IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CEASAR SANCHAZ VALENCIA, A/K/A CEASAR SANCHEZ VALENCIA,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

CASE NO: 81745-COA

ANSWER TO ORDER TO SHOW CAUSE

COMES NOW the State of Nevada by STEVEN B. WOLFSON, Clark County District Attorney, through his Chief Deputy, KAREN MISHLER, and submits this answer to this Court's Order to Show Cause filed April 9, 2021.

This answer is based on the following memorandum and all papers and pleadings on file herein.

Dated this 28th day of April, 2021.

Respectfully submitted,

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

BY */s/ Karen Mishler*
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MEMORANDUM OF POINTS AND AUTHORITIES

On April 9, 2021, this Court issued an Order to Show Cause as to why this Court should not reverse the district court's order denying Valencia's petition as untimely and remand for the district court to consider Valencia's petition on the merits.

In this case, although the district court erred in concluding that Valencia's petition was untimely, it did not err by denying the petition because, as demonstrated below, Valencia's claims in his petition lacked merit. The Nevada Supreme Court has stated that if a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal. Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970).

All of the claims Valencia raised in his petition are contradicted by the record, not cognizable on habeas review, barred from further consideration, or are bare and naked allegations. The majority of Valencia's claims are ineffective-assistance-of-counsel claims. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness, and prejudice resulted in that there was a reasonable probability of a different outcome in the absence of counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2063 (1984); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505

(1984) (adopting the Strickland test). Both components – deficient performance and prejudice – must be shown. Strickland, 466 U.S. at 687, 104 S.Ct. at 2065. "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 697, 104 S. Ct. at 2069.

Importantly, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

A. Ineffective Assistance of Initial Counsel During the Preliminary Process

In his petition, Valencia alleged that his initial counsel, Deputy Public Defender Steven Lisk, provided ineffective assistance during the "preliminary process and pretrial." Record on Appeal, Case No. A-20-815616-W ("ROA A815616") at 06. Specifically, Valencia alleges that Mr. Lisk did not visit him in

jail, wanted him to accept a plea negotiation, and did not provide him with discovery. Id. at 06-10.

These allegations regarding Mr. Lisk, even if accepted as true, are insufficient to meet the Strickland standard because Valencia cannot demonstrate that he was prejudiced as a result of Mr. Lisk's conduct. Mr. Lisk did not represent Valencia at trial. He withdrew as counsel and Gregory E. Coyer was appointed to represent Valencia. Record on Appeal, Case No. C-16-315580-1 ("ROA C315580) Vol. II at 321-26, 333. Thus, Valencia cannot demonstrate a reasonable probability that the outcome of the trial would have been different in the absence of these alleged errors. Valencia does not even allege this is the case, as he maintains he was prejudiced, not at trial, but at "the preliminary hearing and calendar call." ROA A815616 at 09. Accordingly, Valencia is not entitled to relief on this claim.

B. Ground Two: Ineffective Assistance of Trial Counsel

Valencia alleged his trial counsel was ineffective for failing to assist him with a civil forfeiture case. ROA A815616 at 11. Valencia has failed to state a claim for which he is entitled to relief. Based on Valencia's own account of counsel's conduct, this does not amount to ineffective assistance. Counsel's statement to Valencia that he was not appointed to represent him in a civil matter was correct; counsel was appointed to represent Valencia only in the criminal case. ROA C315580 Vol. II at 333. Further, Valencia does not explain how counsel's

supposed failure to assist him in this forfeiture case prejudiced him in the criminal trial. Accordingly, this claim must be summarily denied.

Valencia also alleges there was body camera footage in this case that counsel failed to provide to him. ROA A815616 at 12. This allegation is contradicted by the record, and therefore must be dismissed. See Mann, 118 Nev. at 354, 46 P.3d at 1230; Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. At trial, Officer Houston testified that neither he nor Officer Jacobitz was wearing body-worn camera on the date of the incident, and that at the time body-worn camera was not standardly issued for department personnel. ROA C315580 Vol. IV at 758, 771-72. Furthermore, trial counsel obtained the radio traffic from the incident and admitted it at trial. Id. at 763. Counsel also repeatedly used the radio traffic during cross-examination of Officer Houston. Id. at 763-71. Thus, trial counsel did in fact ensure he obtained discovery from the State, and at trial presented the best documentation of the incident that was available to him.

Valencia also complains about counsel advising him as to the elements of Trafficking in Controlled Substance, and states that by doing so counsel was an "advocate for the state, not for the defense." ROA A815616 at 12-13. Based on Valencia's own pleading, it appears counsel correctly informed Valencia that the key element of the offense was the amount of the controlled substance, and that it did not require separate proof of intent to sell. See NRS 453.3385. Providing

Valencia with accurate information as to the charges he was facing was clearly not deficient performance; in fact it was counsel's duty to do so. Accordingly, Valencia is not entitled to relief on this claim.

C. Ground Three: Ineffective Assistance of Trial Counsel for Inadequate Pre-Trial Contact

Valencia alleged his trial counsel was ineffective for failing to meet and communicate with him. ROA A815616 at 15. Valencia fails to provide any specificity as to how this alleged lack of communication amounted to deficient performance or prejudiced him at trial. See Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. See also NRS 34.735 (stating that failure to raise specific facts rather than conclusions may cause a petition to be dismissed); Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Here, rather than plead any specific facts relating to this alleged lack of communication, Valencia simply asserts that he "was extremely prejudiced by the abandonment of counsel." ROA A815616 at 15. He fails to state what additional communication was needed or demonstrate that additional communication with counsel would have changed the outcome of his trial. Nor does he explain how he was "abandoned" by counsel. The record reveals Valencia's counsel extensively cross-examined witnesses at trial, presented a strong closing argument alleging that the State had not met its burden, and represented Valencia on appeal. ROA C315580 Vol. IV at 750-71, 774-77, 900-31, 935-37; Vol. V at 986-88, 1005-1011,

1067-77, 1082-1101, 1111-13, 1158-69. This is hardly evidence of abandonment. This conclusory claim is completely lacking in factual support. Accordingly, Valencia is not entitled to relief on this claim.

D. Ground 4: Ineffective Assistance of Trial Counsel for Failure to Conduct DNA Testing and Present Expert Witnesses

Valencia alleged that counsel was ineffective for failing to conduct independent DNA testing of the evidence and for failing to present expert witnesses. ROA A815616 at 16-18. Not calling an expert witness or having independent testing performed is not *per se* deficient performance. If counsel and the client understand the evidence to be presented by the State and the possible outcomes of that evidence, "counsel is not required to unnecessarily exhaust all available public or private resources." Id. Further, "strategic choices"—such as choice of witnesses—"made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 691, 104 S. Ct. at 2064; Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). And simply because the State presented a DNA expert does not mean a defense expert was also required. See Harrington v. Richter, 562 U.S. 111, 131 S. Ct. 770, 791, 578 F.3d 944 (2011). ("Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert for the defense.").

Further, Valencia fails to specify precisely how independent DNA testing or hiring an expert DNA witness would have rendered a different trial outcome probable. The DNA expert testimony presented by the State at trial did not inculpate Valencia. In fact, Valencia was excluded as a contributor to the major DNA profile on the firearm recovered from the scene. ROA C315580 Vol. V. at 981, 987. In closing, defense counsel argued to the jury that these results exculpated Valencia. Id. at 1159, 1165. It is highly improbable that further DNA testing or testimony would have benefited Valencia, when clearly DNA evidence was not the basis for his conviction. Accordingly, Valencia is not entitled to relief on this claim.

E. Ground Five: Ineffective Assistance of Trial Counsel Regarding the Denial of Valencia's Request for Self-Representation

Valencia alleged trial counsel was ineffective for "failure to correct the record and to preserve the denial of the conditional waiver of self representation…" ROA A815616 at 19. Valencia also cited a statement made by the district court at a hearing on November 1, 2016, in which the court indicated Valencia could request to have counsel removed if he felt he and counsel had become "incompatible." Id.; ROA C315580 Vol. II at 378. Valencia's claim is facially unclear because he is claiming that counsel failed to correct the record while simultaneously citing a statement directly from the record in an attempt to

support this claim. He appears to believe that counsel failed to present this statement by the district court to the Nevada Supreme Court on direct appeal.

This claim is both contradicted by the record and barred under the law of the case doctrine. See Mann, 118 Nev. at 354, 46 P.3d at 1230; Hargrove, 100 Nev. at 502, 686 P.2d at 225; Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975). Trial counsel also represented Valencia on direct appeal, wherein he argued that the district court erred by denying Valencia's request to represent himself. Valencia v. State, Docket No. 75282 (Order of Affirmance, Apr. 12, 2019); ROA A815616 at 29. The Nevada Supreme Court concluded that this claim was meritless, noting "the record as a whole demonstrates Valencia did not make an unequivocal request to represent himself." Valencia v. State, Docket No. 75282 (Order of Affirmance, Apr. 12, 2019), at 3; ROA A815616 at 31. Accordingly, this claim is also barred by the law of the case doctrine.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall, 91 Nev. At 315, 535 P.2d at 798 (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117

Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, the district court cannot overrule the Nevada Supreme Court. NEV. CONST. Art. VI § 6. Therefore, the district court is barred from granting Valencia any relief on this claim.

F. Ground Six: Ineffective Assistance of Trial Counsel for Failure to Remind the Court that His Waiver of Self-Representation Was Conditional

This claim is substantially similar to Ground Five. Valencia appears to believe trial counsel was under a duty to "remind the Court that the waiver to self representation was conditional." ROA A815616 at 20. It is unclear why Valencia interpreted what occurred at the November 1, 2016 hearing in the district court as amounting to a conditional waiver of his right to self-representation, or why he believes it was trial counsel's duty to bring this to the court's attention, particularly considering that trial counsel was not present at the November 1, 2016 hearing. The court was merely informing Valencia that should he wish in the future to move for the removal of trial counsel, he could do so. Valencia was certainly aware that he had the right to do so, as he had moved for the dismissal of previous counsel and filed numerous pro per motions. ROA C315580 Vol. I at 30-40, 94-128, 173-87; Vol. VI at 1247-55. Regardless, for the reasons stated above, any claim regarding the district court's denial of Valencia's request for self-representation is

barred under the law of the case doctrine. Accordingly, the district court was barred from granting Valencia any relief on this claim.

G. Ground Seven: Ineffective Assistance of Trial Counsel for Failure to Provide Legal Materials

Valencia alleged trial counsel failed to provide him with legal materials. ROA A815616 at 21. This is a bare and naked claim suitable only for summary denial. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Valencia fails to identify what specific materials he believes should have been provided to him, or how provision of these materials would have rendered a different result probable at trial. Accordingly, Valencia is not entitled to relief on this claim.

H. Ground Eight: Ineffective Assistance of Trial Counsel for Failure to Object to Certified Judgment of Conviction; Imposition of Habitual Sentence

As a preliminary matter, to the extent Valencia appears to contend that the district court erred by sentencing him pursuant to the habitual criminal statute, this is a substantive claim that has been waived for habeas review. NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) *The petitioner's conviction was the result of a trial and the grounds for the petition could have been:*
> *[. . .]*
> *(2) Raised in a direct appeal* or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that while claims of ineffective assistance of trial and appellate counsel are appropriately raised for the first time in post-conviction proceedings, "all other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). See also NRS 34.724(2)(a) (stating that a post-conviction petition is not a substitute for a direct appeal); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001). Accordingly, Valencia is not entitled to relief on his claim that the sentencing court erred by imposing a habitual criminal sentence.

As to Valencia's claim that counsel should have objected to the admission of one of the certified judgments of conviction that the State admitted at sentencing, the only argument Valencia offers in support of this claim is his bare assertion that "Case No. C224558 is an illegal sentence." ROA A815616 at 22. For Count 1, Valencia was sentenced pursuant to the small habitual criminal statute, and a prison sentence of 84 to 240 months was imposed. ROA C315580 Vol. II at 299. At the time of Valencia's sentencing, a defendant was eligible for small habitual criminal treatment upon the proof of two prior felony convictions. NRS 207.010(1)(a). At sentencing, the State admitted four certified judgments of

conviction. ROA C315580 Vol. II at 418. Certified judgments of conviction are prima facie evidence of a defendant's previous convictions. NRS 207.016(5). Thus, counsel could not have raised a valid legal objection to the certified judgments of conviction. To do so would have been futile, and counsel cannot be found ineffective for failure to raise futile objections or motions. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Furthermore, Valencia only claims one of his admitted convictions was invalid. Even if that conviction had not been presented, the State still presented three other certified judgments of conviction. This was more than enough to adjudicate Valencia as a habitual criminal. Thus, Valencia cannot demonstrate he was prejudiced. Accordingly, Valencia is not entitled to relief on this claim.

I. Ground Nine: Ineffective Assistance of Trial Counsel for Failure to Request a Change of Venue

Valencia claims that counsel "failed to request change of venue for a jury who explained to the court that Ms. Plunkett had brought cell phones into the jail on that all that he seen on the news…" ROA A815616 at 23. To the best the State can ascertain, Valencia appears to claim that trial counsel Gregory Coyer should have requested a change of venue due to there having been local media coverage regarding an incident involving Mr. Coyer's co-counsel Ms. Plunkett bringing a cell phone into the Clark County Detention Center. This claim is nearly incomprehensible, and is entirely lacking in support or explanation as to why

Valencia believes a change in venue was warranted, or how he was prejudiced. This is a bare and naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Further, a motion to change venue would have been futile, and counsel cannot be held ineffective for failing to file a futile motion. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. A request for a change in venue must comply with the requirements of NRS 174.455(1), which states that "[a] criminal action prosecuted by indictment, information or complaint may be removed from the court in which it is pending, on application of the defendant or state, *on the ground that a fair and impartial trial cannot be had* in the county where the indictment, information or complaint is pending." (emphasis added). Additionally, a motion to change venue cannot be granted by the district court until after voir dire examination of the jury. NRS 174.455(2). Such a motion requires a demonstration that members of the jury were biased against the defendant, not defendant's counsel. See Rhyne, 118 Nev. at 11, 38 P.3d at 169. There is nothing in the record of voir dire in this case indicating that any members of the jury were prejudiced against Valencia. Thus, any request for a change in venue would have been futile. Accordingly, Valencia is not entitled to relief on this claim.

To the extent Valencia appears claim that counsel failed to object to the "admittance of the bag with the gun", this claim was raised on direct appeal and

rejected by the Nevada Supreme Court. See Valencia v. State, Docket No. 75282 (Order of Affirmance, Apr. 12, 2019), at 03-05. The Nevada Supreme Court stated as follows:

> Valencia was not denied a fair trial as the evidence bag that the officer read from had already been admitted without objection from Valencia and neither the State nor Valencia realized it contained the ex-felon language…the district court properly found that the prejudicial effect was minimal as the ex-felon testimony was a passing comment that the district court did not permit to be expounded on.

Id. at 04-05.

This holding is the law of the case and this issue cannot be revisited in a habeas petition. See Pellegrini, 117 Nev. at 879, 34 P.3d at 532. Valencia also ignores the fact that trial counsel requested a mistrial based on the witness inadvertently reading this information from the bag containing the firearm. ROA C315580 Vol. IV at 879.

To the extent Valencia claims trial counsel should have objected to "perjured testimony", Valencia fails to support his claim that this testimony was perjured, beyond simply making this bare allegation. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. It is highly improbable that counsel objecting to a witness's testimony and asserting the witness was committing perjury would have benefited Valencia in any way, as such an objection would be at best improper, and at worst outright misconduct, as counsel is not permitted to testify nor is counsel permitted to express a personal opinion as to whether or not a witness is being truthful. Ross v.

State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990) ("It is improper argument for counsel to characterize a witness as a liar."). Further, whether or not to object is a strategic decision, which is virtually unchallengeable. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). Accordingly, Valencia is not entitled to relief on this claim.

J. Ground Ten: Ineffective Assistance of Trial Counsel for Not Presenting a Defense, Subpoenaing Witnesses or Requesting Video Footage

Valencia alleged that trial counsel deprived him of a defense. ROA A815616 at 24. Valencia appears to believe that trial counsel should have presented a defense that the police fabricated the incident and maintains that this fabrication can by shown by DNA, fingerprints, and witness Eric Gilbert. Id. To the extent Valencia maintains his counsel did not present a defense, this claim is contradicted by the record and thus does not entitle Valencia to relief. See, e.g., Mann, 118 Nev. at 354, 46 P.3d at 1230. As to his complaint that counsel did not present a defense of "police fabrication", the decision not to raise such a defense was a strategic choice within the sole discretion of counsel. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating that trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.").

The record reveals that DNA and fingerprint analyses were performed on the recovered firearm, and those results were presented at trial. ROA C315580 Vol. V

at 971-89, 994-1011. Neither Valencia's DNA nor his fingerprints were found on the firearm, but despite Valencia's claims, this did not establish that the police "fabricated" this incident. Furthermore, trial counsel argued in closing that these results exonerated Valencia. Id. at 1159. Contrary to Valencia's assertion, trial counsel did in fact present a defense. Though trial counsel did not allege that the testifying police officers had fabricated the entire incident, counsel presented the far more reasonable argument that the police were mistaken as to the identity of the perpetrator and had rushed to judgment in identifying Valencia. Id. at 1160-62. The decision to present this particular defense was within the discretion of trial counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167 (2002).

As to Valencia's contention that police fabrication could have been proven through the witness Eric Gilbert, Valencia fails to provide a cogent explanation as to how this individual would have done so. The record reveals that Eric Gilbert attempted to steal the moped that Valencia was riding on the date of the initial police incident. ROA C315580 Vol. IV at 843, 848. Valencia refers to a voluntary statement presumably made by Eric Gilbert, but none of the purported statements point to police fabrication or another individual as the perpetrator. Thus, this is a bare allegation that must be summarily denied. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Valencia is also not entitled to relief on his claims that trial counsel failed to subpoena witnesses. The decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. See Rhyne, 118 Nev. at 8, 38 P.3d at 168 (2002); Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). "[T]he trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call." Rhyne, 118 Nev. at 8, 38 P.3d at 167. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. See Harrington, 562 U.S. at 111, 131 S. Ct. at 791. Further, Valencia fails to identify the supposed alibi witness he believes counsel should have called, or any helpful information that could have been presented through Eric Gilbert's testimony. To satisfy the Strickland standard and establish ineffectiveness for failure to interview or obtain witnesses, a petitioner must allege *in the pleadings* the substance of the missing witness' testimony, and demonstrate how such testimony would have resulted in a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003). Valencia has clearly not met this burden.

As to Valencia's claim that counsel failed to subpoena "dashcam footage", nothing in the record indicates that there was such footage in this case. Further, Valencia fails to adequately explain how such footage, even if it existed, would

have altered the outcome of his trial. The testimony at trial was that Valencia pointed a firearm at Officer Jacobitz during a foot pursuit in an alleyway, and thus any sort of "dashcam" would not have captured the incident. ROA C315580 Vol. IV at 823-826. Thus, Valencia's allegation that counsel did not obtain dashcam footage, even if true, would not entitle him to relief. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, this claim must be summarily denied.

As to Valencia's claim that counsel failed to request the photograph used for identification, Valencia fails to specify how this alleged failure amounted to deficient performance or how it prejudiced him at trial. Accordingly, this claim must be summarily denied.

As to his claims that counsel failed to correct misinformation from the prosecutor and failed to object to inconsistencies, these bare allegations are entirely vague with no citation to the record. Valencia also fails to specify the misinformation and the inconsistencies to which he refers. Valencia has not met his burden to present specific factual allegations. See Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. Accordingly, these claims must be summarily denied.

K. Ground Eleven: Ineffective Assistance of Trial Counsel for Failure to Investigate and Prepare for Trial

Valencia raised several broad allegations that must be summarily denied pursuant to Hargrove, 100 Nev. at 502-03, 686 P.2d at 225. He alleges that counsel failed to investigate, but fails to specify what matters should have been

investigated, or to show how a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. He repeats his allegation that counsel failed to call witnesses, but does not specify what witnesses should have been called or the expected substance of such testimony. He complains that counsel did not make an opening statement, but fails to explain how this amounted to deficient performance or how it prejudiced him. He also raises a nearly incomprehensible allegation that counsel failed to raise a legally cognizable defense that could render a sentence of life in prison unreliable. It is entirely unclear what Valencia even means by a life sentence being "unreliable" or what defense he believes counsel should have raised. This claim is so devoid of specificity that it must be summarily denied.

As to Valencia's claim that counsel failed to instruct the jury as to the exculpatory value of the DNA evidence, this claim is belied by the record. Mann, 118 Nev. at 354, 46 P.3d at 1230. During closing argument, trial counsel explicitly stated to the jury that the DNA and fingerprint results exonerated Valencia. ROA C315580 Vol. V at 1159. Accordingly, this claim must be denied.

To the extent that Valencia appears to maintain counsel was ineffective on appeal, Valencia has not met his burden of pleading specific facts to demonstrate ineffectiveness of appellate counsel. See Kirksey v. State, 112 Nev. 980, 998, 923

P.2d 1102, 1114 (1996). Valencia merely makes a conclusory assertion that counsel failed to prepare for appeal. Accordingly, this claim must be denied.

To the extent Valencia appears to claim that counsel had a conflict of interest, he also fails to present specific factual allegations. A conflict of interest arises when counsel's loyalty to a client is threatened by his responsibilities to another client or person, or by his own interests. Jefferson v. State, 133 Nev. 874, 876, 410 P.3d 1000, 1002 (Nev. App. 2017). Valencia fails to identify the alleged conflict; he merely presents a conclusory assertion that there was an irreconcilable conflict. Accordingly, he is not entitled to relief on this claim.

L. Ground Twelve: Ineffective Assistance of Trial Counsel for Suggestive Identification; Ineffectiveness of Appellate Counsel; Errors by District Court in Jury Selection, Jury Instruction, and Sentencing

All of Valencia's claims under this ground are bare and naked allegations that are plead in a conclusory manner, with no accompanying argument or factual explanation. Accordingly, all of these claims must be summarily denied pursuant to Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

Further, as to Valencia's allegations that the district court erred during jury selection and the setting of jury instructions, as well as by sentencing Valencia pursuant to the habitual criminal statute, these are all claims that could have been raised on direct appeal. Accordingly, they cannot be considered on habeas review.

See NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

CONCLUSION

Though the district court erred in finding that the petition was untimely filed, the district court nevertheless reached the right result in denying the petition because Valencia is not entitled to relief on any of his claims. All of his claims are insufficiently plead and lacking in specific factual allegations that would entitle him to relief if true. Many of his allegations are repelled by the record, and several are barred from consideration or waived due to not being raised on direct appeal. Valencia has not demonstrated that counsel's actions fell below an objective standard of reasonableness and that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2068. Therefore, the State respectfully requests that the judgment of the district court be affirmed.

Dated this April 28, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Court of Appeals on April 28, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

KAREN MISHLER
Chief Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

CEASAR SANCHAZ VALENCIA,
a/k/a CEASAR SANCHEZ VALENCIA, #94307
High Desert State Prison
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Indian Springs, Nevada 89070

BY */s/ E. Davis*
Employee, District Attorney's Office

KM//ed