Nev. at 502. Petitioner only includes
19 a conclusory sentence that counsel did not provide discovery. He also cites no authority
20 supporting an argument that he was entitled to discovery.

21 Second, his lack of consultation argument is baseless. Petitioner was not entitled to a
22 particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610,
23 1617 (1983). There is no requirement for any specific amount of communication as long as his
24 counsel was reasonably effective in his representation. See id. After all, Petitioner
25 acknowledged he had discussed the charges and "any possible defenses, strategies and
26 circumstances which might be in [his] favor" with counsel, that counsel had "answered all
27 [his] questions regarding this guilty plea agreement and its consequences to [his] satisfaction,"
28

1 and that he was “satisfied with the services provided by [his] attorney.” See GPA, filed March
2 20, 2018, at 5–6.

3 Accordingly, Petitioner fails to demonstrate his counsel acted in an objectively
4 unreasonable manner in his treatment of Petitioner, his case file, or discovery. Therefore, he
5 cannot establish ineffective assistance of counsel and his claim is denied.

6 **C. Additional Alleged Issues Regarding Petitioner’s Guilty Plea**

7 At Petitioner’s evidentiary hearing, he testified the Court said Petitioner would only
8 sentence him to six to fifteen years in prison instead of the nine to twenty-five years Petitioner
9 received. Petitioner goes on to say that he was not expecting a nine to twenty-five year
10 sentence. However, such a claim is belied by the record. The Court canvassed the Petitioner,
11 and the guilty plea agreement put Petitioner on notice of the possibility of receiving a ten to
12 Life sentence, due to Petitioner’s three prior felonies. This Court sentenced Petitioner to nine
13 to twenty-year sentence, which is well within the maximum and minimum possible for
14 Petitioner.

15 Petitioner further testified he did not understand the negotiations. Petitioner testified
16 that he would not have filed the petition if he had received the requested sentence. However,
17 later on, Petitioner testified that he would still assert the instant allegations. However, the Court
18 thoroughly canvassed Petitioner. At no time did Petitioner advise the Court that Petitioner did
19 not understand the negotiations. Additionally, Petitioner signed the guilty plea agreement.
20 Moreover, this Court notes that the instant guilty plea agreement was a part of a global
21 negotiation involving Petitioner entering into a guilty plea in C-17-323049-1. There, Petitioner
22 had not filed a similar Petition.

23 Additionally, Petitioner claimed Mr. Treffinger's was ineffective in recommending that
24 Petitioner accept the plea agreement. However, it is important to acknowledge that Petitioner
25 was charged with eight felonies in the instant case and two in C-17-323049-1. Petitioner also
26 faced possible habitual felony treatment. In the instant case, Petitioner signed a guilty plea
27 agreement. Here, the Court found Petitioner's plea to be freely and voluntarily entered. The
28 Court asked Petitioner if he was pleading guilty because he was, in fact, guilty. Petitioner

1 answered in the affirmative. Furthermore, Petitioner stated that Mr. Treffinger answered all of
2 his questions and that Petitioner was satisfied with the services of Mr. Treffinger.

3 **D. Alleged Failure to Advise Petitioner of his Right to Appeal**

4 While the Nevada Supreme Court has concluded that counsel must advise his client
5 about an appeal when he so inquires, the general rule is that counsel is not constitutionally
6 required to advise a defendant who has pled guilty of his right to appeal. Thomas v. State, 115
7 Nev. 148, 150, 979 P.2d 222, 223 (1999). Even so, Petitioner has failed to indicate whether
8 Petitioner ever told his counsel that he wished to file a direct appeal. Notwithstanding this
9 omission, Petitioner was, in fact, advised of his limited right to appeal in his GPA. By signing
10 the GPA, Petitioner acknowledged that he was waiving his right to file a direct appeal and that
11 his attorney explained this to him:

12
13 By entering my plea of guilty, I understand that I am waiving and
14 forever giving up the following rights and privileges:

15 ...

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

25 ...

26 All of the foregoing elements, consequences, rights, and waiver of
27 rights have been *thoroughly explained to me by my attorney*.

28 GPA, filed March 20, 2018, at 4–5 (emphasis added). Therefore, as discussed *infra*, such claim
is belied by the record, and should be denied. Hargrove, 100 Nev. at 503, 686 P.2d at 225.

//

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and associated filings shall be, and are, hereby denied.

Dated this 25th day of February, 2021



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

74B 7EF 3F84 CFA4
Michael Villani
District Court Judge

BY /s/ JOHN NIMAN
JOHN NIMAN
Deputy District Attorney
Nevada Bar #014408

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this ____ day of _____, 2021, by electronic transmission to:

BRET WHIPPLE
admin@justice-law-center.com

BY /s/ E. DEL PADRE
E. DEL PADRE
Secretary for the District Attorney's Office

JN/bg/ed/GCU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Gerald Allen, Plaintiff(s)

CASE NO: A-19-794024-W

7 vs.

DEPT. NO. Department 17

8 James Dzurenda, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 2/25/2021

15 Bret Whipple

admin@justice-law-center.com

16 John Niman

john.niman@clarkcountyda.com

17 District Attorney

Motions@clarkcountyda.com

18 Jennifer Garcia

jennifer.garci@clarkcountyda.com

20

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23

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28



1 NEFF

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4 GERALD ALLEN,

5
6 Petitioner,

7 vs.

8 JAMES DZURENDA,

9 Respondent,

Case No: A-19-794024-W

Dept No: XVII

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on February 25, 2021, the court entered a decision or order in this
12 matter, a true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
15 mailed to you. This notice was mailed on March 1, 2021.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

18 Amanda Hampton, Deputy Clerk

19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 1 day of March 2021, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

23 ☒ The United States mail addressed as follows:

24 Gerald Allen # 1199686
P.O. Box 208
25 Indian Springs, NV 89070

Bret O. Whipple, Esq.
1100 S. Tenth St.
Las Vegas, NV 89104

26
27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Chief Deputy District Attorney
Nevada Bar #014408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GERALD ALLEN,
#7032275

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-19-794024-W

C-17-325743-1

DEPT NO: XVII

**FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER**

DATE OF HEARING: JANUARY 14, 2021

TIME OF HEARING: 3:00 AM

THIS CAUSE having come on for hearing before the Honorable MICHAEL VILLANI, District Judge, on the 14th day of January, 2021, the Petitioner present, being represented by BRET O. WHIPPLE, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through WILLIAM FLINN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On August 16, 2017, the Grand Jury returned an Indictment, charging ALLEN
4 GERALD (“Petitioner”) with COUNT 1 – BURGLARY WHILE IN POSSESSION OF A
5 FIREARM (Category B Felony - NRS 205.060); COUNTS 2 & 3 – ATTEMPT MURDER
6 WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.010, 200.030,
7 193.330, 193.165); COUNTS 4 & 5 – BATTERY WITH USE OF A DEADLY WEAPON
8 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481);
9 COUNT 6 – DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR
10 VEHICLE (Category B Felony - NRS 202.287); COUNT 7 – CHILD ABUSE, NEGLECT,
11 OR ENDANGERMENT WITH SUBSTANTIAL BODILY HARM WITH USE OF A
12 DEADLY WEAPON (Category B Felony - NRS 200.508(1), 193.165) and COUNT 8 –
13 OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B
14 Felony - NRS 202.360).

15 Petitioner was arraigned, pled not guilty, and invoked the 60-day rule on August 24,
16 2017. On August 25, 2017, the State filed a Notice of Intent to Seek Punishment as a Habitual
17 Criminal.

18 On March 20, 2018, pursuant to negotiations, Petitioner entered into a written Guilty
19 Plea Agreement (“GPA”), wherein both parties would retain the right to argue, including for
20 consecutive or concurrent time between the counts; the State also agreed to not seek habitual
21 criminal treatment in either case, and Petitioner agreed to pay full restitution and to forfeit the
22 firearm seized.¹ The same day, the State filed an Amended Indictment charging Petitioner with
23 COUNT 1 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
24 SUBSTANTIAL BODILY HARM (Category B Felony - NRS 200.481) and COUNT 2 –
25 BURGLARY (Category B Felony - NRS 205.060), and Petitioner pled guilty to those charges.
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28 ¹ This GPA also laid out negotiations in case C323049, wherein both parties would retain the
right to argue but the State would not oppose concurrent time with the instant case.

1 On May 29, 2018, Petitioner was sentenced to an aggregate total of one hundred eight
2 (108) to three hundred (300) months in the Nevada Department of Corrections, with three
3 hundred thirty-nine (339) days credit for time served. The Judgment of Conviction was filed
4 on June 1, 2018.

5 On May 1, 2019, Petitioner filed a Motion to Withdraw Plea. Petitioner also filed a
6 Petition for Writ of Habeas Corpus (“Petition”) that same day. On June 13, 2019, the State
7 filed its Response. Subsequently, on October 1, 2019, counsel filed a Supplement to
8 Petitioner’s Post-Conviction Petition for Writ of Habeas Corpus (“Supplemental Petition”).
9 The State filed its Response on January 10, 2020. On October 2, 2020 and October 16, 2020,
10 the Court held an evidentiary hearing and took the matter under advisement. On January 14,
11 2021, the Court denied Petitioner’s Petition by way of Minute Order. The Court’s findings
12 follow.

13 **ANALYSIS**

14 **I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD OF REVIEW**

15 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
16 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
17 defense.” The United States Supreme Court has long recognized that “the right to counsel is
18 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
19 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
20 (1993).

21 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
22 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
23 Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865
24 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
25 representation fell below an objective standard of reasonableness, and second, that but for
26 counsel's errors, there is a reasonable probability that the result of the proceedings would have
27 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
28 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).

1 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
2 inquiry in the same order or even to address both components of the inquiry if the defendant
3 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

4 The court begins with the presumption of effectiveness and then must determine
5 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
6 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
7 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
8 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
9 537 P.2d 473, 474 (1975).

10 Counsel cannot be ineffective for failing to make futile objections or arguments. See
11 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
12 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
13 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
14 (2002). Further, a defendant who contends his attorney was ineffective because he did not
15 adequately investigate must show how a better investigation would have rendered a more
16 favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). If
17 counsel and the client understand the evidence to be presented by the State and the possible
18 outcomes of that evidence, “counsel is not required to unnecessarily exhaust all available
19 public or private resources.” Id. Further, “strategic choices”—such as choice of witnesses—
20 “made after thorough investigation of law and facts relevant to plausible options are virtually
21 unchallengeable.” Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne, 118 Nev. at 8, 38
22 P.3d at 167.

23 Based on the above law, the role of a court in considering allegations of ineffective
24 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
25 whether, under the particular facts and circumstances of the case, trial counsel failed to render
26 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
27 (1978). This analysis does not mean that the court should “second guess reasoned choices
28 between trial tactics nor does it mean that defense counsel, to protect himself against

1 allegations of inadequacy, must make every conceivable motion no matter how remote the
2 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
3 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
4 cannot create one and may disserve the interests of his client by attempting a useless charade.”
5 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

6 “There are countless ways to provide effective assistance in any given case. Even the
7 best criminal defense attorneys would not defend a particular client in the same way.”
8 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
9 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
10 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
11 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's
12 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
13 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

14 Even if a defendant can demonstrate that his counsel's representation fell below an
15 objective standard of reasonableness, he must still demonstrate prejudice and show a
16 reasonable probability that, but for counsel's errors, the result of the trial would have been
17 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
18 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
19 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
20 694, 104 S. Ct. at 2064-65, 2068). This portion of the test is slightly modified when the
21 convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v.
22 State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). For a guilty plea, a defendant “must
23 show that there is a reasonable probability that, but for counsel's errors, he would not have
24 pled guilty and would have insisted on going to trial.” Kirksey, 112 Nev. at 988, 923 P.2d at
25 1107 (quoting Hill, 474 U.S. at 59).

26 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
27 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
28 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,

1 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
2 be supported with specific factual allegations, which if true, would entitle the petitioner to
3 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
4 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
5 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
6 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
7 petition to be dismissed.” (emphasis added).

8 The Court finds that neither prong of the Strickland standard has been met for each of
9 Petitioner’s claims and any errors, if any, do not rise to the level of cumulative error.

10 **II. PETITIONER’S PRO PER PETITION CLAIMS FAIL**

11 **A. Alleged Failure to Correct Criminal Complaint**

12 In Ground One, as part of a due process claim that is otherwise waived, Petitioner
13 claims counsel should have had the “fatally flawed” criminal complaint corrected. Petition at
14 8–10. This claim is meritless. First, the document referenced is an Indictment, not a Criminal
15 Complaint. Petition, Exhibit D. Moreover, the Indictment does, in fact, reference the correct
16 Nevada Revised Statutes. Petitioner was originally charged with Attempt Murder With Use of
17 a Deadly Weapon. Id. Attempt crimes are charged by indicating the attempt statute, NRS
18 193.330, along with the statute governing the underlying crime. Id. This is precisely how the
19 crime was charged in Petitioner’s Indictment: “Attempt” (NRS 193.330) “Murder” (NRS
20 200.010 and 200.030) “With Use of a Deadly Weapon” (NRS 193.165). Id. Because there was
21 no error in the Indictment, counsel was not ineffective for not challenging it.

22 Further, Petitioner seems to misunderstand that the operative charging document is the
23 Amended Indictment, wherein pursuant to negotiations, Petitioner was charged with: COUNT
24 1 – BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL
25 BODILY HARM (Category B Felony - NRS 200.481) and COUNT 2 – BURGLARY
26 (Category B Felony - NRS 205.060). Amended Indictment, filed March 20, 2018. Even if there
27 had been a charging error in the original Indictment, this Amended Indictment is what controls.
28 Thus, Petitioner’s complaint that he is “actually innocent” of murder is irrelevant. Petition at

1 8. Petitioner was only originally charged with Attempt Murder—which, regardless, was not
2 reflected in the Amended Indictment and to which he did not plead guilty. Petition, Exhibit D;
3 Amended Indictment, filed March 20, 2018.

4 Finally, Petitioner seems to allege an issue with the Burglary charge as listed in the
5 Indictment. Petition at 9. This crime was also charged in the Amended Indictment. But
6 Petitioner pled guilty to that crime. He has not specifically alleged how counsel was ineffective
7 such that Petitioner’s plea was involuntary. He baldly states “that counsel misled him into an
8 unnecessary, unwholesome plea bargain” without providing any supporting facts. In fact,
9 when entering his guilty plea, Petitioner specifically “confirmed he wished to accept the
10 negotiations and did not feel rushed or pressured.” Court Minutes, March 20, 2018. Thus, his
11 claim is both bare and naked as well as belied by the record and is denied. Hargrove, 100 Nev.
12 at 502.

13 **B. Alleged Failure to Conduct a Proper Investigation**

14 In Grounds Two, Three, and Seven, Petitioner claims counsel failed to conduct a proper
15 investigation by not investigating: the “fatally flawed” complaint; Shaledra Givens; cocaine
16 found in the apartment; and the details of the shooting. Petition at 11–12, 14–15. However,
17 there is no merit to any of these claims. Because Petitioner pled guilty, he would have to show
18 how a better investigation would have led to a more favorable outcome—that is, that he would
19 not have pled guilty if counsel had investigated. Molina, 120 Nev. at 192, 87 P.3d at 538.
20 Petitioner fails to do so.

21 As discussed, Petitioner’s complaints about the “fatally flawed” complaint are
22 misguided. See Section I(A), *supra*; Petition at 11.

23 Next, Petitioner speculates that his “alibi” witness, Givens, would have revealed that
24 Petitioner could not have shot the victim from his position in the home. Petition at 12.
25 However, his Petition merely advances bare and naked allegations. Hargrove, 100 Nev. at 502.
26 His hand-sketched “blueprint” is not an indication that Givens would have provided the same
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1 information. Petition, Exhibit F. Even Givens' affidavit² fails to mention any information
2 regarding Petitioner's position. Petition, Exhibit A(1). Moreover, this claim is in fact belied
3 by Petitioner's own Petition, wherein he admits that "the shoot out was between Gerald Allen,
4 and Keith Manning" and that "Gerald's gun wounded the gunman Keith." Petition at 7. He
5 also raises a "self-defense" argument on several occasions. Petition at 12, 13, 47 ("Affidavit
6 of Gerald Allen"). Thus, despite any protestations about the possible positions of the parties,
7 Petitioner admits that there was a shooting between himself and the victim and that Petitioner
8 shot the victim. Thus, any investigation by counsel in terms of positioning would have been
9 fruitless.

10 Next, Petitioner's complaint that police allegedly failed to impound cocaine found in
11 the apartment is irrelevant. Petition at 12. Petitioner does not explain how counsel's
12 investigations into this alleged failure would have led to a more favorable outcome for him.

13 Finally, the complaints in Ground Seven are in no way cogent. Petition at 14–15.
14 Petitioner seems to offer argument about issues with the evidence and the police investigation.
15 But he does not provide any evidence whatsoever to demonstrate that he is entitled to relief—
16 let alone that, had these claims been investigated, he would have chosen to go to trial rather
17 than plead guilty. These claims are bare and naked claims. Hargrove, 100 Nev. at 502.
18 Accordingly, Petitioner cannot establish ineffective assistance of counsel due to a failure to
19 conduct a proper investigation regarding police procedure.

20 Petitioner fails to establish that counsel's investigations into any of these issues would
21 have led to information that would have led to a better outcome—that is, that Petitioner would
22 not have pled guilty. Thus, all three of these claims are denied.

23 **C. Alleged Failure to Present a Defense**

24 In Ground Four, Petitioner claims counsel was ineffective in that he failed to present an
25 affirmative self-defense argument. Petition at 13. However, even when counsel advises
26 Petitioner to enter a guilty plea while Petitioner believes he has a "viable self-defense argument

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28 ² Assuming this document is, in fact, genuine. It is not notarized, and the handwriting bears a striking similarity to Petitioner's own.

1 does not render . . . the advice deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL
2 366896, at *3 (Jan. 10, 2018). Thus, even if the complaint is that counsel advised Petitioner to
3 plead guilty rather than go to trial and affirmatively claim self-defense, there was no ineffective
4 assistance. Moreover, Petitioner is not entitled to present a defense when he pleads guilty: that
5 is, admits to his crimes. Thus, counsel was not ineffective for not presenting an affirmative
6 defense. This claim is denied.

7 **D. Alleged Failure to Present a Defense**

8 In Ground Four, Petitioner claims counsel was ineffective in that he failed to present an
9 affirmative self-defense argument. Petition at 13. However, even when counsel advises
10 Petitioner to enter a guilty plea while Petitioner believes he has a “viable self-defense argument
11 does not render . . . the advice deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL
12 366896, at *3 (Jan. 10, 2018). Thus, even if the complaint is that counsel advised Petitioner to
13 plead guilty rather than go to trial and affirmatively claim self-defense, there was no ineffective
14 assistance. Moreover, Petitioner is not entitled to present a defense when he pleads guilty: that
15 is, admits to his crimes. Thus, counsel was not ineffective for not presenting an affirmative
16 defense.

17 **E. Alleged Failure to File the Proper Motions**

18 In Ground Five, Petitioner claims counsel failed to file the proper motions. Petition at
19 13. However, Petitioner fails to include any information regarding what motions counsel
20 should have filed or how they would have led to a more favorable outcome. Petitioner’s failure
21 to support his claim with specific facts constitutes a bare and naked allegation. Hargrove, 100
22 Nev. at 502. Consequently, this claim is denied.

23 **F. Alleged Failure to Provide Discovery**

24 Also in Ground Five, Petitioner claims counsel failed to provide him with discovery.
25 Petition at 13. Again, this claim is bare and naked. Hargrove, 100 Nev. at 502. Petitioner only
26 includes a conclusory sentence that counsel did not provide discovery. Petitioner also cites no
27 authority supporting an argument that he was entitled to discovery. Moreover, in the written
28 plea agreement, Petitioner acknowledged he had discussed the charges and “any possible

1 defenses, strategies and circumstances which might be in [his] favor” with counsel, that
2 counsel had “answered all [his] questions regarding this guilty plea agreement and its
3 consequences to [his] satisfaction,” and that he was “satisfied with the services provided by
4 [his] attorney.” See GPA, filed March 20, 2018, at 5–6. Accordingly, Petitioner fails to
5 demonstrate his counsel acted in an objectively unreasonable manner in his treatment of
6 Petitioner’s discovery. Further, Petitioner fails to establish a reasonable probability he would
7 have refused to plead guilty and insisted on proceeding to trial had he further reviewed the
8 evidence against him. Therefore, he cannot establish ineffective assistance of counsel and his
9 claim is denied.

10 **G. Alleged Failure to Conduct a Gun Ballistics Test**

11 In Ground Six, Petitioner claims counsel failed to conduct a gun ballistics test or to
12 investigate the police handling of evidence. Petition at 13. This claim is without merit because
13 Petitioner once again does not demonstrate how such an investigation would have rendered a
14 more favorable outcome. Molina, 120 Nev. at 192. He does not even include what a gun
15 ballistics test would have revealed. Thus, his claim is bare and naked. Hargrove, 100 Nev. at
16 502. As is his claim that there was cocaine in the apartment, to begin with. Id. Petitioner does
17 not and cannot make a showing of what counsel should have discovered that would have
18 caused him not to plead guilty. Indeed, neither a ballistics test or a failure to impound cocaine
19 provides support to suggest that Petitioner did not fire at the victim—because Petitioner
20 admitted that he did. Petition at 12, 13. Thus, Petitioner cannot establish ineffective assistance
21 of counsel. Further, this Court finds that Petitioner has merely speculated about the exonerating
22 effect that an ordered ballistic test would have. Thus, his claim fails.

23 **H. Alleged Failure to Inform Petitioner of Ability to Appeal**

24 In Ground Eight, Petitioner claims that counsel failed to inform him of his ability to
25 appeal as a result of an Alford plea. Petition at 16. However, Petitioner did not enter an Alford
26 plea. In addition, his claim is not only bare and naked but belied by the record. Hargrove, 100
27 Nev. at 502. Petitioner does not provide any evidence, beyond a conclusory statement, that
28 counsel failed to inform him regarding the details of his plea deal. And in his Guilty Plea

1 Agreement, Petitioner specifically agreed that he understood he was “unconditionally waiving
2 [his] right to a direct appeal of this conviction, including any challenges based upon reasonable
3 constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as
4 stated in NRS 177.015(4).” See GPA, filed March 20, 2018, at 4–5. Most importantly,
5 Petitioner did not allege that he asked for an appeal. Toston v. State, 127 Nev. 971, 267 P.3d
6 795 (2011) (stating the duty to inform “arises in the guilty-plea context only when the
7 defendant inquires about the right to appeal or in circumstances where the defendant may
8 benefit from receiving advice about the right to a direct appeal, such as the existence of a direct
9 appeal claim that has reasonable likelihood of success”). Thus, Petitioner’s claim is denied.

10 **I. Alleged Failure to Provide Mitigating Evidence**

11 In Ground Nine, Petitioner alleges his counsel was ineffective for failing to
12 allow Petitioner the opportunity to provide mitigating evidence. Petition at 9. Again, this claim
13 is bare and naked. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner does not
14 articulate how counsel failed to provide him with such opportunity or how such failure was
15 objectively unreasonable. Further, Petitioner fails to adequately show the existence of a
16 reasonable probability that any alleged mitigating evidence would have resulted in a different
17 outcome. In fact, Petitioner spoke on his own behalf at not one, but two sentencing hearings,
18 and Petitioner specifies no particular mitigation information that counsel allegedly denied him
19 the ability to present in those statements. Court Minutes, May 29, 2018, May 31, 2018. Thus,
20 this claim is denied.

21 **J. Alleged Legal Malpractice Claim**

22 In Ground Ten, Petitioner claims that his counsel, Timothy Treffinger, Esq., was on
23 probation for a drug conviction, committing legal malpractice. Petition at 9. The assertion that
24 Petitioner’s counsel was and/or is on probation is not only legally and factually insignificant,
25 but also a bare and naked claim unsupported by specific facts. Hargrove, 100 Nev. at 502, 686
26 P.2d at 225. Petitioner does not explain how counsel’s alleged probation led to deficient
27 performance or prejudice. Thus, this claim is denied.

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III. Petitioner's Supplemental Petition Claims Fail

In Petitioner's Supplemental Petition, he alleged that his counsel was ineffective for failing to: (1) investigate exculpatory evidence, (2) consult with and advise Petitioner prior to entry of plea, and (3) advise Petitioner of his right to appeal.

A. Alleged Failures to Investigate Exculpatory Evidence

Petitioner asserts that had counsel properly investigated certain exculpatory evidence, counsel would not have incorrectly advised Petitioner to take a plea. Supplemental Petition, filed October 1, 2019, at 6–7. At Petitioner's evidentiary hearing, Petitioner testified his trial counsel failed to consult with him, that he only received part of the discovery, that an expert was never retained regarding cocaine use, and that a diagram of the crime was not utilized. Petitioner's claims are meritless.

In his Supplemental Petition, Petitioner claimed that a proper investigation would have revealed that he was "actually innocent" of burglary. Supplemental Petition, filed October 1, 2019, at 6. Petitioner's claim fails for several reasons. To begin, his claim is bare and naked without any supported facts. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner fails to support his claim with specific facts that if true, would have entitled him to relief. Petitioner's own self-serving affidavit is hardly evidence, insufficient to show that he had permission to be in the home and thus that no reasonable jury would have convicted him. Petition, filed May 1, 2019, Exhibit H. Moreover, Petitioner pled guilty to burglary. By signing the GPA, and by confirming his wish to accept the negotiations during his plea canvass, Petitioner indicated that he understood the nature of his plea and admitted that he was not, in fact, innocent. See GPA, filed March 20, 2018; Court Minutes, March 20, 2018. Thus, he cannot meritoriously argue that his plea was coerced and involuntary.

Second, Petitioner alleges that had counsel properly investigated, he would have discovered evidence which would have revealed that he did not commit Battery with Use of a Deadly Weapon. Supplemental Petition, filed October 1, 2019, at 6. Specifically, had counsel investigated that Petitioner was behind a wall or conducted a gun ballistics test at the time of the shooting, he would have been able to establish that Petitioner could not have fired the shot

1 that killed the victim. Id. However, Petitioner does not demonstrate how such an investigation
2 would have rendered a more favorable outcome. Molina, 120 Nev. at 192. Petitioner does not
3 show whether a ballistics test would have had favorable results, or that he would have elected
4 not to plead guilty in light of those uncertain results. Indeed, a ballistics test could not provide
5 support to suggest that Petitioner did not fire at the victim—because Petitioner admitted that
6 he did. Petition, filed May 1, 2019, at 12, 13.

7 Third, Petitioner argues that counsel failed to investigate his claims of self-defense,
8 which would have been bolstered by the victim’s cocaine use prior to the shooting.
9 Supplemental Petition, filed October 1, 2019, at 7. Further, he argues that expert testimony to
10 support this theory would have been available. Id. He also believes that had counsel
11 investigated, he would have discovered evidence relating to the victim concealing or
12 destroying evidence and the fact that the victim was seeking to buy guns in order to kill
13 Petitioner. Id. Regardless of these alleged facts, Petitioner still fails to state that counsel’s
14 investigations into any of these issues would have led to information that would have led to a
15 better outcome—that is, that Petitioner would not have pled guilty. Molina, 120 Nev. at 192,
16 87 P.3d at 538. Moreover, even when counsel advises a defendant to enter a guilty plea while
17 the defendant believes he has a “viable self-defense argument does not render . . . the advice
18 deficient.” Mack v. State, 410 P.3d 981, No. 69225, 2018 WL 366896, at *3 (Jan. 10, 2018).
19 Thus, even if the complaint is that counsel advised Petitioner to plead guilty rather than go to
20 trial and affirmatively claim self-defense, there was no ineffective assistance. Regardless,
21 Petitioner is not entitled to present a defense when he pleads guilty: that is, admits to his
22 crimes. Petitioner provides no expert report, or evidence that the victim concealed or destroyed
23 evidence, or that the victim was buying guns, or that the victim was doing so to kill Petitioner.
24 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

25 In sum, Petitioner has failed to argue how these facts, assuming they were true, would
26 have caused him to alter his course, let alone would have resulted in a more favorable outcome.
27 Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 192, 87 P.3d at 538.
28 Therefore, his claim is denied.

1 Mr. Treffinger testified at Petitioner's evidentiary hearing that he met with Petitioner
2 numerous times and that he spoke with various tenants as well as Petitioner's girlfriend in
3 preparation for trial. Additionally, according to Mr. Treffinger, the global negotiations were
4 in Petitioner's best interests based upon Petitioner's charges. Mr. Treffinger represented
5 Petitioner in C-17-323049-1 as well as the instant case. Petitioner was charged by way of
6 Grand Jury Indictment with one count of BURGLARY WHILE IN POSSESSION OF A
7 FIREARM, two counts of ATTEMPT MURDER WITH USE OF A DEADLY WEAPON, two
8 counts of BATTERY WITH A DEADLY WEAPON RESULTING IN SUBSTANTIAL
9 BODILY HARM, one count DISCHARGE OF A FIREARM FROM OR WITHIN A
10 STRUCTURE, one count CHILD ABUSE, NEGLECT OR ENDANGERMENT
11 RESULTING IN SUBSTANTIAL BODILY HARM WITH USE OF A DEADLY WEAPON,
12 and one count OWNERSHIP OR POSSESSION OF A FIREARM BY A PROHIBITED
13 PERSON. In Case C-17-323049-1, Petitioner was charged with one count of OWNERSHIP
14 OR POSSESSION OF FIREARM BY A PROHIBITED PERSON and one count of
15 POSSESSION OF STOLEN PROPERTY. Pursuant to negotiations, Petitioner pled guilty to
16 one count of BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN
17 SUBSTANTIAL BODILY HARM and one count of BURGLARY. In Case C-17-323049-1,
18 Petitioner pled guilty to OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
19 PERSON instead of the original charge of one count of OWNERSHIP OR POSSESSION OF
20 FIREARM BY PROHIBITED PERSON and one count of POSSESSION OF STOLEN
21 PROPERTY. In both cases, the State retained the right to argue for a consecutive sentence for
22 the two counts but no opposition to concurrent time between the two cases. Furthermore, the
23 State would not seek habitual treatment as Petitioner, at the time of sentencing, had three prior
24 felony convictions. The Court sentenced Petitioner to concurrent time in C-17-323049-1.

25 Moreover, Mr. Treffinger testified that he discussed discovery with Petitioner. Mr.
26 Treffinger explained to Petitioner that discovery established that Petitioner's firearm struck the
27 child. Mr. Treffinger recalls going over the ballistic report with Petitioner as well as the issue
28 of self-defense.

1 Mr. Treffinger further testified that he discussed at length with Petitioner his claim of
2 self-defense. However, Mr. Treffinger was concerned with Petitioner's version of events since
3 Petitioner went to the location of the shooting to confront the victim. Based on the above, Mr.
4 Treffinger determined that a jury would likely not believe Petitioner's self-defense claim.
5 Therefore, Petitioner has failed to establish how a better investigation would have established
6 Petitioner's innocence of the burglary while in possession of a firearm charge and the validity
7 of Petitioner's self-defense claim.

8 Mr. Treffinger was aware of Petitioner's education issues. However, Petitioner did not
9 indicate a lack of understanding of the facts of the case or entry of plea. In both cases, the
10 Court conducted a thorough canvass found Petitioner's plea to be freely and voluntarily
11 entered. This Court notes that Petitioner has not made a similar claim based upon the above,
12 in C323049. The Court finds Mr. Treffinger's testimony to be credible. Thus, Petitioner's
13 claims fail.

14 **B. Alleged Failure to Consult with and Advise Petitioner Prior to Entry of Plea**

15 Petitioner argues that counsel was ineffective for failing to consult with him and for
16 failing to provide him with his case file or discovery. Supplemental Petition, filed October 1,
17 2019, at 7.

18 First, this claim is bare and naked. Hargrove, 100 Nev. at 502. Petitioner only includes
19 a conclusory sentence that counsel did not provide discovery. He also cites no authority
20 supporting an argument that he was entitled to discovery.

21 Second, his lack of consultation argument is baseless. Petitioner was not entitled to a
22 particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610,
23 1617 (1983). There is no requirement for any specific amount of communication as long as his
24 counsel was reasonably effective in his representation. See id. After all, Petitioner
25 acknowledged he had discussed the charges and "any possible defenses, strategies and
26 circumstances which might be in [his] favor" with counsel, that counsel had "answered all
27 [his] questions regarding this guilty plea agreement and its consequences to [his] satisfaction,"
28

1 and that he was “satisfied with the services provided by [his] attorney.” See GPA, filed March
2 20, 2018, at 5–6.

3 Accordingly, Petitioner fails to demonstrate his counsel acted in an objectively
4 unreasonable manner in his treatment of Petitioner, his case file, or discovery. Therefore, he
5 cannot establish ineffective assistance of counsel and his claim is denied.

6 **C. Additional Alleged Issues Regarding Petitioner’s Guilty Plea**

7 At Petitioner’s evidentiary hearing, he testified the Court said Petitioner would only
8 sentence him to six to fifteen years in prison instead of the nine to twenty-five years Petitioner
9 received. Petitioner goes on to say that he was not expecting a nine to twenty-five year
10 sentence. However, such a claim is belied by the record. The Court canvassed the Petitioner,
11 and the guilty plea agreement put Petitioner on notice of the possibility of receiving a ten to
12 Life sentence, due to Petitioner’s three prior felonies. This Court sentenced Petitioner to nine
13 to twenty-year sentence, which is well within the maximum and minimum possible for
14 Petitioner.

15 Petitioner further testified he did not understand the negotiations. Petitioner testified
16 that he would not have filed the petition if he had received the requested sentence. However,
17 later on, Petitioner testified that he would still assert the instant allegations. However, the Court
18 thoroughly canvassed Petitioner. At no time did Petitioner advise the Court that Petitioner did
19 not understand the negotiations. Additionally, Petitioner signed the guilty plea agreement.
20 Moreover, this Court notes that the instant guilty plea agreement was a part of a global
21 negotiation involving Petitioner entering into a guilty plea in C-17-323049-1. There, Petitioner
22 had not filed a similar Petition.

23 Additionally, Petitioner claimed Mr. Treffinger's was ineffective in recommending that
24 Petitioner accept the plea agreement. However, it is important to acknowledge that Petitioner
25 was charged with eight felonies in the instant case and two in C-17-323049-1. Petitioner also
26 faced possible habitual felony treatment. In the instant case, Petitioner signed a guilty plea
27 agreement. Here, the Court found Petitioner's plea to be freely and voluntarily entered. The
28 Court asked Petitioner if he was pleading guilty because he was, in fact, guilty. Petitioner

1 answered in the affirmative. Furthermore, Petitioner stated that Mr. Treffinger answered all of
2 his questions and that Petitioner was satisfied with the services of Mr. Treffinger.

3 **D. Alleged Failure to Advise Petitioner of his Right to Appeal**

4 While the Nevada Supreme Court has concluded that counsel must advise his client
5 about an appeal when he so inquires, the general rule is that counsel is not constitutionally
6 required to advise a defendant who has pled guilty of his right to appeal. Thomas v. State, 115
7 Nev. 148, 150, 979 P.2d 222, 223 (1999). Even so, Petitioner has failed to indicate whether
8 Petitioner ever told his counsel that he wished to file a direct appeal. Notwithstanding this
9 omission, Petitioner was, in fact, advised of his limited right to appeal in his GPA. By signing
10 the GPA, Petitioner acknowledged that he was waiving his right to file a direct appeal and that
11 his attorney explained this to him:

12
13 By entering my plea of guilty, I understand that I am waiving and
14 forever giving up the following rights and privileges:

15 ...

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

25 ...

26 All of the foregoing elements, consequences, rights, and waiver of
27 rights have been *thoroughly explained to me by my attorney*.

28 GPA, filed March 20, 2018, at 4–5 (emphasis added). Therefore, as discussed *infra*, such claim
is belied by the record, and should be denied. Hargrove, 100 Nev. at 503, 686 P.2d at 225.

//

1 **ORDER**

2 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
3 and associated filings shall be, and are, hereby denied.

4 Dated this 25th day of February, 2021

5 

6
7 STEVEN B. WOLFSON
8 Clark County District Attorney
9 Nevada Bar #001565

74B 7EF 3F84 CFA4
Michael Villani
District Court Judge

10 BY /s/ JOHN NIMAN
11 JOHN NIMAN
12 Deputy District Attorney
13 Nevada Bar #014408

14 **CERTIFICATE OF ELECTRONIC TRANSMISSION**

15 I hereby certify that service of the above and foregoing was made this ____ day of
16 _____, 2021, by electronic transmission to:

17 BRET WHIPPLE
18 admin@justice-law-center.com

19 BY /s/ E. DEL PADRE
20 E. DEL PADRE
21 Secretary for the District Attorney's Office

22
23
24
25
26
27
28 JN/bg/ed/GCU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Gerald Allen, Plaintiff(s)

CASE NO: A-19-794024-W

7 vs.

DEPT. NO. Department 17

8 James Dzurenda, Defendant(s)

9
10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
13 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

14 Service Date: 2/25/2021

15 Bret Whipple

admin@justice-law-center.com

16 John Niman

john.niman@clarkcountyda.com

17 District Attorney

Motions@clarkcountyda.com

18 Jennifer Garcia

jennifer.garci@clarkcountyda.com

20

21

22

23

24

25

26

27

28

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

July 16, 2019

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

July 16, 2019 8:30 AM All Pending Motions

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Olivia Black

RECORDER: Cynthia Georgilas

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...MOTION FOR PRODUCTION OF DOCUMENTS, PAPERS, PLEADINGS AND TANGIBLE PROPERTY OF DEFENDANT...MOTION TO WITHDRAW PLEA

Upon Court's inquiry, Mr. Whipple advised he had been retained and requested to supplement the briefing. COURT ORDERED, Briefing Schedule SET as follows: Defendant's reply due by September 17, 2019, State's response due by November 18, 2019 and Hearing SET.

NDC

12/13/19 9:00 AM PETITION FOR WRIT OF HABEAS CORPUS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

February 28, 2020

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

**February 28, 2020 10:00 AM Petition for Writ of Habeas
Corpus**

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Shannon Reid

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Allen, Gerald Plaintiff
Niman, John T. Attorney
Whipple, Bret O Attorney

JOURNAL ENTRIES

- Mr. Whipple requested the matter be set for an Evidentiary Hearing, advising that he would want Mr. Treffinger's testimony to complete the record. Court noted the original petition alleged that the Defendant was not advised of his right to appeal and issue of improper representation of taking the plea agreement versus taking the case to trial. Mr. Wiman argued that the Guilty Plea Agreement itself delineated the appellate rights and that there would be no need for an evidentiary hearing on the claim. Further arguments by the State. Court FINDS that on the issue of the appeal, it was not alleged that the Defendant asked for an appeal, so the record would not need to be expanded as to that. With respect to the issue of actual innocence relating to discovery performance and investigation, Court GRANTED Mr. Whipple's request for an Evidentiary Hearing. Colloquy regarding scheduling. Court instructed counsel to advise Mr. Treffinger as to specific areas that will be heard at the Evidentiary Hearing so he can review his notes. Mr. Whipple stated he would issue a subpoena outlying the specific areas.

NDC

04/17/2020 10:00 AM PETITION FOR WRIT OF HABEAS CORPUS...EVIDENTIARY HEARING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

October 02, 2020

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

October 02, 2020 10:15 AM All Pending Motions

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Rem Lord

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Allen, Gerald Plaintiff
Whipple, Bret O Attorney

JOURNAL ENTRIES

- EVIDENTIARY HEARING... PETITION FOR WRIT OF HABEAS CORPUS

William Flinn Esq. present on behalf of the State.

Court noted the Plaintiff Gerald Allen is present via Blue Jeans from the Clark County Detention Center. Gerald Allen sworn and testified. Colloquy regarding the scope of the hearing, Court advised the parties the evidence should pertain to the investigation completed by Mr. Treffinger and what was discussed between Mr. Allen and Mr. Treffinger. Mr. Whipple confirmed with Mr. Allen that he had waived his attorney client privilege to allow Mr. Treffinger to testify. Matter trailed.

Matter recalled. Mr. Flinn cross examined Mr. Allen. Colloquy regarding scheduling. COURT ORDERED, matter CONTINUED. COURT FURTHER ORDERED the Defendant to be transported to the Clark County Detention Center for the next hearing.

CONTINUED TO: 10/16/2020 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

October 16, 2020

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

October 16, 2020 10:15 AM All Pending Motions

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Shannon Reid

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Allen, Gerald Plaintiff
Niman, John T. Attorney
Whipple, Bret O Attorney

JOURNAL ENTRIES

- EVIDENTIARY HEARING...DEFT'S PETITION FOR WRIT OF HABEAS CORPUS

Testimony and exhibits presented. (See worksheets). Arguments by counsel. COURT ORDERED, matter taken UNDER ADVISEMENT and will issue a written decision.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 14, 2021

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

January 14, 2021	3:00 AM	Minute Order	Petition for Writ of Habeas Corpus
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HEARD BY: Villani, Michael **COURTROOM:** Chambers

COURT CLERK: Louisa Garcia

RECORDER:

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

- Petitioner filed a Pro Per Petition for Writ of Habeas Corpus. The Court appointed private counsel before ruling on the merits. Private counsel filed a Supplemental Petition for Writ of Habeas Corpus. After which, an evidentiary hearing was held.

The Court's reasoning and pertinent information from said hearing follows:

(1) Petitioner testified the Judge said Petitioner would only sentence him [Petitioner] to 6 to 15 years in prison instead of the 9 to 25 years Petitioner received. Petitioner goes on to say that he was not expecting a 9 to 25 sentence. However, such a claim is belied by the record. The Court canvassed the Petitioner, and the guilty plea agreement put Petitioner on notice of the possibility of receiving a 10 to Life sentence, due to Petitioner 3 prior felonies. This Court sentenced Petitioner to 9 to 25, which is well within the maximum and minimum possible for Petitioner.

(2) Petitioner testified he did not understand the negotiations. Petitioner testified that he would not have filed the petition if he [Petitioner] had received the requested sentence. However, later on, Petitioner testified that he would still assert the instant allegations. However, The Court thoroughly canvassed Petitioner. At no time did Petitioner advise the Court that Petitioner did not understand

the negotiations. Additionally, Petitioner signed the guilty plea agreement.

Moreover, this Court notes that the instant guilty plea agreement was a part of a global negotiation involving Petitioner entering into a guilty plea in C-17-323049-1. There, Petitioner has not filed a similar Petition.

(3) Petitioner testified his trial counsel failed to consult with him, that he [Petitioner] only received part of the discovery, that an expert was never retained regarding cocaine use, and that a diagram of the crime was not utilized. Mr. Treffinger testified that he met with Petitioner numerous times and that he [Mr. Treffinger] spoke with various tenants and Petitioner's girlfriend in preparation for trial.

According to Mr. Treffinger, the global negotiations were in Petitioner's best interests based upon Petitioner's charges. Mr. Treffinger represented Petitioner in C-17-323049-1 and the instant case. Petitioner was charged by way of Grand Jury Indictment with 1 count of burglary while in possession of a firearm, 2 counts of attempt murder with use of a deadly weapon, 2 counts of battery with a deadly weapon resulting in substantial bodily harm, 1 count discharge of a firearm from or within a structure, 1 count child abuse, neglect or endangerment resulting in substantial bodily harm with use of a deadly weapon and 1 count ownership or possession of a firearm by a prohibited person. In case C-17-323049-1, Petitioner was charged with 1 count of ownership or possession of firearm by a prohibited person and 1 count of possession of stolen property.

Further, the negotiations provided Petitioner to plea to battery with use of a deadly weapon resulting in substantial bodily harm and burglary. In Case C-17-323049-1, Petitioner plead to ownership or possession of firearm by prohibited person instead of the original charge of ownership or possession of firearm by prohibited person possession of stolen property.

Here, State retained the right to argue for a consecutive sentence for the 2 counts but no opposition to concurrent time between the two cases. Furthermore, State would not seek habitual treatment Petitioner at time of sentencing had 3 prior felony convictions. The Court sentenced Petitioner to concurrent time in C-17-323049-1.

Mr. Treffinger testified that he discussed discovery with Petitioner. Mr. Treffinger explained to Petitioner that discovery established that Petitioner's firearm struck the child. Mr. Treffinger recalls going over the ballistic report with Petitioner as well as the issue of self-defense.

Moreover, Mr. Treffinger testified that he discussed at length with Petitioner regarding Petitioner's claim of self-defense. However, he [Mr. Treffinger] was concerned with Petitioner's version of events since Petitioner went to the location of the shooting to confront the victim. Based on the above, Mr. Treffinger determined that a jury would likely not believe Petitioner's self-defense claim.

Mr. Treffinger was aware of Petitioner's education issues. However, Petitioner did not indicate a lack of understanding of the facts of the case or entry of plea. In both cases, the Court conducted a thorough canvass found Petitioner's plea to be freely and voluntarily entered. This Court notes that

Petitioner has not made a similar claim based upon the above, in C323049.

THIS COURT FINDS Mr. Treffinger's testimony to be credible.

(4) Petitioner claims Mr. Treffinger's was ineffective in recommending that Petitioner accepts the plea agreement. However, It is important to acknowledge that Petitioner was charged with 8 felonies in the instant case, 2 in C-17-323049-1. Petitioner faced possible habitual felony treatment.

In the instant case, Petitioner signed a guilty plea agreement. Here, the Court found Petitioner's plea to be freely and voluntarily entered. The Court asked Petitioner if he was pleading guilty because he was, in fact, guilty. Petitioner answered in the affirmative. Furthermore, Petitioner stated that Mr. Treffinger answered all of his questions and that he [Petitioner] was satisfied with the services of Mr. Treffinger.

Therefore, THIS COURT FINDS Petitioner failed to establish how a better investigation would have established Petitioner's innocence of the burglary while in possession of a firearm charge and the validity of Petitioner's self-defense claim. Further, THIS COURT FINDS Petitioner speculates about the exonerating effect that an ordered ballistic test would have. THIS COURT FINDS all other claims are bare and naked allegations.

Therefore, THIS COURT FINDS that neither prong of the Strickland standard has been met for all of the above. Further, the errors, if any, do not rise to the level of cumulative error.

Therefore, COURT ORDERD, Petition for Writ of Habeas Corpus DENIED. COURT ORDER'S State is directed to submit a proposed order consistent with the foregoing within ten (10) days after counsel is notified of the ruling and distribute a filed copy to all parties involved pursuant to EDCR 7.21. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. Status check for January 28, 2021, regarding filing of the order. That date to be vacated if the Court receives the order prior to January 28, 2021.

CLERK'S NOTE: The above minute order has been distributed to: Bret Whipple, admin@justice-law-center.com; John T. Niman, john.niman@clarkcountyda.com.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 28, 2021

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

January 28, 2021 8:30 AM Status Check

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Samantha Albrecht

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Cole, Madilyn M. Attorney
Whipple, Bret O Attorney

JOURNAL ENTRIES

- Defendant not present. Court noted the State was to file the Order. Ms. Cole stated she would contact Appeals to get the Order filed. COURT ORDERED, matter CONTINUED. Court advised the Status Check would be vacated if the Order was filed.

NDOC

CONTINUED TO: 2/18/2021 8:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

February 18, 2021

A-19-794024-W Gerald Allen, Plaintiff(s)
vs.
James Dzurenda, Defendant(s)

February 18, 2021 8:30 AM Status Check

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Samantha Albrecht

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES

PRESENT: Stanton, David L. Attorney
Whipple, Bret O Attorney

JOURNAL ENTRIES

- Defendant not present. Court noted the State had filed an Order for various transcripts. Upon Court's inquiry, Mr. Stanton had no note in his file regarding the status of the Order. Court Recorder advised two of the transcripts had already been prepared. COURT ORDERED, matter CONTINUED for 3 weeks.

NDC

CONTINUED TO: 3/11/2021 10:00 AM

EXHIBIT(S) LIST

Case No.: A794024

Hearing Date: 10/16/2020

Dept. No.:

Judge: Michael P. Villani

Court Clerk: Shannon Reid

Plaintiff: GERALD ALLEN

Recorder / Reporter: Cynthia Georgilas

Counsel for Plaintiff: Bret Whipple

VS.

Defendant: JAMES DZURENDA

Counsel for Defendant: William Flynn

HEARING / TRIAL BEFORE THE COURT

DEFENDANT'S EXHIBITS

[illegible]



EIGHTH JUDICIAL DISTRICT COURT CLERK'S OFFICE
NOTICE OF DEFICIENCY
ON APPEAL TO NEVADA SUPREME COURT

BRET O. WHIPPLE, ESQ.
1100 S. TENTH ST.
LAS VEGAS, NV 89104

DATE: March 1, 2021
CASE: A-19-794024-W

RE CASE: GERALD ALLEN vs. JAMES DZURENDA

NOTICE OF APPEAL FILED: February 25, 2021

YOUR APPEAL HAS BEEN SENT TO THE SUPREME COURT.

PLEASE NOTE: DOCUMENTS **NOT TRANSMITTED HAVE BEEN MARKED:**

- ☐ \$250 – Supreme Court Filing Fee (Make Check Payable to the Supreme Court)**
 - If the \$250 Supreme Court Filing Fee was not submitted along with the original Notice of Appeal, it must be mailed directly to the Supreme Court. The Supreme Court Filing Fee will not be forwarded by this office if submitted after the Notice of Appeal has been filed.
- ☐ \$24 – District Court Filing Fee (Make Check Payable to the District Court)**
- ☐ \$500 – Cost Bond on Appeal (Make Check Payable to the District Court)**
 - NRAP 7: Bond For Costs On Appeal in Civil Cases
 - *Previously paid Bonds are not transferable between appeals without an order of the District Court.*
- ☒ Case Appeal Statement
 - NRAP 3 (a)(1), Form 2
- ☐ Order
- ☐ Notice of Entry of Order

NEVADA RULES OF APPELLATE PROCEDURE 3 (a) (3) states:

"The district court clerk must file appellant's notice of appeal despite perceived deficiencies in the notice, including the failure to pay the district court or Supreme Court filing fee. The district court clerk shall apprise appellant of the deficiencies in writing, and shall transmit the notice of appeal to the Supreme Court in accordance with subdivision (g) of this Rule with a notation to the clerk of the Supreme Court setting forth the deficiencies. Despite any deficiencies in the notice of appeal, the clerk of the Supreme Court shall docket the appeal in accordance with Rule 12."

Please refer to Rule 3 for an explanation of any possible deficiencies.

*****Per District Court Administrative Order 2012-01, in regards to civil litigants, "...all Orders to Appear in Forma Pauperis expire one year from the date of issuance." You must reapply for in Forma Pauperis status.***

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES; EXHIBITS LIST; NOTICE OF DEFICIENCY

GERALD ALLEN,

Plaintiff(s),

vs.

JAMES DZURENDA,

Defendant(s),

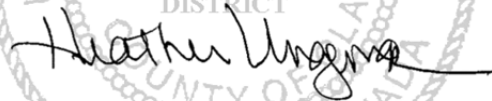
Case No: A-19-794024-W

Dept No: XVII

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 1 day of March 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk