

Steven D. Grierson

RECEIVED

APR 26 2021

Electronically Filed
May 12 2021 03:17 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

TONEY A. WHITE
NDOC NO. 1214172
HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PETITIONER/ DEFENDANT
IN PRO SE

DISTRICT COURT
CLARK COUNTY, NEVADA

TONEY A. WHITE,

PETITIONER,

VS.

THE STATE OF NEVADA,

RESPONDENT.

CASE NUMBER
A-20-824261-W
C-16-313216-2

PETITIONER/ DEFENDANT'S
NOTICE OF APPEAL PUR-
SUANT TO NRP R. 4.

ALL PARTIES OF RECORD ARE HEREBY NOTIFIED
THAT PETITIONER ELECTS TO APPEAL THE FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER FILED
APRIL 08, 2021 AS MISLEADING AND ERRONEOUS ON
ITS FACE.

GIVEN PETITIONER'S INTEGRITY AND INABILITY
TO EMPLOY COUNSEL FOR APPEAL HE SEES THAT SAID
COUNSEL BE APPOINTED.

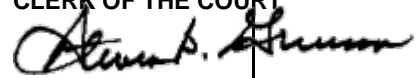
IN ACCORDANCE THIS NOTICE OF APPEAL AND
REQUEST FOR COUNSEL IS RESPECTFULLY SUBMITTED.

RESPECTFULLY SUBMITTED.

DATED: APRIL 20, 2021

BY.

Toney A. White, III
TONEY A. WHITE, III
PETITIONER/ DEFENDANT
IN PRO SE



1 ASTA

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5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 TONEY A. WHITE, III,

10 Plaintiff(s),

11 vs.

12 CALVIN JOHNSON, WARDEN,

13 Defendant(s),

Case No: A-20-824261-W

Dept No: XII

Amended

14
15
16 **AMENDED CASE APPEAL STATEMENT**

17 1. Appellant(s): Toney A. White, III

18 2. Judge: Michelle Leavitt

19 3. Appellant(s): Toney A. White, III

20 Counsel:

21 Toney A. White, III #1214172
22 P.O. Box 650
23 Indian Springs, NV 89070

24 4. Respondent (s): Calvin Johnson, Warden

25 Counsel:

26 Steven B. Wolfson, District Attorney
27 200 Lewis Ave.
28 Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A

8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: No
10 Date Application(s) filed: N/A

11 9. Date Commenced in District Court: November 5, 2020

12 10. Brief Description of the Nature of the Action: Civil Writ

13 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

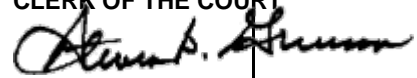
18 Dated This 7 day of May 2021.

19 Steven D. Grierson, Clerk of the Court

20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk
22 200 Lewis Ave
23 PO Box 551601
24 Las Vegas, Nevada 89155-1601
25 (702) 671-0512

26 cc: Toney A. White, III
27
28



1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 TONEY A. WHITE, III,

10 Plaintiff(s),

11 vs.

12 STATE OF NEVADA,

13 Defendant(s),

Case No: A-20-824261-W

Dept No: XII

14
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16 **CASE APPEAL STATEMENT**

17 1. Appellant(s): Toney A. White, III

18 2. Judge: Michelle Leavitt

19 3. Appellant(s): Toney A. White, III

20 Counsel:

21 Toney A. White, III #1214172
22 P.O. Box 650
23 Indian Springs, NV 89070

24 4. Respondent (s): Calvin Johnson, Warden

25 Counsel:

26 Steven B. Wolfson, District Attorney
27 200 Lewis Ave.
28 Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A

8 **Expires 1 year from date filed

9 Appellant Filed Application to Proceed in Forma Pauperis: No
10 Date Application(s) filed: N/A

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19 Steven D. Grierson, Clerk of the Court

20 /s/ Heather Ungermann

21 Heather Ungermann, Deputy Clerk
22 200 Lewis Ave
23 PO Box 551601
24 Las Vegas, Nevada 89155-1601
25 (702) 671-0512

26
27 cc: Toney A. White, III
28

CASE SUMMARY

CASE NO. A-20-824261-W

Toney White, Plaintiff(s)
vs.
Calvin Johnson, Warden, Defendant(s)

§
§
§
§
§
§

Location: **Department 12**
 Judicial Officer: **Leavitt, Michelle**
 Filed on: **11/05/2020**
 Cross-Reference Case Number: **A824261**
 Defendant's Scope ID #: **8270790**

CASE INFORMATION

Related Cases
 C-16-313216-2 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

Case Status: **11/05/2020 Open**

DATE

CASE ASSIGNMENT

Current Case Assignment

Case Number	A-20-824261-W
Court	Department 12
Date Assigned	11/05/2020
Judicial Officer	Leavitt, Michelle

PARTY INFORMATION

Plaintiff

White, Toney

Lead Attorneys

Pro Se

Defendant

Calvin Johnson, Warden







Wolfson, Steven B
Retained
 702-671-2700(W)

DATE

EVENTS & ORDERS OF THE COURT

INDEX


EVENTS

11/05/2020	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff White, Toney <i>Post Conviction</i>
11/05/2020	 Motion Filed By: Plaintiff White, Toney <i>Motion to File Under Seal Exhibits 1 Thru 4</i>
11/05/2020	 Temporary Seal Pending Court Approval Filed By: Plaintiff White, Toney
11/05/2020	 Appendix Filed By: Plaintiff White, Toney <i>Appendix Volume I</i>
11/05/2020	 Appendix Filed By: Plaintiff White, Toney <i>Appendix Volume II</i>
12/08/2020	 Order for Petition for Writ of Habeas Corpus <i>Order for Petition for Writ of Habeas Corpus</i>

CASE SUMMARY
CASE NO. A-20-824261-W

01/07/2021	 Motion to Seal/Redact Records Filed By: Plaintiff White, Toney <i>Amended Petitioner's Motion for Filing Exhibits 1- 4 Under Seal</i>
03/09/2021	 Response <i>State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction)</i>
03/22/2021	 Motion Filed By: Plaintiff White, Toney <i>Plaintiff's Motion for Extension of Time of 60 Day from March 25, 2021 Hearing to File Reply to States Response to PCR Petition</i>
04/08/2021	 Findings of Fact, Conclusions of Law and Order Filed By: Defendant Calvin Johnson, Warden <i>Findings of Fact, Conclusions of Law and Order</i>
04/12/2021	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant Calvin Johnson, Warden <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
04/21/2021	 Request Filed by: Plaintiff White, Toney <i>Petitioner's Renewed Request for Appointment of Counsel</i>
04/21/2021	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
04/21/2021	 Motion for Appointment of Attorney Filed By: Plaintiff White, Toney <i>Motion for Appointment of Counsel</i>
04/22/2021	 Notice of Change of Hearing Filed By: Plaintiff White, Toney <i>Notice of Change of Hearing</i>
05/06/2021	 Notice of Appeal <i>Notice of Appeal</i>
05/07/2021	 Case Appeal Statement Filed By: Plaintiff White, Toney <i>Case Appeal Statement</i>
05/07/2021	 Amended Case Appeal Statement Party: Plaintiff White, Toney <i>Amended Case Appeal Statement</i>

HEARINGS

03/25/2021	 Petition for Writ of Habeas Corpus (12:30 PM) (Judicial Officer: Leavitt, Michelle) Denied; Journal Entry Details: <i>Petitioner not present. COURT ORDERED, Petition DENIED; State to prepare the Findings of Facts and Conclusions of Law. NDC;</i>
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CASE SUMMARY

CASE NO. A-20-824261-W

05/25/2021

Request (8:30 AM) (Judicial Officer: Leavitt, Michelle)

Petitioner's Renewed Request for Appointment of Counsel

DISTRICT COURT CIVIL COVER SHEET

A-20-824261-W
Dept. 12

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):

Toney White

Defendant(s) (name/address/phone):

Calvin Johnson, Warden

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

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

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

November 5, 2020

Date

PREPARED BY CLERK

Signature of initiating party or representative

See other side for family-related case filings.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Petitioner

**DISTRICT COURT
CLARK COUNTY, NEVADA**

TONEY A. WHITE,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-824261-W

C-16-313216-2

DEPT NO: XII

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

DATE OF HEARING: MARCH 25, 2021
TIME OF HEARING: 12:30 PM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 25th day of March, 2021, the Petitioner not being present, in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD B. ZADROWSKI, 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 March 9, 2016, ANTHONY WHITE (hereinafter “Petitioner”) was charged by way
4 of Grand Jury Indictment with the following charges: CONSPIRACY TO COMMIT
5 ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147), BURGLARY
6 WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060 –
7 NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON
8 (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT
9 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
10 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON
11 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 –
12 NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS
13 199.430 – NOC 53013).

14 On October 19, 2017, Petitioner, pursuant to Guilty Plea Agreement (“GPA”), pled
15 guilty to: COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
16 200.380, NRS 199.480 – NOC 50147) and COUNT 2 – ATTEMPT ROBBERY WITH USE
17 OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC
18 50145). The parties stipulated to a sentence of nine (9) to twenty-five (25) years in the Nevada
19 Department of Corrections (“NDOC”) and the State agreed not to file additional charges
20 regarding the incident.

21 On January 9, 2018, January 12, 2018, and September 5, 2018, respectively Petitioner
22 filed Motions to Withdraw Guilty Plea. The State did not oppose these motions. The Court
23 granted Petitioner’s motion, reinstated his original charges in the March 9, 2016 Indictment,
24 and set the matter for a February 19, 2019 Jury Trial.

25 On February 19, 2019, Petitioner’s Jury Trial commenced. On February 21, 2019,
26 Petitioner pled guilty to the following charges in the Amended Indictment: CONSPIRACY
27 TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147),
28 BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony –

1 NRS 205.060 – NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY
2 WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT
3 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
4 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON
5 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 –
6 NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS
7 199.430 – NOC 53013).

8 On March 19, 2019, the Court sentenced Petitioner to an aggregate term of life with a
9 minimum parole eligibility after twenty (20) years. The Judgment of Conviction was filed on
10 March 27, 2019. On March 28, 2019, Petitioner filed a Notice of Appeal.

11 On July 26, 2019, Petitioner filed a Motion to Withdraw Plea. On August 29, 2019, the
12 Court ordered the State to respond by October 10, 2019. On August 30, 2019, Petitioner filed
13 a Motion for Certification and Request for Remand. On September 24, 2019, Petitioner's
14 counsel requested a continuance for the State to respond to his Motion for Certification and
15 Request for Remand, but the Court stated that because the case was on Appeal, the Court had
16 no jurisdiction. Accordingly, the Court denied the matter as moot. The State filed its
17 Opposition to Petitioner's Motion to Withdraw Plea on October 7, 2019.

18 On June 11, 2020, Petitioner's counsel filed a Motion to Withdraw as Counsel. On May
19 11, 2020, the Nevada Supreme Court affirmed Defendant's Judgment of Conviction with
20 remittitur issuing on June 5, 2020.

21 On June 19, 2020, Petitioner filed a Motion to Dismiss Counsel. On June 23, 2020, the
22 Court granted Petitioner's counsel's Motion to Withdraw as Counsel.

23 On July 26, 2020, Petitioner filed a Motion to Obtain a Copy of a Sealed Record
24 (Presentence Investigation Report – NRS 176.156) on an Order Shortening Time. On July 13,
25 2020, Petitioner filed a Motion for Order for Additional Court Records. On July 21, 2020, the
26 Court stated that Petitioner indicated that his family could pay for his records, so the Court
27 ordered the transcripts requested and that Defendant's PSI would be mailed to him. On August
28 11, 2020, the Court denied Defendant's Motion for Order for Additional Court Records

1 because he had now requested transcripts at the State's expense and Defendant had failed to
2 meet his burden.

3 On August 19, 2020, Defendant filed the instant Renewed Motion for Appointment of
4 PCR Counsel. The State filed its Opposition on September 2, 2020. On September 10, 2020,
5 the Court denied Defendant's Motion without prejudice because there was no Petition for Writ
6 of Habeas Corpus pending and Defendant had failed to meet his burden.

7 On September 14, 2020, Defendant filed a Motion for Credit for Additional Records.
8 The State filed its Opposition on September 23, 2020. On October 6, 2020, the Court denied
9 Petitioner's Motion.

10 On November 5, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
11 (Post-Conviction) (hereinafter "Petition"). Petitioner also filed a Motion to File Under Seal
12 Exhibits 1 Thru 4, Appendix Volume I, and Appendix Volume II. On January 7, 2021,
13 Petitioner filed Amended Petitioner's Motion for Filing Exhibits 1-4 Under Seal. The State
14 filed its Response on March 9, 2021. On March 25, 2021, the Court denied Petitioner's Petition
15 and found as follows.

16 FACTS

17 Petitioner's Supplemental Presentence Investigation Report (hereinafter "PSI") stated
18 the facts as follows:

19 On January 20, 2016, Henderson Police dispatch received a call for service
20 at a local Henderson apartment community in reference to a loud verbal
21 dispute taking place in an apartment and a possible home invasion. Upon the
22 officer's arrival, he observed a male standing behind a Jeep Cherokee. The
23 officer briefly spoke with the male, identified as one of the co-defendants,
24 Kevin Wong, as the officer approached the door. Screaming was heard from
25 the apartment and a male victim (**Victim 2**) was found lying on the floor
26 handcuffed and bleeding. The officer freed the handcuffs from the victim and
also found a female victim (**Victim 1**) and secured the apartment. At this
time, Mr. Wong entered his Jeep and fled the scene eventually being stopped
by patrol units for several driving infractions.

27 **Victim 2** was transported to the hospital with significant head injuries to
28 include lacerations and loss of teeth. He also suffered from numerous strikes
from a baton to the head and torso area. Photographs were taken of his

1 injuries. A detective arrived at the scene and interviewed **Victim 1**. She stated
2 she was sitting on the couch and heard someone knocking at the door. She
3 answered and there was a female, identified as codefendant, Amanda Sexton
4 and two male suspects, identified as co-defendants Marland Dean, and Toney
5 White who forcibly opened the door and entered the apartment. Firearms
6 were drawn and aimed at both of the victims. Ms. Sexton placed **Victim 1** in
7 handcuffs and Mr. White and Mr. Dean began to yell at **Victim 2** stating,
8 “We have a search warrant, US Marshals; get on the ground.” Mr. White and
9 Mr. Dean began beating **Victim 2** with metal batons and struck him in the
10 head and face.

11 A detective responded to a traffic stop location involving Mr. Wong. Mr.
12 Wong gave the detective consent to search his vehicle. The detective
13 observed a purse on the passenger seat and located a Nevada Identification
14 card with Amanda Sexton’s name on it. Mr. White, Mr. Dean, and Ms.
15 Sexton met up with Mr. Wong and forced their way into the victim’s
16 apartment. Mr. Wong stated he observed officers arriving so he left the
17 complex when he saw Mr. White, Mr. Dean, and Ms. Sexton flee the
18 residence.

19 All four subjects were arrested, transported to the Henderson Detention
20 Center and booked accordingly.

21 PSI, filed Mar. 11, 2019, at 8-9.

22 ANALYSIS

23 **I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD**

24 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
25 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
26 defense.” The United States Supreme Court has long recognized that “the right to counsel is
27 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
28 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
representation fell below an objective standard of reasonableness, and second, that but for

1 counsel's errors, there is a reasonable probability that the result of the proceedings would have
2 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
3 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
4 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
5 inquiry in the same order or even to address both components of the inquiry if the defendant
6 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

7 The court begins with the presumption of effectiveness and then must determine
8 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
9 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
10 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
11 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
12 537 P.2d 473, 474 (1975).

13 Counsel cannot be ineffective for failing to make futile objections or arguments. See
14 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
15 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
16 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
17 (2002).

18 Based on the above law, the role of a court in considering allegations of ineffective
19 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
20 whether, under the particular facts and circumstances of the case, trial counsel failed to render
21 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
22 (1978). This analysis does not mean that the court should “second guess reasoned choices
23 between trial tactics nor does it mean that defense counsel, to protect himself against
24 allegations of inadequacy, must make every conceivable motion no matter how remote the
25 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
26 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
27 cannot create one and may disserve the interests of his client by attempting a useless charade.”
28 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

1 “There are countless ways to provide effective assistance in any given case. Even the
2 best criminal defense attorneys would not defend a particular client in the same way.”
3 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
4 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
5 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
6 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
7 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
8 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

9 Even if a defendant can demonstrate that his counsel’s representation fell below an
10 objective standard of reasonableness, he must still demonstrate prejudice and show a
11 reasonable probability that, but for counsel’s errors, the result of the trial would have been
12 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
13 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
14 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
15 694, 104 S. Ct. at 2064-65, 2068).

16 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
17 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
18 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
19 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
20 be supported with specific factual allegations, which if true, would entitle the petitioner to
21 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
22 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
23 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
24 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
25 petition to be dismissed.” (emphasis added).

26 Additionally, there is a strong presumption that appellate counsel’s performance was
27 reasonable and fell within “the wide range of reasonable professional assistance.” See United
28 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104

1 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-
2 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114
3 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted
4 issue would have had a reasonable probability of success on appeal. Id.

5 The professional diligence and competence required on appeal involves "winnowing
6 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
7 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In
8 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .
9 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313.
10 "For judges to second-guess reasonable professional judgments and impose on appointed
11 counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very
12 goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

13 However, to establish a claim of ineffective assistance of counsel for advice regarding
14 a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon,
15 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant
16 must show that there is a "reasonable probability that, but for counsel's errors, he would not
17 have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52,
18 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988,
19 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).
20 "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
21 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466
22 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). Ultimately, while it is counsel's duty to
23 candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a
24 plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

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A. Ground 1: The District Court Did Not Err When It Did Not Allow Petitioner to Represent Himself and Appellate Counsel was Not Ineffective for Failing to Raise the Issue in a Particular Way

Under his first ground, Petitioner argues that the Court erred in not permitting him to represent himself at trial as well as refusing to canvas Petitioner on March 21, 2017 and appellate counsel was ineffective for failing to raise that issue as a claim in his direct appeal with the complete record. Petition at 8-15. Specifically, he claims that appellate counsel failed to order transcripts for hearings on April 18, 2017, March 27, 2017, and May 3, 2017 to provide the appellate court with the complete record and properly frame his claim to include the Court's denial of Petitioner's request on March 27, 2017 and April 18, 2017. Petition at 8, 12. He asserts that appellate counsel should have "weeded out" the February 6, 2018 denial of his request that was raised on direct appeal and replaced it with a Faretta claim stemming from March 27, 2017 and April 18, 2017. Petition at 14-15. Additionally, in a footnote, Petitioner claims that the district court abused its discretion by failing, prior to trial, to address his *pro per* filings on May 18, 2016, June 15, 2016, December 6, 2016, December 28, 2016, March 27, 2017, May 3, 2017, December 14, 2017, January 9, 2018, January 12, 2018, and March 28, 2019. Petition at 9.

Petitioner correctly concedes that appellate counsel raised his Faretta claim on direct appeal and is thus 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 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (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 McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV.

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1 CONST. Art. VI § 6. Here, the Nevada Court of Appeals concluded such claim was meritless
2 and stated:

3 A district court may properly deny a request for self-representation if the
4 request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213
5 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22
6 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion
7 requesting to withdraw his guilty plea and for either the appointment of
8 substitute counsel or permission to represent himself. The district court held
9 a hearing concerning White's motion, discussed the motion with White, and
10 clarified White's desire to move for the withdrawal of his guilty plea.
11 Following the discussion, the district court decided to appoint substitute
12 counsel. White acknowledged he understood the district court's decision to
13 appoint substitute counsel and agreed that the district court had addressed his
concerns. A review of White's motion and the transcript of the pertinent
hearing demonstrates he did not make an unequivocal request to represent
himself and the district court appropriately addressed White's motion and
concerns without conducting a *Faretta* canvass. Therefore, White fails to
demonstrate he is entitled to relief.

14 Order of Affirmance, Docket No. 78483, filed May 11, 2020, at 1-2. Thus, Petitioner's claim
15 is barred by the law of the case doctrine.

16 To the extent Petitioner now claims that appellate counsel was ineffective because he
17 failed to frame the issue regarding the March 27, 2018 request and April 18, 2017 denial of
18 his request and failed to order such transcripts, his claim is still meritless as he cannot
19 demonstrate that such claim would have been meritorious as he was making the same request:
20 to represent himself. Accordingly, Petitioner cannot demonstrate that framing his claim in this
21 way would have been successful especially in light of the Nevada Court of Appeals rejecting
22 his claim.

23 Generally, a criminal defendant has the right to representation by counsel under the
24 Sixth Amendment of the United States Constitution and the Nevada Constitution. See U.S.
25 CONST. AMEND. VI; NEV. CONST. ART. 1, § 8, cl. 1. However, a defendant can waive this right
26 and, where he chooses to represent himself, he must satisfy the court that his waiver of the
27 right to counsel is knowing and voluntary. *Faretta*, 422 U.S. at 818-19, 835, 95 S. Ct. at 2525;
28 *Vanisi v. State*, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001).

1 Both the United States Supreme Court and this Court have recognized that “the right
2 to defend is given directly to the accused; for it is he who suffers the consequences if the
3 defense fails.” Johnson v. State, 117 Nev. 153, 162, 17 P.3d 1008 (2001) (quoting Faretta,
4 422 U.S. at 819-20, 95 S. Ct. at 2533). The Court further emphasized that “[i]t is the defendant
5 . . . who must be free personally to decide whether in his particular case counsel is to his
6 advantage. And although he may conduct his own defense ultimately to his own detriment, his
7 choice must be honored out of that respect for the individual which is the lifeblood of the
8 law.” Id. Indeed, once a defendant is found competent to stand trial, so long as he freely,
9 intelligently, and knowingly waives his right to counsel a district court has little power to
10 prevent the defendant from representing himself: “[I]n the absence of some indication that
11 Johnson's attempt to waive counsel was not knowing, intelligent and voluntary, or that some
12 other factor warranted denial of the right to self-representation under this court's holding in
13 Tanksley, the district court could not properly preclude Johnson from waiving his right to
14 counsel.” Id. at 164, 17 P.3d 1008.

15 While this Court “indulge[s] in every reasonable presumption against waiver of the
16 right to counsel,” it gives deference to the lower court’s decision to grant a defendant’s waiver
17 of his right to counsel. Hooks v. State, 124 Nev. 48, 55, 57, 176 P.3d 1081, 1085-86 (2008).
18 “Through face-to-face interaction in the courtroom, the trial judges are much more competent
19 to judge a defendant’s understanding” of his rights than the appellate court since a “cold record
20 is a poor substitute for demeanor observation.” Graves v. State, 112 Nev. 118, 124, 912 P.2d
21 234, 238 (1996). Indeed, “[e]ven the omission of a canvass is not reversible error if it appears
22 from the whole record that the defendant knew his rights and insisted upon representing
23 himself.” Hooks, 124 Nev. at 55, 176 P.3d at 1085 (quotation marks and citation omitted).

24 In assessing a waiver, the inquiry is whether the defendant can knowingly and
25 voluntarily waive his right to counsel, not whether the defendant can competently represent
26 himself. Tanksley v. State, 113 Nev. 997, 1000-01, 946 P.2d 148, 150 (1997). A defendant’s
27 technical knowledge is not relevant to the inquiry and a request for self-representation may
28 not be denied solely because the defendant lacks legal skills. Id. However, a request *may* be

1 denied if the request is equivocal, the defendant abuses his right by disrupting the judicial
2 process, or the defendant is incompetent to waive his right to counsel. Id.

3 Moreover, Petitioner's allegation that the district court abused its discretion by failing,
4 prior to trial, to address his *pro per* filings on May 18, 2016, June 15, 2016, December 6, 2016,
5 December 28, 2016, March 27, 2017, May 3, 2017, December 14, 2017, January 9, 2018,
6 January 12, 2018, and March 28, 2019 is waived, belied by the record, and meritless. Petition
7 at 9. As a preliminary matter, this is a substantive claim that is waived. NRS 34.810(1) reads:

8 The court shall dismiss a petition if the court determines that:

9 (a) The petitioner's conviction was upon a plea of guilty or guilty
10 but mentally ill and the petition is not based upon an allegation
11 that the plea was involuntarily or unknowingly or that the plea was
12 entered without effective assistance of counsel.

13 (b) The petitioner's conviction was the result of a trial and the
14 grounds for the petition could have been:

15 [...]

16 (2) Raised in a direct appeal or a prior petition for a writ of habeas
17 corpus or postconviction relief.

18 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims
19 of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction
20 proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on
21 direct appeal, or they will be *considered waived in subsequent proceedings.*" Franklin v. State,
22 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other
23 grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a
24 habeas petition if it presents claims that either were or could have been presented in an earlier
25 proceeding, unless the court finds both cause for failing to present the claims earlier or for
26 raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-
27 47, 29 P.3d 498, 523 (2001). In other words, substantive claims are beyond the scope of habeas
28 and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646-47, 29 P.3d at 523 (2001); Franklin,
110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148,
979 P.2d at 222.

Moreover, Petitioner's claim is waived because a defendant cannot enter a guilty plea
then later raise independent claims alleging a deprivation of his rights before entry of his plea.

1 State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting
2 Tollett v. Henderson, 411 U.S. 258, 267 (1973). Generally, the entry of a guilty plea waives
3 any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91
4 Nev. 469, 538 P.2d 164 (1975). “[A] guilty plea represents a break in the chain of events
5 which has preceded it in the criminal process [...] [A defendant] may not thereafter raise
6 independent claims relating to the deprivation of constitutional rights that occurred prior to the
7 entry of the guilty plea.” Id. (quoting Tollett, 411 U.S. at 267).

8 Additionally, Petitioner’s claim is largely belied by the record. Hargrove, 100 Nev. at
9 502, 686 P.2d at 225. Indeed, the record indicates that on June 9, 2016, the Court denied
10 Petitioner’s Application to Recuse Counsel and for Appointment for Alternative Counsel:
11 Memorandum of Points and Authorities filed on May 18, 2016. On July 7, 2016, the Court
12 addressed Petitioner’s additional Application to Recuse Counsel and for Appointment of
13 Alternative Counsel: Memorandum of Points and Authorities filed on June 15, 2016 and
14 ordered it off calendar as having been previously denied. On January 19, 2017, Petitioner
15 withdrew his Motion to Recuse Counsel And Proceed In Pro Pria Personam In Light Of
16 Counsels Demonstrated Ineffectiveness And Case Neglect And In Light Of Existing Conflict
17 filed on December 28, 2016 in open court. On April 18, 2017, the Court denied Petitioner’s
18 Motion for Trial Extension for 180 Days; Motion to Recuse Counsel and Application to
19 Proceed in Propria Personam filed on March 27, 2017. Petitioner alleges the Court failed to
20 address a December 14, 2017, but the record does not show that Petitioner filed a pleading that
21 day. On February 6, 2018, the Court addressed his Motions for Withdrawal of Guilty Plea and
22 for Appointment of New Counsel or Alternatively to Proceed in Pro Per filed on January 9,
23 2018 and January 12, 2018. The only filing by Petitioner on March 28, 2019 was a Notice of
24 Appeal to the Nevada Supreme Court, which was not a matter this Court could address.

25 The only two (2) filings the Court did not address prior to Petitioner’s trial was his
26 pretrial petition for writ of habeas corpus filed on December 6, 2016 and his petition for writ
27 of habeas corpus as well as his Objection to Court’s Denial of Motion filed May 3, 2017.
28 However, as discussed *supra*, not only is this a substantive claim that is waived, but also

1 Petitioner cannot demonstrate prejudice because these pleadings were meritless. Indeed, in his
2 December 6, 2016 Petition, Petitioner's sole claim was that he should be released from custody
3 because the State violated Marcum. As discussed *infra* in Section F, Petitioner was given
4 "reasonable notice." Hargrove, 100 Nev. at 502, 686 P.2d at 225. Thus, even if the Court had
5 addressed this petition, it would have failed. Additionally, Petitioner has not and cannot
6 demonstrate that he was prejudiced by the Court failing to address his Objection to Court's
7 Denial of Motion that he filed on May 3, 2017. Indeed, such document does not amount to a
8 cognizable motion as Petitioner claimed in such document he was merely preserving the issue
9 for appellate review. To the extent Petitioner was seeking rehearing by filing such document,
10 he cannot demonstrate that the Court would have granted rehearing and more importantly
11 whether that would have caused him not to plead guilty and proceed with trial. Hill, 474 U.S.
12 at 59, 106 S.Ct. at 370; *see also* Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
13 at 190-91, 87 P.3d at 537. Likewise, Petitioner's petition for writ of habeas corpus filed on
14 May 3, 2017, is meritless as discussed *infra* in Section B, Petitioner's Fourth Amendment
15 complaints are meritless. Thus, Petitioner cannot demonstrate good cause or prejudice and his
16 claims are denied.

17 **B. Ground 2: Petitioner's Fourth Amendment Violation Claim**

18 Petitioner claims his fourth amendment rights were violated for the following reasons:
19 (1) Wong, the alleged unauthorized driver of Petitioner's vehicle, did not have standing to
20 consent to the search of Petitioner's vehicle as well as Co-Defendant Sexton's purse and thus
21 the items found in such search were fruit of the poisonous tree (Petition at 17-21); (2) law
22 enforcement committed a warrantless "surreptitious surveillance" of one of Petitioner's
23 residences (Petition at 21-22); and (3) the affidavits attached to the search warrants for
24 Petitioner's vehicle and apartment contained "misrepresentations, distortions, omissions,
25 inaccuracies, and/or falsities" (Petition at 22-26).

26 As a preliminary matter Petitioner's claims are waived in two (2) ways. First,
27 Petitioner's claims are substantive and therefore waived. NRS 34.724(2)(a); Evans, 117 Nev.
28 at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other

1 grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222. Second, Petitioner's claims are waived
2 because he is alleging a deprivation of rights that would have occurred prior to entry of his
3 guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See Webb,
4 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claims are meritless and are thus
5 denied.

6 **1. Alleged Warrantless Search**

7 Petitioner's claim that his rights were violated because Wong consented to the search
8 of Petitioner's vehicle during a traffic stop is not only waived, but it is also barred by the
9 doctrine of res judicata. Re-litigation of this issue is precluded by the doctrine of res judicata.
10 Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing
11 Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). "The doctrine
12 is intended to prevent multiple litigation causing vexation and expense to the parties and
13 wasted judicial resources..." Id.; see also Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005)
14 (recognizing the doctrine's availability in the criminal context); York v. State, 342 S.W. 3d
15 528, 553 (Tex. Crim. App. 2011); Bell v. City of Boise, 993 F.Supp.2d 1237 (D. Idaho 2014)
16 (finding res judicata applies in both civil and criminal contexts).

17 Here, Petitioner raised this issue in his Motion for Trial Extension for 180 Days; Motion
18 to Recuse Counsel and Application for Proceed in Properia Personam filed on March 27, 2017.
19 This Court denied the Motion and found that Petitioner's claim regarding Wong was meritless
20 because Petitioner did not have standing to raise another individual's Fourth Amendment
21 Right. Defendant White's Pro Per Motion for Trial Extension for 180 Days; Motion to Recuse
22 Counsel and Application to Proceed in Properia Personam Hearing Minutes, Apr. 18, 2017.
23 Regardless, the claim is meritless as Wong, the driver of the vehicle, could properly give
24 consent to the search. United States v. Eldridge, 984 F.2d 943, 948 (8th Cir. 1993); See United
25 States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). Therefore,
26 Petitioner's claim is denied.

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1 **2. Pre-arrest Surreptitious Surveillance of Petitioner**

2 In addition to being waived, Petitioner's argument that his rights were violated because
3 law enforcement conducted a warrantless "surreptitious surveillance" of Petitioner's residence
4 is meritless. Petitioner cites to one (1) of the law enforcement incident reports which states
5 that the officers surveilled an apartment on foot, from their vehicle, and searched the apartment
6 with consent. Petitioner has not and cannot cite any legal authority that states that surveilling
7 from a lawful position is a violation of an individual's fourth amendment right. Regardless,
8 Petitioner has not alleged that he would have proceeded with trial and not pled guilty.
9 Therefore, Petitioner's claim is denied.

10 **3. Oath or Affirmation**

11 Also in addition to being waived, Petitioner's complaint that his Fourth Amendment
12 right was violated because some of the contents of the warrant affidavits were false is meritless.

13 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const.
14 Amend. IV. The Fourth Amendment states that "no warrants shall issue, but upon probable
15 cause, supported by oath or affirmation, and particularly describing the place to be searched,
16 and the persons or things to be seized." U.S. Const. Amend. IV; Draper v. United States, 358
17 U.S. 307, 79 S. Ct. 329 (1959). "'Probable cause' requires that law enforcement officials have
18 trustworthy facts and circumstances which would cause a person of reasonable caution to
19 believe that it is more likely than not that the specific items to be searched for are: seizable
20 and will be found in the place to be searched." Keesee v. State, 110 Nev. 997, 1002, 879 P.2d
21 63, 66 (1994).

22 While the information contained in every warrant must be truthful, this "does not mean
23 'truthful' in the sense that every fact recited in the warrant affidavit is necessarily correct, for
24 probable cause may be founded upon hearsay and upon information received from informants,
25 as well as upon information within the affiant's own knowledge that sometimes must be
26 garnered hastily." Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 2681 (1978). Further,
27 in U.S. v. Rettig, 589 F.2d 418 (9th Cir.1979), the Court held:

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1 Where factual inaccuracy of the affidavit is alleged, a warrant is invalidated
2 only if it is established that the affiant was guilty of deliberate falsehood or
3 reckless disregard for the truth, and if with the affidavit's false material set
4 to one side, the information remaining in the affidavit is inadequate to
5 support probable cause. Id. at 422 (Citing Franks v. Delaware, 438 U.S.
6 154, 98 S. Ct 2674 (1978)).

7 Here, Petitioner complains that nowhere in the dispatch records did it state "home
8 invasion." However, Petitioner has omitted information from other reports indicating that
9 officers received information of forcible entry into the apartment. See e.g., Petitioner's
10 Appendix, Volume 1, at 35, 37, 84. Regardless, Petitioner has not explained the relevance of
11 such information or more importantly whether a difference in such information would have
12 caused him to proceed with trial instead of ultimately pleading guilty. Additionally, Petitioner
13 claims there were misrepresentations of what certain individuals observed or did not observe.
14 Not only has Petitioner failed to explain why he believes such information to be false, but also
15 his assertions are pure speculation as he cannot state what other people witnessed. Moreover,
16 Petitioner alleges additional information that he believes to be false, but he has not
17 demonstrated that even if any of the information was indeed false, a point not conceded, the
18 affiant was guilty of deliberate falsehood or had a reckless disregard for the truth. Franks, 438
19 U.S. at 165, 98 S.Ct. at 2681. Indeed, Petitioner cannot show prejudice or that counsel would
20 have succeeded in suppressing the evidence obtained from the Search Warrant Affidavits. The
21 submitting detective based the information on the statements of first responding patrol officers.
22 There is nothing indicating that he intentionally misrepresented the facts. Furthermore,
23 Petitioner has not indicated that the information in the affidavits was so inadequate that they
24 do not support a finding of probable cause. Id. Therefore, Petitioner's claim is denied.

24 **C. Ground 3: The State Did Not Breach its Duty Under Brady v. Maryland**

25 Petitioner argues that the State breached its duty under Brady v. Maryland for failing to
26 disclose the following: (1) criminal histories of victims and the State's witnesses; (2) the search
27 warrant and return on the victim's apartment; (3) police reports and criminal documents
28 criminally charging Cliff; (4) body camera footage of Petitioner's arrest. Petition at 26-28.

1 As a preliminary matter, Petitioner's claim is substantive and thus waived. NRS
2 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d
3 at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222.
4 Additionally, the claim is waived because Petitioner is asserting a constitutional claim that
5 occurred prior to entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112
6 P.3d at 1070, n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claim
7 is belied by the record as well as bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

8 It is well-settled that Brady and its progeny require a prosecutor to disclose evidence
9 favorable to the defense when that evidence is material either to guilt or to punishment. See
10 Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-
11 19, 918 P.2d 687 (1996). “[T]here are three components to a Brady violation: (1) the evidence
12 at issue is favorable to the accused; (2) the evidence was withheld by the state, either
13 intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.”
14 Mazzan 116 Nev. at 67. “Where the state fails to provide evidence which the defense did not
15 request or requested generally, it is constitutional error if the omitted evidence creates a
16 reasonable doubt which did not otherwise exist. In other words, evidence is material if there is
17 a reasonable probability that the result would have been different if the evidence had been
18 disclosed.” Id. at 66 (internal citations omitted). “In Nevada, after a specific request for
19 evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted
20 evidence would have affected the outcome. Id. (original emphasis), *citing Jimenez v. State*,
21 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996); Roberts v. State, 110 Nev. 1121, 1132, 881
22 P.2d 1, 8 (1994).

23 “The mere possibility that an item of undisclosed information might have helped the
24 defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the
25 constitutional sense.” United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400
26 (1976). Favorable evidence is material, and constitutional error results, “if there is a reasonable
27 probability that the result of the proceeding would have been different.” Kyles v. Whitley, 514
28 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995), *citing United States v. Bagley*, 473 U.S. 667,

1 682, 105 S.Ct. 3375, 3383 (1985). A reasonable probability is shown when the nondisclosure
2 undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. 1565.

3 Due Process does not require simply the disclosure of “exculpatory” evidence.
4 Evidence must also be disclosed if it provides grounds for the defense to attack the reliability,
5 thoroughness, and good faith of the police investigation or to impeach the credibility of the
6 State’s witnesses. See Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot
7 be regarded as “suppressed” by the government when the defendant has access to the evidence
8 before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337
9 (7th Cir. 1992). “Regardless of whether the evidence was material or even exculpatory, when
10 information is fully available to a defendant at the time of trial and his only reason for not
11 obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the
12 defendant has no Brady claim.” United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

13 “While the [United States] Supreme Court in Brady held that the [g]overnment may not
14 properly conceal exculpatory evidence from a defendant, it does not place any burden upon
15 the [g]overnment to conduct a defendant’s investigation or assist in the presentation of the
16 defense’s case.” United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United
17 States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304,
18 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their
19 possession or to which they have access, they cannot miraculously resuscitate their defense
20 after conviction by invoking Brady. White, 970 F.2d at 337.

21 The Nevada Supreme Court has followed the federal line of cases in holding that Brady
22 does not require the State to disclose evidence which was available to the defendant from other
23 sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495,
24 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls
25 that the defendant made. This Court held that the defendant certainly had knowledge of the
26 calls that he made and through diligent investigation the defendant’s counsel could have
27 obtained the phone records independently. Id. Based on that finding, this Court found that

28 //

1 there was no Brady violation when the State did not provide the phone records to the defense.
2 Id.

3 First, Petitioner's claim that the State failed to provide certain discovery is belied by
4 the record as counsel for the State, an officer of the court, stated that the State provided all
5 discovery to defense counsel. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Defendant White's
6 Pro Per Motion for Trial Extension for 180 Days; Motion to Recuse Counsel and Application
7 to Proceed in Propria Personam Hearing Minutes, Apr. 18, 2017. To the extent Petitioner
8 claims that the State's record was false, he has failed to provide any support for why he
9 believes such record was false. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless,
10 Petitioner has not demonstrated the materiality of the information he now self-servingly claims
11 he did not receive and whether it truly would have resulted in him not pleading guilty.
12 Therefore, his claim is denied.

13 **D. Ground 4: Ineffective Assistance of Counsel Claims**

14 Petitioner argues that counsel was ineffective for: (1) "failing to acquire certain
15 information from Petitioner at their initial interviewing of him including his physical and
16 mental health and his immediate medical needs," including his alleged medical, mental health,
17 and duress claims, (2) failing to hire a medical and mental health expert to evaluate Petitioner
18 prior to trial, (3) failing to consult and discuss with Petitioner the grand jury process including
19 Petitioner's right to testify and failing to challenge the Marcum notice error as well as present
20 evidence and impeach victims at such hearing, (4) failing to communicate all anticipated
21 tactics and strategies, including failing to explore Petitioner's desire to suppress evidence and
22 pursuing a diminished capacity defense, (5) failing to retrieve certain witness affidavits and
23 interview witnesses, including Trina Potluck. Petition at 31, 33-36. Additionally, he complains
24 that appellate counsel was ineffective for failing to comply with ADKT 411. Petition at 32.

25 A defendant who contends his attorney was ineffective because he did not adequately
26 investigate must show how a better investigation would have rendered a more favorable
27 outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

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1 *1. Harvey Gruber Complaints*

2 Petitioner argues that counsel was ineffective for several reasons. As an initial threshold
3 matter, Petitioner cannot demonstrate any error by Mr. Gruber prejudiced Petitioner because
4 Mr. Gruber did not represent Petitioner at trial. Regardless, Petitioner's claims are meritless.

5 First, Petitioner complains that counsel was ineffective for failing to ensure Petitioner
6 was provided a timely Marcum notice and was given an opportunity to testify as well as present
7 evidence at the grand jury hearing. Petition at 36. However, Petitioner cannot claim ineffective
8 assistance of counsel for an action taken by the State. Indeed, Petitioner's claim appears to be
9 a waived substantive claim that he attempted to disguise as an ineffective assistance of counsel
10 claim. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at
11 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at
12 222. Regardless, Petitioner's claim is meritless because it is belied by the record. The record
13 indicates that the State served Marcum Notice on February 23, 2016 and Petitioner's counsel
14 acknowledged notification on February 24, 2016. See State's Exhibit A; Henderson Justice
15 Court Minutes, Feb. 24, 2016. Petitioner's Grand Jury Hearing was held March 25, 2016. One
16 month was "reasonable notice" for Petitioner to decide whether he wished to testify or present
17 evidence at the hearing. NRS 172.241. Moreover, Petitioner has not demonstrated what he
18 would have testified about, what evidence he would have presented if given the opportunity,
19 and whether he ultimately would not have pled guilty and proceeded with his trial. Hill, 474
20 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120
21 Nev. at 190-91, 87 P.3d at 537.

22 Second, Petitioner claims that counsel was ineffective for failing to investigate the basis
23 for Petitioner's pre-trial petition for writ of habeas corpus, which sought a Franks and
24 suppression hearing due to the State allegedly illegally obtaining evidence. Petition at 36. As
25 discussed *supra* in Section B, Petitioner has failed to demonstrate that a Franks suppression
26 hearing would have been successful or that the State illegally obtained evidence. Accordingly,
27 counsel cannot be deemed ineffective for not filing frivolous motions and Petitioner cannot
28 establish prejudice. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

1 Third, as discussed in Section C *supra*, Petitioner's claim that the State failed to abide
2 by its discovery obligation and provide discovery pursuant to Brady is belied by the record
3 and he has failed to demonstrate why he believes the State's record on the matter was false,
4 let alone the materiality of the information he was seeking, and whether it would have changed
5 his decision of pleading guilty. Thus, it would have been futile for counsel to pursue the matter
6 and he cannot demonstrate he was prejudiced by counsel's failure to do so. Ennis, 122 Nev. at
7 706, 137 P.3d at 1103.

8 Fourth, Petitioner complains that counsel failed to object, interject, and "treat the
9 record" at the April 18, 2017 hearing to ensure Petitioner's Sixth Amendment right to self-
10 representation. Petition at 36. This is a bare and naked claim suitable only for summary denial
11 as Petitioner has failed to even attempt to allege how counsel should have objected, interjected,
12 and "treated the record." Moreover, the minutes from said hearing show counsel's active
13 participation at the hearing. Regardless, he does not demonstrate that had counsel acted in such
14 a way he would, for a fact, not have pled guilty and proceeded with his trial. Hill, 474 U.S. at
15 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
16 at 190-91, 87 P.3d at 537.

17 Fifth, Petitioner claims counsel was ineffective for failing to conduct pre-trial
18 investigation of Petitioner's mental health history, medical history, diminished capacity,
19 duress defenses, and diminished capacity defenses as well as his competency during the crime.
20 Petition at 36. He also reiterates that counsel should have hired an expert for this purpose. Id.
21 Such claim is belied by the record as Petitioner indicated during his plea canvass with the
22 Court:

23 THE COURT: Okay. And you had a chance to discuss any defenses that you
24 would have to these charges?

25 THE DEFENDANT: Yeah.

26 THE COURT: You discussed them with your attorney?

27 THE DEFENDANT: Yeah.

28 //

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1 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 13; Hargrove, 100
2 Nev. at 502, 686 P.2d at 225. Regardless, Petitioner's claim that counsel did not investigate
3 Petitioner's medical history and mental health history is belied by Petitioner's own Exhibit to
4 the instant Petition. Indeed, Petitioner's Appendix, Volume II, pages 314 through 331, reveal
5 that counsel did in fact obtain medical records on Petitioner's behalf. To the extent Petitioner
6 complains that counsel should have investigated further, he has not proven what that
7 investigation would have shown whether the information received would have caused him not
8 to plead guilty or more importantly provided a better outcome. Molina, 120 Nev. at 192, 87
9 P.3d at 538. Similarly, Petitioner has not demonstrated what an expert would have said, let
10 alone whether hiring an expert would have rendered a better outcome. Id. Therefore,
11 Petitioner's claim is denied.

12 Sixth, Petitioner claims counsel failed to investigate evidence and witnesses for his
13 case. Petition at 36. Specifically, he claims that counsel failed to investigate "Sexton, Burton,
14 Cousert, White, Bennett, Hoyer, Cliff, Burkhalter, Portlock, Deann, Perry, and Wong" to assist
15 in Petitioner's defenses even though counsel had the Affidavit from Portluck. Id. Petitioner's
16 claim fails as he has not and cannot demonstrate whether these witnesses would have assisted
17 in his defense and provided a better outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. Thus,
18 Petitioner's claim is bare and naked and suitable only for summary dismissal. Hargrove, 100
19 Nev. at 502, 686 P.2d at 225. Moreover, Petitioner concedes that counsel possessed Portluck's
20 Affidavit, so his claim regarding counsel's investigation of Portluck is also belied by the record
21 he has provided this Court. Id. Regardless, Petitioner does not allege what further investigation
22 Petitioner should have conducted in light of this Affidavit. Therefore, Petitioner's claim is
23 denied.

24 Seventh, Petitioner complains that counsel was ineffective for failing to investigate
25 facts surrounding Deann's alleged threats and coercion that induced Petitioner's October 19,
26 2017 later withdrawn guilty plea. Petition at 37. However, this claim fails as Petitioner cannot
27 demonstrate prejudice because his first plea withdrawal request was granted. As it relates to
28 his second plea, Petitioner cannot demonstrate how investigating his prior plea would have

1 changed the outcome of his later guilty plea. In other words, regardless of whether counsel
2 investigated Deann's alleged threats prior to Petitioner's first guilty plea, Petitioner cannot
3 demonstrate how investigating this prior plea allegation would have caused him not to enter
4 his second guilty plea and proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also
5 Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537.
6 Therefore, Petitioner's claim is denied.

7 Eighth, Petitioner claims counsel was ineffective for failing to pursue a mental health
8 defense in light of Petitioner's mental health records. Petition at 37. Petitioner's claim fails as
9 he cannot demonstrate that had counsel pursued such a defense, he would not have pled guilty
10 and proceeded to trial because he does not know if such defense would have been successful.
11 Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107;
12 Molina, 120 Nev. at 190-91, 87 P.3d at 537. Regardless, Petitioner acknowledged during his
13 plea canvass with the Court that he went over all defenses with counsel and still proceeded to
14 enter his guilty plea. Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019,
15 at 13. Therefore, Petitioner's claim is denied.

16 2. *Michael Sanft Complaints*

17 First, Petitioner claims counsel was ineffective for failing to pursue the basis for his
18 pretrial petition for writ of habeas corpus and request a Franks hearing as well as a suppression
19 hearing regarding allegedly illegally obtained evidence. As discussed *supra* in Section B as well
20 as the previous section, Petitioner cannot demonstrate that the pursuit of such matter would
21 have been successful. Thus, counsel cannot be faulted for failing to pursue a futile motion and
22 Petitioner cannot demonstrate prejudice. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

23 Second, Petitioner again complains that counsel was ineffective for failing to detect and
24 pursue the Marcum notice violation. As discussed *supra*, Petitioner's claim fails because it
25 belied by the record which indicates that Petitioner received "reasonable notice" regarding the
26 grand jury hearing. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

27 Third, Petitioner again complains that counsel was ineffective for failing to investigate
28 Petitioner's mental health history, medical history, diminished capacity, intoxication, duress,

1 and competency defenses as well as failed to hire an expert to evaluate Petitioner. Petition at
2 38. This claim fails because, as discussed *supra*, Mr. Gruber obtained some of Petitioner's
3 medical records. Thus, Mr. Sanft obtaining the same record would have been futile. Moreover,
4 to the extent Petitioner complains that counsel should have investigated further, he has not
5 proven what that investigation would have shown whether the information received would
6 have caused him not to plead guilty or more importantly provided a better outcome. Molina,
7 120 Nev. at 192, 87 P.3d at 538. Similarly, Petitioner has not demonstrated what an expert
8 would have said, let alone whether hiring an expert would have rendered a better outcome. Id.
9 Therefore, Petitioner's claim is denied.

10 Fourth, Petitioner reiterates that counsel was ineffective for failing to investigate the
11 evidence as well as "Sexton, Burton, Cousert, White, Bennett, Hoyer, Cliff, Burkhalter,
12 Portlock, Deann, Perry, and Wong" to assist in Petitioner's defenses. Petition at 38. As
13 discussed *supra*, Petitioner has not and cannot demonstrate whether these witnesses would
14 have assisted in his defense and provided a better outcome. Molina, 120 Nev. at 192, 87 P.3d
15 at 538. Thus, Petitioner's claim is bare and naked and suitable only for summary dismissal.
16 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

17 Fifth, Petitioner repeats that counsel was ineffective for failing to discover the
18 challenged Brady materials. Petition at 38. As discussed *supra* in Section C as well as the
19 previous section, Petitioner's claim, that the State failed to provide discovery pursuant to
20 Brady, is belied by the record. Moreover, he has failed to indicate why he believes the State's
21 record was false, let alone that he would have received information that would have changed
22 his decision to end his trial and plead guilty. Thus, it would have been futile for counsel to
23 pursue this matter and his claim is denied. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

24 Sixth, Petitioner complains that counsel failed to "adequately cross examine witnesses
25 and subject the prosecutor's case to rigorous testing." Petition at 38. However, Petitioner
26 cannot show counsel was ineffective because Petitioner pled guilty during his trial. Thus, any
27 efforts by counsel was extinguished when Petitioner elected to end his trial early and pled
28 guilty to his charges. Therefore, Petitioner's claim is denied.

1 Seventh, Petitioner argues that counsel failed to impeach the following State's
2 witnesses with their criminal histories: Burkhalter, White, Cliff, Burton, Perry, and Cousert.
3 Petition at 38. As a preliminary matter, out of the aforementioned list only Burkhalter and Cliff
4 had testified before Petitioner decided to end his trial and plead guilty. Thus, as discussed with
5 his previous claim, Petitioner can only attempt to demonstrate prejudice as to Burkhalter and
6 Cliff. Regardless, Petitioner's claim fails because it is a bare and naked claim suitable only for
7 summary denial. Indeed, Petitioner does not provide the crimes of moral turpitude to which he
8 is referring and fails to provide any indication that such witnesses were convicted of such
9 crimes. Hargrove, 100 Nev. at 502, 686 P.2d at 225. It bears noting that the State did question
10 Cliff about his 2016 conviction for attempt grand larceny and 2017 conviction for using and
11 possession of identification of another. Regardless, Petitioner cannot demonstrate that had
12 Burkhalter and Cliff been questioned about the crimes of moral turpitude they allegedly
13 committed, he would not have pled guilty and permitted his trial to proceed. Hill, 474 U.S. at
14 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
15 at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

16 Eighth, Petitioner complains that counsel was ineffective for failing to call a single
17 witness at trial. Petition at 38. However, his claim fails because it is a bare and naked claim
18 suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed,
19 Petitioner has failed to indicate which witnesses he believes should have been called in
20 addition to the State's witnesses, let alone whether such witnesses would have been willing to
21 testify. While it appears that counsel stated he did not anticipate that he would call witnesses
22 to the stand, but instead would cross-examine the State's witness, it bears noting that counsel
23 later requested Co-Defendant Marland be transported from the prison as a potential witness
24 for the defense. Recorder's Transcript of Hearing: Jury Trial – Day 1, filed July 12, 2019, at
25 7-8, 38-40. Ultimately, however, which witnesses to call is counsel's responsibility and
26 Petitioner has failed to demonstrate that he would have elected to proceed with trial instead of
27 pleading guilty had these unnamed witnesses testified. Rhyne, 118 Nev. at 8, 38 P.3d at 167;

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1 Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107;
2 Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

3 Ninth, Petitioner complains that counsel based all of Petitioner's defenses on the State's
4 evidence and witnesses in its case in chief. Petition at 38. This is also a bare and naked claim
5 suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has
6 failed to indicate how counsel was ineffective in basing Petitioner's defense on the State's
7 evidence and witnesses and that doing so was "gross error." Turner v. Calderon, 281 F.3d 851,
8 880 (9th Cir. 2002). Indeed, which defenses to pursue it ultimately a strategic decision and
9 counsel's responsibility. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Dawson, 108 Nev. at 117, 825
10 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953. More importantly, he has not
11 demonstrated that he would have elected to proceed with trial instead of pleading guilty. Hill,
12 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina,
13 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

14 Tenth, Petitioner claims counsel was ineffective for failing to detect and acknowledge
15 that he was suffering from mental illness as well as coercion when he entered his plea, failing
16 to detect Petitioner's alleged June 11, 2018 mental health court specialty court referral, and
17 not obtaining a mental health expert to evaluate Petitioner. Petition at 38. As discussed *infra*
18 in Section G, Petitioner's claim that he was suffering from mental illness and coercion at the
19 time he entered his plea is belied by his own responses to the Court. Hargrove, 100 Nev. at
20 502, 686 P.2d at 225. Indeed, Petitioner stated multiple times that he was not facing coercion
21 and was on his medication which did not affect his ability to understand the proceedings.
22 Accordingly, hiring a mental health expert to evaluate Petitioner would have been futile. See
23 Ennis, 122 Nev. at 706, 137 P.3d at 1103. Furthermore, the record is silent as to whether
24 Petitioner had a June 11, 2018 mental health specialty court referral and he has failed to
25 provide any documentation to support his allegation. Hargrove, 100 Nev. at 502, 686 P.2d at
26 225. Therefore, Petitioner's claim is denied.

27 Eleventh, Petitioner argues counsel was ineffective for failing to file a Sentencing
28 Memorandum on Petitioner's behalf for mitigation purposes. Petition at 38. While counsel did

1 not file a Sentencing Memorandum, he did argue on Petitioner's behalf during the sentencing
2 hearing to mitigate the State's requested sentence. Recorder's Transcript of Hearing:
3 Sentencing, filed July 10, 2019, at 8-11. Ultimately, Petitioner cannot demonstrate that filing
4 a Sentencing Memorandum with the specific points he now alleges counsel should have raised,
5 would have changed the sentencing outcome as he plead guilty to the charges. Hill, 474 U.S.
6 at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
7 at 190-91, 87 P.3d at 537. Thus, Petitioner's claim is denied.

8 Twelfth, Petitioner asserts that counsel was ineffective for counsel failing to object to
9 the Court imposition of restitution. As discussed *infra* in Section I, Petitioner's claim, that the
10 Court improperly imposed restitution when he was not specifically canvassed on restitution,
11 is meritless because Petitioner acknowledged he understood the consequences of his plea and
12 the sentencing decision, including the restitution imposed, was ultimately in the Court's
13 discretion. Moreover, due to the sentence being in the Court's ultimate discretion, any error
14 would have been harmless. Thus, any objection by counsel would have been futile. See Ennis,
15 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

16 3. Appellate Counsel Complaints

17 Petitioner claims appellate counsel was ineffective for failing to obtain the complete
18 record on appeal, expanding Petitioner's Faretta claim, and briefing the facts of Ann White's
19 Affidavit to challenge the involuntariness of Petitioner's guilty plea. Petition at 38-41.
20 However, his claims are meritless.

21 As for Petitioner's complaint regarding appellate counsel failing to obtain the complete
22 record on appeal and expanding his Faretta claim, as discussed *supra* in Section A, such claim
23 is meritless. Although Petitioner asserts that counsel improperly framed the Faretta issue on
24 direct appeal and failed to obtain more transcripts, he has not and cannot demonstrate that such
25 claim would have been meritorious as he was making the same request to represent himself.
26 He has not indicated how the Nevada Court of Appeals' analysis would have changed had
27 counsel referenced the other hearings in which Petitioner requested to represent himself.
28 Accordingly, Petitioner cannot demonstrate how obtaining additional transcripts would have

1 changed the futility in appellate counsel framing the issue the way Petitioner now believes was
2 the correct way to frame the issue. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. For this same
3 reason, Petitioner cannot demonstrate prejudice.

4 As for Petitioner's claim regarding the Ann White Affidavit, Petitioner's claim also
5 fails. Motion for Seal, at Exhibit 1, Exhibit A, Exhibit B. Although Petitioner and the author
6 of such affidavit claim that appellate counsel was sent the affidavit, Petitioner has failed to
7 provide proof that appellate counsel did in fact receive such document. Regardless, briefing
8 such document would have been futile as Petitioner failed to pursue a challenge to his guilty
9 plea prior to the entry of his Judgment of Conviction. See Ennis, 122 Nev. at 706, 137 P.3d at
10 1103; Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (186), superseded by statute on
11 other grounds as stated in Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000)
12 (concluding that a defendant may not "challenge the validity of a guilty plea on direct appeal
13 from the judgment of conviction" in the first instance). Therefore, Petitioner's claim is denied.

14 **E. Ground 5: Petitioner's Plea was Knowingly and Voluntarily Entered**

15 Petitioner argues that his guilty plea should be withdrawn because it was the result of
16 coercion, intervening psychosis due to not being given his alleged anti-psychotic and seizure
17 medications, he was not competent to understand the rights he was forfeiting, and his guilty
18 plea was the result of counsel not advising Petitioner prior to his plea. Petition at 41-45.
19 Specifically, Petitioner claims that a person named "Deann" threatened Petitioner's family the
20 week before his trial. Petition at 41-44.

21 As a preliminary matter, Petitioner cannot raise constitutional claims that occurred prior
22 to his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See
23 Webb, 91 Nev. at 469, 538 P.2d at 164.

24 Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be
25 withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d
26 391, 394 (1990). The law in Nevada establishes that a plea of guilty is presumptively valid,
27 and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v.
28 State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336,

1 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered
2 his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

3 To determine whether a guilty plea was voluntarily entered, the Court will review the
4 totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721
5 P.2d at 367. A proper plea canvass should reflect that:

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

12 Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev.
13 774, 476 P.2d 950 (1970)). The presence and advice of counsel is a significant factor in
14 determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d
15 107, 107 (1975).

16 This standard requires the court accepting the plea to personally address the defendant
17 at the time he enters his plea in order to determine whether he understands the nature of the
18 charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not
19 rely simply on a written plea agreement without some verbal interaction with a defendant. Id.
20 Thus, a “colloquy” is constitutionally mandated and a “colloquy” is but a conversation in a
21 formal setting, such as that occurring between an official sitting in judgment of an accused at
22 plea. Id. However, the court need not conduct a ritualistic oral canvass. State v. Freese, 116
23 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas “do not require
24 the articulation of talismanic phrases,” but only that the record demonstrates a defendant
25 entered his guilty plea understandingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575,
26 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct.
27 1463, 1470 (1970).

28 Nevada precedent reflects “that where a guilty plea is not coerced and the defendant
[is] competently represented by counsel at the time it [is] entered, the subsequent conviction

1 is not open to collateral attack and any errors are superseded by the plea of guilty.” Powell v.
2 Sheriff, Clark County, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969) (citing Hall v. Warden, 83
3 Nev. 446, 434 P.2d 425 (1967)). In Woods v. State, the Nevada Supreme Court determined
4 that a defendant lacked standing to challenge the validity of a plea agreement because he had
5 “voluntarily entered into the plea agreement and accepted its attendant benefits.” 114 Nev.
6 468, 477, 958 P.2d 91, 96 (1998).

7 Furthermore, the Nevada Supreme Court has explained:

8 [A] guilty plea represents a break in the chain of events which has preceded it in
9 the criminal process. When a criminal defendant has solemnly admitted in open
10 court that he is in fact guilty of the offense with which he is charged, he may not
11 thereafter raise independent claims relating to the deprivation of constitutional
rights that occurred prior to the entry of the guilty plea.

12 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollet v. Henderson, 411
13 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). Indeed, entry of a guilty plea “waive[s] all
14 constitutional claims based on events occurring prior to the entry of the plea[], except those
15 involving voluntariness of the plea[] [itself].” Lyons, 100 Nev. at 431, 683 P.2d 505; see also,
16 Kirksey, 112 Nev. at 999, 923 P.2d at 1114 (“Where the defendant has pleaded guilty, the only
17 claims that may be raised thereafter are those involving the voluntariness of the plea itself and
18 the effectiveness of counsel.”).

19 Here, Petitioner’s claim that his plea was involuntary because he was coerced is belied
20 by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During his extensive plea canvass
21 with the Court, the Court repeatedly ensured that Petitioner was entering his plea freely and
22 voluntarily:

23 THE COURT: Are you entering into this plea today freely and
24 voluntarily?

25 THE DEFENDANT: Yeah.

26 THE COURT: Did anyone threaten or coerce you into entering into
27 this plea? THE DEFENDANT: No.

28 THE COURT: So, you’re entering into this plea today of your own
free will? THE DEFENDANT: Yeah.

[...]

1 THE COURT: Has anyone made you any promises?

2 THE DEFENDANT: No.

3 [...]

4 THE COURT: Okay. And Mr. White, you are pleading guilty today
because you are in truth and in fact guilty of these offenses?

5 THE DEFENDANT: Yeah.

6 THE COURT: And you do not want to proceed and go to trial?

7 THE DEFENDANT: No.

8 THE COURT: I mean, we picked a jury, we've gone through several
witnesses; but you think it's in your best interest to just plead straight
up to these charges?

9 THE DEFENDANT: Yeah.

10 THE COURT: Okay. And, again, you are doing this freely and
voluntarily?

11 THE DEFENDANT: Yeah.

12 [...]

13 THE COURT: Okay. And, again, this is what you want to do and
you're entering into this plea freely and voluntarily?

14 THE DEFENDANT: Yeah.

15 THE COURT: Okay.

16 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 6-19. In fact, the
17 State asked the Court to go even further and ensure that no one was coercing Petitioner or his
18 family:

19 THE COURT: Okay. So, no one has threatened or coerced you into
entering into this plea, correct?

20 THE DEFENDANT: No.

21 THE COURT: No one in the Clark County Detention Center?

22 THE DEFENDANT: No.

23 THE COURT: No one in the Nevada Department of Corrections?

24 THE DEFENDANT: No.

25 THE COURT: No one on the planet earth?

26 THE DEFENDANT: No.

27 THE COURT: Okay, no one has threatened you, correct?

28 THE DEFENDANT: Yeah.

THE COURT: Including, has – have you spoken to Marland Dean?

THE DEFENDANT: No.

THE COURT: Okay. I know you indicated to me the other day your
mom had spoken to him.

THE DEFENDANT: Yeah.

THE COURT: Were any threats communicated to you through your
mom?

1 THE DEFENDANT: No.

2 THE COURT: Okay. And you are satisfied with your representation
3 of Mr. Sanft?

4 THE DEFENDANT: Yeah.

5 THE COURT: Okay. And you're satisfied with how the trial has gone
6 so far?

7 THE DEFENDANT: Yeah.

8 THE COURT: I guess with the exception that the victims testified. I
9 mean I'm --

10 THE DEFENDANT: Yeah.

11 THE COURT: But, again, you think this is in your best interest?

12 THE DEFENDANT: Yeah.

13 THE COURT: And you want me to accept your plea?

14 THE DEFENDANT: Yeah.

15 MR. SCHWARTZER: Thank you, Your Honor.

16 Id. at 19-21.

17 Moreover, Petitioner's claim that he did not have the opportunity to discuss his plea
18 with counsel and did not understand the rights he was forfeiting is also belied by the record.
19 Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Petitioner confirmed with the Court
20 multiple times that he had spoken to counsel about his decision to plead guilty during his
21 canvass and he understood the rights he was giving up:

22 THE COURT: And you've had a chance to talk to your attorney? Is that a
23 yes -- I've got to make sure you're paying attention to me --

24 THE DEFENDANT: Yeah. I am.

25 THE COURT: -- because you've already withdrawn one plea with me. So, I
26 just want to make sure you're paying attention. So, you let me know when
27 you are done looking at that document.

28 [...]

THE COURT: Okay. And you had a chance to discuss all this
with Mr. Sanft?

THE DEFENDANT: Yeah.

THE COURT: And that's what you want to do. Correct?

THE DEFENDANT: Yes, ma'am.

[...]

THE COURT: You also understand you are giving up all your trial rights by
entering into this plea today?

THE DEFENDANT: Yeah.

1 THE COURT: You understand that you do have a right to a speedy and
2 public trial; that if the matter went to trial the State would be required to
3 prove each of the elements as alleged in their charging document by proof
beyond a reasonable doubt. Do you understand that?

4 THE DEFENDANT: Yeah.

5 THE COURT: And, your attorney did explain to you on each count what the
State would have to prove. Is that correct?

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay. Do you have any questions about what the State would
have to prove if this matter went to trial?

8 THE DEFENDANT: No.

9 THE COURT: Okay. And you had a chance to discuss any defenses that you
would have to these charges?

10 THE DEFENDANT: Yeah.

11 THE COURT: You discussed them with your attorney?

12 THE DEFENDANT: Yeah.

13 THE COURT: You understand at the time of trial you would have the right
14 to testify, to remain silent, to have others come in and testify for you, to be
confronted by the witnesses against you and crossexamine them, to appeal
any conviction and to be represented by counsel throughout all critical stages
of the proceedings. Do you understand all these trial rights?

15 THE DEFENDANT: Yeah.

16 THE COURT: And you understand that you will be giving them up by
entering into this plea today?

17 THE DEFENDANT: Yeah.

18 [...]

19 THE COURT: You had a chance to discuss all this with your lawyer and all
the consequences?

20 THE DEFENDANT: Yeah.

21 Id. at 4-19. In fact, Petitioner even went to far as to answer that he was satisfied with counsel's
services:

22 THE COURT: Okay. And you are satisfied with your representation of Mr.
23 Sanft?

24 THE DEFENDANT: Yeah.

25 Id. at 21.

26 Additionally, Petitioner's claim that he was not competent when he entered his plea
27 because he was not administered his medications is unsupported and suitable only for summary
28 denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Nevada law requires a court to suspend

proceedings “if doubt arises as to the competence of the defendant...until the question of competence is determined.” NRS 178.405. NRS 178.400 defines an incompetent person who cannot be tried or adjudged guilty:

1. A person may not be tried or adjudged to punishment for a public offense while incompetent.

2. For the purposes of this section, “incompetent” means that the person does not have the present ability to:

(a) Understand the nature of the criminal charges against the person;

(b) Understand the nature and purpose of the court proceedings; or

(c) Aid and assist the person’s counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

Under Dusky, a defendant is competent to stand trial if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “he has a rational as well as factual understanding of the proceedings against him.” Calvin, 147 P.3d at 1100, citing Dusky v. U.S., 362 U.S. 402, 402, 80 S.Ct. 788 (1960). In Calvin, the Nevada Supreme Court held that Nevada’s statutory competency standard conformed to that of Dusky and thus satisfied constitutional requirements. Consistent with Dusky, under Nevada statutory law, a defendant is incompetent to stand trial if he either “is not of sufficient mentality to be able to understand the nature of the criminal charges against him” or he “is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.” Calvin, 122 Nev. at 1182-83.

A formal hearing to determine competency is only required “when there is ‘substantial evidence’ that the defendant may not be competent to stand trial”—that is, evidence that “raises a reasonable doubt about the defendant’s competency to stand trial.” Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008).

When reviewing whether a defendant was competent to stand trial, the Nevada Supreme Court will review the record to determine if the defendant has adequately shown that he was incompetent. Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000); Warden v. Graham, 93 Nev. 277, 278, 564 P.2d 186, 187 (1977). In Morales, the defendant broke into his attorney’s office with a gun in an attempt to retrieve a document. 116 Nev. at 22, 992 P.2d at 254. The Court concluded that the defendant’s actions did not indicate incompetency, but an

1 attempt to assist his attorney, however illegally. Id. The Court further concluded that “[t]he
2 record contains no evidence that [the defendant] was unable to remember the events relating
3 to his drug arrest, communicate with his attorney or otherwise assist in his own defense.” Id.
4 Similarly, in Graham, the Nevada Supreme Court concluded that based on the psychiatric
5 evaluations and the defendant’s actions in court, specifically during the guilty plea canvass,
6 there was no indication that the defendant was incompetent. 93 Nev. at 278, 564 P.2d at 187.
7 However, in Olivares v. State, 124 Nev. 1142, 1148-49, 195 P.3d 864, 868-69 (2008), the
8 Court held that the district court erred in finding the defendant competent when doctors
9 concluded that he was incompetent to stand trial and statements from the defendant indicated
10 that he believed his attorneys were colluding with the court and the State.

11 To the extent Petitioner claims that counsel was ineffective for allowing him to proceed
12 with his guilty plea despite his alleged medical ailments, Petitioner provides no evidence that
13 his counsel was aware Petitioner was suffering from any actual mental health issues. Counsel
14 cannot be deemed ineffective when she had no information or reason to believe that Petitioner
15 had “particular psychological conditions or disorders that may have shown prior mental
16 disturbance or impaired mental state.” Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280
17 (1994), overruled on other grounds by Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015).

18 Most importantly, Petitioner’s claim that he was not on his prescribed medications is
19 belied by both his counsel’s representations on the record as an officer of the Court as well as
20 Petitioner’s responses to the Court during his canvass:

21 MR. SANFT: [...] *I believe that, at this particular point, that Mr. White is*
22 *not under any type of influence of alcohol or drugs that would impair his*
23 *thinking here today with regards to his decision to enter into this plea. And*
24 *I don’t believe as well that, based upon my communication with Mr. White,*
25 *that there’s been any type of threat made against him. I have not received that*
26 *as well. I just want to make sure that that’s on the record because I know that*
27 *was a concern the last time we were in court with regards to that.*

28 THE COURT: Okay. And that’s all true, correct?

THE DEFENDANT: Yeah.

THE COURT: You’re not on any kind of medication?

1 THE DEFENDANT: *Just the medication that I take, my meds, but they're*
2 *not impacting my decision to plead.*

3 THE COURT: *What kind of medication are you on?*

4 THE DEFENDANT: *Psych meds.*

5 THE COURT: *Okay. And you don't think it's affecting your ability to enter*
6 *into this plea today?*

7 THE DEFENDANT: *No.*

8 THE COURT: *Okay. And, again, you want to stop the trial and you just want*
9 *to accept responsibility. Is that correct?*

10 THE DEFENDANT: *Yeah.*

11 THE COURT: *Well, why did you decide to do it today?*

12 THE DEFENDANT: *I just -- I slept on it. After seeing the victims yesterday*
13 *and then hearing what -- hearing from the victim.*

14 THE COURT: *So, after hearing the victims' testimony you just -- you'd*
15 *heard enough?*

16 THE DEFENDANT: *Yeah.*

17 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 22-23 (emphasis
18 added). Regardless, mental health issues do not provide automatic mitigation at sentencing. In
19 Ford v. State, the Nevada Supreme Court affirmed the murder convictions and death sentence
20 for a defendant who drove her car onto a crowded sidewalk in downtown Reno. 102 Nev. 126,
21 127–28, 717 P.2d 27, 28 (1986). Despite her known significant mental health and competency
22 issues, the Court held that the defendant's mental health issues did not diminish the imposed
23 sentence. Id. at 137, 717 P.2d at 35. The facts of this case sufficiently outweigh any mitigating
24 effect and the sentence would have been the same. Thus, not only did Petitioner enter his plea
25 knowingly and voluntarily, counsel was not ineffective. Therefore, Petitioner's claims are
26 denied.

27 **F. Ground 6: Petitioner was not Improperly Adjudicated as a Habitual Offender**

28 Petitioner argues that he was improperly adjudicated a habitual offender because the
State argued that Petitioner had six (6) felonies instead of the four (4) felonies the State listed
in its Notice of Intent to Seek Habitual Criminal Treatment filed October 18, 2016, the State
failed to comply with the habitual criminal statute, and the amendment to the habitual criminal
statute effective July 1, 2020 should apply to Petitioner. Petition at 45-47. However,
Petitioner's claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Despite

1 being canvassed that the State could intend to argue habitual criminal treatment, Petitioner was
2 never adjudicated a habitual criminal. Therefore, Petitioner's claim is denied.

3 **G. Ground 7: Petitioner's Claim He was Not Informed of His Restitution Obligation**

4 Petitioner claims that his guilty plea should be withdrawn because the Court failed to
5 inform Petitioner of his restitution obligation during his plea canvass. Petition at 47-48. As a
6 preliminary matter, this is a substantive claim that is waived. Evans, 117 Nev. at 646-47, 29
7 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,
8 Thomas, 115 Nev. at 148, 979 P.2d at 222. Petitioner failed to challenge the amount of
9 restitution ordered at his sentencing hearing. District courts "are cautioned to rely on reliable
10 and accurate evidence in setting restitution." Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d
11 133, 135 (1999). While defendants are not entitled to a full evidentiary hearing when
12 challenging the amount of restitution ordered; they are entitled to present their own evidence
13 in support of their challenge. Id. Moreover, "[a] defendant's obligation to pay restitution to the
14 victim may not, of course, be reduced because a victim is reimbursed by insurance proceeds."
15 Id. at 12, 974 P.2d at 135. Petitioner had the opportunity challenge the restitution calculation
16 at sentencing. His failure to do so waives his ability to challenge it on a post-conviction habeas
17 matter.

18 Regardless, even though the Court did not specifically canvass Petitioner regarding
19 restitution, the totality of the circumstances demonstrates that Petitioner understood the
20 consequences of his guilty plea. McConnell v. State, 125 Nev. 243, 251, 212 P.3d 307, 313
21 (2009), as corrected (July 24, 2009) (concluding that although a district court did not inform a
22 defendant that restitution was a consequence of his plea, the totality of the circumstances
23 demonstrated the defendant understood the consequences of his plea). Indeed, during its
24 canvass, the Court ensured that Petitioner understood the consequences of his plea and the
25 sentencing decision was strictly up to the Court prior to accepting it:

26 THE COURT: You had a chance to discuss all this with your lawyer and all
27 the consequences?

28 THE DEFENDANT: Yeah.

[...]

1 THE COURT: And you understand that sentencing is completely within the
2 discretion of the Court, that no one can make you any promises regarding
3 what will happen at the time of sentencing. Do you understand that?

4 THE DEFENDANT: Yeah.

5 Recorder's Transcript of Hearing – Jury Trial Day 3, filed July 12, 2019, at 12, 19. Thus,
6 because Petitioner acknowledged he understood the consequences of his plea and the
7 sentencing decision, including the restitution imposed, was ultimately in the Court's
8 discretion, any error would have been harmless. Therefore, Petitioner's claim is denied.

9 **H. Ground 8: The Court, Trial Counsel, and the State Did Not Have a Conflict of
10 Interest**

11 Petitioner argues that because he filed a civil action against the Court, counsel Gruber,
12 and the assigned prosecutor, such individuals had a conflict of interest during the pendency of
13 Petitioner's case. Petition at 48-49.

14 As an initial matter, Petitioner's claim is waived because it is substantive. NRS
15 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d
16 at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222.
17 Additionally, it is waived because it is an allegation that his rights were deprived prior to
18 entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070,
19 n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164.

20 Additionally, Petitioner's claim is a bare and naked allegation that is suitable only for
21 summary denial. Indeed, Petitioner has provided no case law to support his claim that because
22 there is a civil suit pending there is an automatic conflict of interest or bias. Hargrove, 100
23 Nev. at 502, 686 P.2d at 225. Regardless, his claim is meritless.

24 NRS 1.235 mandates the procedure to be followed when seeking judicial recusal:

- 25 1. Any party to an action or proceeding pending in any court other
26 than the Supreme Court or the Court of Appeals, who seeks to
27 disqualify a judge for actual or implied bias or prejudice must file
28 an affidavit specifying the facts upon which the disqualification is
sought. The affidavit of a party represented by an attorney must be
accompanied by a certificate of the attorney of record that the
affidavit is filed in good faith and not interposed for delay.

[. . .]

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified.

[. . .]

5. The judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) Immediately transfer the case to another department of the court . . . or

(b) File a written answer with the clerk of the court . . . admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification.

Further, while Towbin Dodge, L.L.C. v. Eighth Judicial Dist., 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005), contemplated a route to disqualification via the Nevada Code of Judicial Conduct, it set procedural requirements that must be met to make such a motion:

[A] party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information. The motion must set forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality, and the challenged judge may contradict the motion's allegations. . . . [T]he motion must be referred to another judge.

Importantly, a party must comply with NRS 1.235 unless the “grounds for a judge’s disqualification are discovered after the time limits in NRS 1.235(1) have passed.” Id. at 260, 112 P.3d at 1069; accord Lioce v. Cohen, 124 Nev. 1, 25 n.44, 174 P.3d 970, 985 n.44 (2008) (“Lioce argues that, should we decide a new trial is warranted, his case must be remanded to a different district court judge because Judge Bell was biased toward him. We conclude that this argument is without merit, and we also direct Lioce to NRS 1.235(1).”).

Considering the standards established by the Nevada Supreme Court, the Nevada Legislature, and the Code of Judicial Conduct, disqualification was unwarranted. “A judge has an obligation not to recuse himself where there is no occasion to do so. . . . A judge's decision not to recuse himself voluntarily is given ‘substantial weight’ and will be affirmed absent an abuse of discretion.” Kirksey v. State, 112 Nev. 980, 1005-06, 923 P.2d 1102, 1118 (1996) (citations omitted). A judge must “‘preside to the conclusion of all proceedings, in the absence

1 of some statute, rule of court, ethical standard, or other compelling reason to the contrary.”
2 City of Las Vegas v. Eighth Judicial Dist. Ct., 116 Nev. 640, 643, 5 P.3d 1059, 1061 (2000)
3 (quoting Ham v. Dist. Ct., 93 Nev. 409, 415, 566 P.2d 420, 424 (1977)); accord CJC 2.7 (“A
4 judge shall hear and decide all matters assigned to the judge except when disqualification is
5 required by Rule 2.11 or other law.”).

6 It was Petitioner’s burden to establish that the Court “displays ‘a deep-seated favoritism
7 or antagonism that would make fair judgment impossible[,]” Walker v. State, 113 Nev. 853,
8 864, 944 P.2d 762, 769 (1997) (quoting Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct.
9 1147, 1157 (1994)), cert. denied, 525 U.S. 950, 119 S. Ct. 377 (1998), and must set “forth
10 facts and reasons sufficient to cause a reasonable person to question the judge’s impartiality.”
11 Towbin Dodge, 121 Nev. at 260, 112 P.3d at 1069. A reviewing court should look for actual
12 manifestations of bias on the part of the judicial officer. A Minor v. State, 86 Nev. 691, 695,
13 476 P.2d 11, 12 (1970). “Disqualification must be based on facts, rather than mere
14 speculation.” Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (citing PETA
15 v. Bobby Berosini, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995)).

16 “[R]ulings and actions of a judge during the course of official judicial proceedings do
17 not establish legally cognizable grounds for disqualification.” In re Petition to Recall
18 Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). To do otherwise “would nullify
19 the court’s authority and permit manipulation of justice, as well as the court.” Id.

20 In this case, it is clear that Petitioner did not follow the mandated procedures for judicial
21 recusal. Moreover, Petitioner has failed to demonstrate how the Court, counsel Guber, or the
22 State acted in a manner that demonstrated a conflict of interest. Hargrove, 100 Nev. at 502,
23 686 P.2d at 225; Jefferson v. State, 133 Nev. 874, 879, 410 P.3d 1000, 1004 (Nev. App. 2017)
24 (internal citations omitted) (“a criminal defendant’s decision to file such an action against
25 appointed counsel does not require disqualification unless the circumstances demonstrate an
26 actual conflict of interest.”). Also, Petitioner has not demonstrated that had another Court,
27 other counsel, or another district attorney handled his case he would not have pled guilty and
28 decided to proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev.

1 at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's
2 claim is denied.

3 **II. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

4 NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

5 1. The judge or justice, upon review of the return, answer and all supporting
6 documents which are filed, shall determine whether an evidentiary hearing is
7 required. A petitioner must not be discharged or committed to the custody of a
8 person other than the respondent *unless an evidentiary hearing is held*.

9 2. If the judge or justice determines that the petitioner is not entitled to relief
10 and an evidentiary hearing is not required, he shall dismiss the petition without
11 a hearing.

12 3. If the judge or justice determines that an evidentiary hearing is required, he
13 shall grant the writ and shall set a date for the hearing.

14 The Nevada Supreme Court has held that if a petition can be resolved without
15 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
16 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
17 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
18 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
19 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
20 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction
21 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
22 record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it
23 existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
24 improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
25 Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court
26 considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as
27 complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

28 Further, the United States Supreme Court has held that an evidentiary hearing is not
required simply because counsel's actions are challenged as being unreasonable strategic
decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge

1 post hoc rationalization for counsel's decision making that contradicts the available evidence
2 of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis
3 for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain
4 issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing
5 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
6 *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466
7 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

8 Petitioner's Petition does not require an evidentiary hearing. An expansion of the record
9 is unnecessary because Petitioner has failed to assert any meritorious claims and the Petition
10 can be disposed of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605;
11 Mann, 118 Nev. at 356, 46 P.3d at 1231.

12 **ORDER**

13 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
14 and Request for an Evidentiary Hearing shall be, and are, hereby denied.

15 DATED this ____ day of April, 2021.

Dated this 8th day of April, 2021

16 

17 _____
DISTRICT JUDGE

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

A7A 653 C606 A19E
Michelle Leavitt
District Court Judge

20
21 BY /s/ ALEXANDER CHEN

22 ALEXANDER CHEN
23 Chief Deputy District Attorney
Nevada Bar #010539

1 CERTIFICATE OF MAILING

2 I hereby certify that service of the above and foregoing was made this ____ day of
3 April, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

4 TONEY WHITE, BAC #1214172
5 HIGH DESERT STATE PRISON
6 22010 COLD CREEK ROAD
7 P.O. BOX 650
8 INDIAN SPRINGS, NEVADA 89070

9 BY /s/ L.M.
10 Secretary for the District Attorney's Office
11
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28 16FH0191B/AC/bg/lm/GU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Toney White, Plaintiff(s)

CASE NO: A-20-824261-W

7 vs.

DEPT. NO. Department 12

8 Calvin Johnson, Warden,
9 Defendant(s)

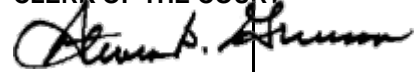
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 4/8/2021

16 Dept 12 Law Clerk

dept12lc@clarkcountycourts.us



1 NEFF

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

4 TONEY WHITE,

5
6 Petitioner,

Case No: A-20-824261-W

Dept No: XII

7 vs.

8 CALVIN JOHNSON, WARDEN,

9 Respondent,

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

10
11 **PLEASE TAKE NOTICE** that on April 8, 2021, the court entered a decision or order in this matter, a
true and correct copy of which is attached to this notice.

12 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
13 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is
14 mailed to you. This notice was mailed on April 12, 2021.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17
18
19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 12 day of April 2021, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

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

23 ☒ The United States mail addressed as follows:

24 Toney White # 1214172
P.O. Box 650
25 Indain Springs, NV 89070

26
27 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Petitioner

**DISTRICT COURT
CLARK COUNTY, NEVADA**

TONEY A. WHITE,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-824261-W

C-16-313216-2

DEPT NO: XII

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

DATE OF HEARING: MARCH 25, 2021
TIME OF HEARING: 12:30 PM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 25th day of March, 2021, the Petitioner not being present, in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD B. ZADROWSKI, 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 March 9, 2016, ANTHONY WHITE (hereinafter “Petitioner”) was charged by way
4 of Grand Jury Indictment with the following charges: CONSPIRACY TO COMMIT
5 ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147), BURGLARY
6 WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060 –
7 NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON
8 (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT
9 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
10 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON
11 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 –
12 NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS
13 199.430 – NOC 53013).

14 On October 19, 2017, Petitioner, pursuant to Guilty Plea Agreement (“GPA”), pled
15 guilty to: COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS
16 200.380, NRS 199.480 – NOC 50147) and COUNT 2 – ATTEMPT ROBBERY WITH USE
17 OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC
18 50145). The parties stipulated to a sentence of nine (9) to twenty-five (25) years in the Nevada
19 Department of Corrections (“NDOC”) and the State agreed not to file additional charges
20 regarding the incident.

21 On January 9, 2018, January 12, 2018, and September 5, 2018, respectively Petitioner
22 filed Motions to Withdraw Guilty Plea. The State did not oppose these motions. The Court
23 granted Petitioner’s motion, reinstated his original charges in the March 9, 2016 Indictment,
24 and set the matter for a February 19, 2019 Jury Trial.

25 On February 19, 2019, Petitioner’s Jury Trial commenced. On February 21, 2019,
26 Petitioner pled guilty to the following charges in the Amended Indictment: CONSPIRACY
27 TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147),
28 BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony –

1 NRS 205.060 – NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY
2 WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT
3 ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380,
4 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON
5 RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 –
6 NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS
7 199.430 – NOC 53013).

8 On March 19, 2019, the Court sentenced Petitioner to an aggregate term of life with a
9 minimum parole eligibility after twenty (20) years. The Judgment of Conviction was filed on
10 March 27, 2019. On March 28, 2019, Petitioner filed a Notice of Appeal.

11 On July 26, 2019, Petitioner filed a Motion to Withdraw Plea. On August 29, 2019, the
12 Court ordered the State to respond by October 10, 2019. On August 30, 2019, Petitioner filed
13 a Motion for Certification and Request for Remand. On September 24, 2019, Petitioner's
14 counsel requested a continuance for the State to respond to his Motion for Certification and
15 Request for Remand, but the Court stated that because the case was on Appeal, the Court had
16 no jurisdiction. Accordingly, the Court denied the matter as moot. The State filed its
17 Opposition to Petitioner's Motion to Withdraw Plea on October 7, 2019.

18 On June 11, 2020, Petitioner's counsel filed a Motion to Withdraw as Counsel. On May
19 11, 2020, the Nevada Supreme Court affirmed Defendant's Judgment of Conviction with
20 remittitur issuing on June 5, 2020.

21 On June 19, 2020, Petitioner filed a Motion to Dismiss Counsel. On June 23, 2020, the
22 Court granted Petitioner's counsel's Motion to Withdraw as Counsel.

23 On July 26, 2020, Petitioner filed a Motion to Obtain a Copy of a Sealed Record
24 (Presentence Investigation Report – NRS 176.156) on an Order Shortening Time. On July 13,
25 2020, Petitioner filed a Motion for Order for Additional Court Records. On July 21, 2020, the
26 Court stated that Petitioner indicated that his family could pay for his records, so the Court
27 ordered the transcripts requested and that Defendant's PSI would be mailed to him. On August
28 11, 2020, the Court denied Defendant's Motion for Order for Additional Court Records

1 because he had now requested transcripts at the State's expense and Defendant had failed to
2 meet his burden.

3 On August 19, 2020, Defendant filed the instant Renewed Motion for Appointment of
4 PCR Counsel. The State filed its Opposition on September 2, 2020. On September 10, 2020,
5 the Court denied Defendant's Motion without prejudice because there was no Petition for Writ
6 of Habeas Corpus pending and Defendant had failed to meet his burden.

7 On September 14, 2020, Defendant filed a Motion for Credit for Additional Records.
8 The State filed its Opposition on September 23, 2020. On October 6, 2020, the Court denied
9 Petitioner's Motion.

10 On November 5, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
11 (Post-Conviction) (hereinafter "Petition"). Petitioner also filed a Motion to File Under Seal
12 Exhibits 1 Thru 4, Appendix Volume I, and Appendix Volume II. On January 7, 2021,
13 Petitioner filed Amended Petitioner's Motion for Filing Exhibits 1-4 Under Seal. The State
14 filed its Response on March 9, 2021. On March 25, 2021, the Court denied Petitioner's Petition
15 and found as follows.

16 FACTS

17 Petitioner's Supplemental Presentence Investigation Report (hereinafter "PSI") stated
18 the facts as follows:

19 On January 20, 2016, Henderson Police dispatch received a call for service
20 at a local Henderson apartment community in reference to a loud verbal
21 dispute taking place in an apartment and a possible home invasion. Upon the
22 officer's arrival, he observed a male standing behind a Jeep Cherokee. The
23 officer briefly spoke with the male, identified as one of the co-defendants,
24 Kevin Wong, as the officer approached the door. Screaming was heard from
25 the apartment and a male victim (**Victim 2**) was found lying on the floor
26 handcuffed and bleeding. The officer freed the handcuffs from the victim and
also found a female victim (**Victim 1**) and secured the apartment. At this
time, Mr. Wong entered his Jeep and fled the scene eventually being stopped
by patrol units for several driving infractions.

27 **Victim 2** was transported to the hospital with significant head injuries to
28 include lacerations and loss of teeth. He also suffered from numerous strikes
from a baton to the head and torso area. Photographs were taken of his

1 injuries. A detective arrived at the scene and interviewed **Victim 1**. She stated
2 she was sitting on the couch and heard someone knocking at the door. She
3 answered and there was a female, identified as codefendant, Amanda Sexton
4 and two male suspects, identified as co-defendants Marland Dean, and Toney
5 White who forcibly opened the door and entered the apartment. Firearms
6 were drawn and aimed at both of the victims. Ms. Sexton placed **Victim 1** in
7 handcuffs and Mr. White and Mr. Dean began to yell at **Victim 2** stating,
8 “We have a search warrant, US Marshals; get on the ground.” Mr. White and
9 Mr. Dean began beating **Victim 2** with metal batons and struck him in the
10 head and face.

11 A detective responded to a traffic stop location involving Mr. Wong. Mr.
12 Wong gave the detective consent to search his vehicle. The detective
13 observed a purse on the passenger seat and located a Nevada Identification
14 card with Amanda Sexton’s name on it. Mr. White, Mr. Dean, and Ms.
15 Sexton met up with Mr. Wong and forced their way into the victim’s
16 apartment. Mr. Wong stated he observed officers arriving so he left the
17 complex when he saw Mr. White, Mr. Dean, and Ms. Sexton flee the
18 residence.

19 All four subjects were arrested, transported to the Henderson Detention
20 Center and booked accordingly.

21 PSI, filed Mar. 11, 2019, at 8-9.

22 ANALYSIS

23 **I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD**

24 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
25 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
26 defense.” The United States Supreme Court has long recognized that “the right to counsel is
27 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
28 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
(1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865
P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
representation fell below an objective standard of reasonableness, and second, that but for

1 counsel's errors, there is a reasonable probability that the result of the proceedings would have
2 been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
3 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
4 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
5 inquiry in the same order or even to address both components of the inquiry if the defendant
6 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

7 The court begins with the presumption of effectiveness and then must determine
8 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
9 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
10 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
11 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
12 537 P.2d 473, 474 (1975).

13 Counsel cannot be ineffective for failing to make futile objections or arguments. See
14 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
15 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
16 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
17 (2002).

18 Based on the above law, the role of a court in considering allegations of ineffective
19 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
20 whether, under the particular facts and circumstances of the case, trial counsel failed to render
21 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
22 (1978). This analysis does not mean that the court should “second guess reasoned choices
23 between trial tactics nor does it mean that defense counsel, to protect himself against
24 allegations of inadequacy, must make every conceivable motion no matter how remote the
25 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
26 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
27 cannot create one and may disserve the interests of his client by attempting a useless charade.”
28 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

1 “There are countless ways to provide effective assistance in any given case. Even the
2 best criminal defense attorneys would not defend a particular client in the same way.”
3 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
4 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
5 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
6 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
7 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
8 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

9 Even if a defendant can demonstrate that his counsel’s representation fell below an
10 objective standard of reasonableness, he must still demonstrate prejudice and show a
11 reasonable probability that, but for counsel’s errors, the result of the trial would have been
12 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
13 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
14 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
15 694, 104 S. Ct. at 2064-65, 2068).

16 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
17 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
18 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
19 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
20 be supported with specific factual allegations, which if true, would entitle the petitioner to
21 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
22 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
23 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
24 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
25 petition to be dismissed.” (emphasis added).

26 Additionally, there is a strong presumption that appellate counsel’s performance was
27 reasonable and fell within “the wide range of reasonable professional assistance.” See United
28 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104

1 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-
2 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114
3 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted
4 issue would have had a reasonable probability of success on appeal. Id.

5 The professional diligence and competence required on appeal involves "winnowing
6 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a
7 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In
8 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .
9 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313.
10 "For judges to second-guess reasonable professional judgments and impose on appointed
11 counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very
12 goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

13 However, to establish a claim of ineffective assistance of counsel for advice regarding
14 a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon,
15 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant
16 must show that there is a "reasonable probability that, but for counsel's errors, he would not
17 have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52,
18 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988,
19 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).
20 "A reasonable probability is a probability sufficient to undermine confidence in the outcome."
21 McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466
22 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068). Ultimately, while it is counsel's duty to
23 candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a
24 plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

25 //

26 //

27 //

28 //

A. Ground 1: The District Court Did Not Err When It Did Not Allow Petitioner to Represent Himself and Appellate Counsel was Not Ineffective for Failing to Raise the Issue in a Particular Way

Under his first ground, Petitioner argues that the Court erred in not permitting him to represent himself at trial as well as refusing to canvas Petitioner on March 21, 2017 and appellate counsel was ineffective for failing to raise that issue as a claim in his direct appeal with the complete record. Petition at 8-15. Specifically, he claims that appellate counsel failed to order transcripts for hearings on April 18, 2017, March 27, 2017, and May 3, 2017 to provide the appellate court with the complete record and properly frame his claim to include the Court's denial of Petitioner's request on March 27, 2017 and April 18, 2017. Petition at 8, 12. He asserts that appellate counsel should have "weeded out" the February 6, 2018 denial of his request that was raised on direct appeal and replaced it with a Faretta claim stemming from March 27, 2017 and April 18, 2017. Petition at 14-15. Additionally, in a footnote, Petitioner claims that the district court abused its discretion by failing, prior to trial, to address his *pro per* filings on May 18, 2016, June 15, 2016, December 6, 2016, December 28, 2016, March 27, 2017, May 3, 2017, December 14, 2017, January 9, 2018, January 12, 2018, and March 28, 2019. Petition at 9.

Petitioner correctly concedes that appellate counsel raised his Faretta claim on direct appeal and is thus 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 v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (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 McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. NEV.

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1 CONST. Art. VI § 6. Here, the Nevada Court of Appeals concluded such claim was meritless
2 and stated:

3 A district court may properly deny a request for self-representation if the
4 request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213
5 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22
6 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion
7 requesting to withdraw his guilty plea and for either the appointment of
8 substitute counsel or permission to represent himself. The district court held
9 a hearing concerning White's motion, discussed the motion with White, and
10 clarified White's desire to move for the withdrawal of his guilty plea.
11 Following the discussion, the district court decided to appoint substitute
12 counsel. White acknowledged he understood the district court's decision to
13 appoint substitute counsel and agreed that the district court had addressed his
concerns. A review of White's motion and the transcript of the pertinent
hearing demonstrates he did not make an unequivocal request to represent
himself and the district court appropriately addressed White's motion and
concerns without conducting a *Faretta* canvass. Therefore, White fails to
demonstrate he is entitled to relief.

14 Order of Affirmance, Docket No. 78483, filed May 11, 2020, at 1-2. Thus, Petitioner's claim
15 is barred by the law of the case doctrine.

16 To the extent Petitioner now claims that appellate counsel was ineffective because he
17 failed to frame the issue regarding the March 27, 2018 request and April 18, 2017 denial of
18 his request and failed to order such transcripts, his claim is still meritless as he cannot
19 demonstrate that such claim would have been meritorious as he was making the same request:
20 to represent himself. Accordingly, Petitioner cannot demonstrate that framing his claim in this
21 way would have been successful especially in light of the Nevada Court of Appeals rejecting
22 his claim.

23 Generally, a criminal defendant has the right to representation by counsel under the
24 Sixth Amendment of the United States Constitution and the Nevada Constitution. See U.S.
25 CONST. AMEND. VI; NEV. CONST. ART. 1, § 8, cl. 1. However, a defendant can waive this right
26 and, where he chooses to represent himself, he must satisfy the court that his waiver of the
27 right to counsel is knowing and voluntary. *Faretta*, 422 U.S. at 818-19, 835, 95 S. Ct. at 2525;
28 *Vanisi v. State*, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001).

1 Both the United States Supreme Court and this Court have recognized that “the right
2 to defend is given directly to the accused; for it is he who suffers the consequences if the
3 defense fails.” Johnson v. State, 117 Nev. 153, 162, 17 P.3d 1008 (2001) (quoting Faretta,
4 422 U.S. at 819-20, 95 S. Ct. at 2533). The Court further emphasized that “[i]t is the defendant
5 . . . who must be free personally to decide whether in his particular case counsel is to his
6 advantage. And although he may conduct his own defense ultimately to his own detriment, his
7 choice must be honored out of that respect for the individual which is the lifeblood of the
8 law.” Id. Indeed, once a defendant is found competent to stand trial, so long as he freely,
9 intelligently, and knowingly waives his right to counsel a district court has little power to
10 prevent the defendant from representing himself: “[I]n the absence of some indication that
11 Johnson's attempt to waive counsel was not knowing, intelligent and voluntary, or that some
12 other factor warranted denial of the right to self-representation under this court's holding in
13 Tanksley, the district court could not properly preclude Johnson from waiving his right to
14 counsel.” Id. at 164, 17 P.3d 1008.

15 While this Court “indulge[s] in every reasonable presumption against waiver of the
16 right to counsel,” it gives deference to the lower court’s decision to grant a defendant’s waiver
17 of his right to counsel. Hooks v. State, 124 Nev. 48, 55, 57, 176 P.3d 1081, 1085-86 (2008).
18 “Through face-to-face interaction in the courtroom, the trial judges are much more competent
19 to judge a defendant’s understanding” of his rights than the appellate court since a “cold record
20 is a poor substitute for demeanor observation.” Graves v. State, 112 Nev. 118, 124, 912 P.2d
21 234, 238 (1996). Indeed, “[e]ven the omission of a canvass is not reversible error if it appears
22 from the whole record that the defendant knew his rights and insisted upon representing
23 himself.” Hooks, 124 Nev. at 55, 176 P.3d at 1085 (quotation marks and citation omitted).

24 In assessing a waiver, the inquiry is whether the defendant can knowingly and
25 voluntarily waive his right to counsel, not whether the defendant can competently represent
26 himself. Tanksley v. State, 113 Nev. 997, 1000-01, 946 P.2d 148, 150 (1997). A defendant’s
27 technical knowledge is not relevant to the inquiry and a request for self-representation may
28 not be denied solely because the defendant lacks legal skills. Id. However, a request *may* be

1 denied if the request is equivocal, the defendant abuses his right by disrupting the judicial
2 process, or the defendant is incompetent to waive his right to counsel. Id.

3 Moreover, Petitioner's allegation that the district court abused its discretion by failing,
4 prior to trial, to address his *pro per* filings on May 18, 2016, June 15, 2016, December 6, 2016,
5 December 28, 2016, March 27, 2017, May 3, 2017, December 14, 2017, January 9, 2018,
6 January 12, 2018, and March 28, 2019 is waived, belied by the record, and meritless. Petition
7 at 9. As a preliminary matter, this is a substantive claim that is waived. NRS 34.810(1) reads:

8 The court shall dismiss a petition if the court determines that:

9 (a) The petitioner's conviction was upon a plea of guilty or guilty
10 but mentally ill and the petition is not based upon an allegation
11 that the plea was involuntarily or unknowingly or that the plea was
12 entered without effective assistance of counsel.

13 (b) The petitioner's conviction was the result of a trial and the
14 grounds for the petition could have been:

15 [...]

16 (2) Raised in a direct appeal or a prior petition for a writ of habeas
17 corpus or postconviction relief.

18 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims
19 of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction
20 proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on
21 direct appeal, or they will be *considered waived in subsequent proceedings.*" Franklin v. State,
22 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other
23 grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a
24 habeas petition if it presents claims that either were or could have been presented in an earlier
25 proceeding, unless the court finds both cause for failing to present the claims earlier or for
26 raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-
27 47, 29 P.3d 498, 523 (2001). In other words, substantive claims are beyond the scope of habeas
28 and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646-47, 29 P.3d at 523 (2001); Franklin,
110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148,
979 P.2d at 222.

Moreover, Petitioner's claim is waived because a defendant cannot enter a guilty plea
then later raise independent claims alleging a deprivation of his rights before entry of his plea.

1 State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting
2 Tollett v. Henderson, 411 U.S. 258, 267 (1973). Generally, the entry of a guilty plea waives
3 any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91
4 Nev. 469, 538 P.2d 164 (1975). “[A] guilty plea represents a break in the chain of events
5 which has preceded it in the criminal process [...] [A defendant] may not thereafter raise
6 independent claims relating to the deprivation of constitutional rights that occurred prior to the
7 entry of the guilty plea.” Id. (quoting Tollett, 411 U.S. at 267).

8 Additionally, Petitioner’s claim is largely belied by the record. Hargrove, 100 Nev. at
9 502, 686 P.2d at 225. Indeed, the record indicates that on June 9, 2016, the Court denied
10 Petitioner’s Application to Recuse Counsel and for Appointment for Alternative Counsel:
11 Memorandum of Points and Authorities filed on May 18, 2016. On July 7, 2016, the Court
12 addressed Petitioner’s additional Application to Recuse Counsel and for Appointment of
13 Alternative Counsel: Memorandum of Points and Authorities filed on June 15, 2016 and
14 ordered it off calendar as having been previously denied. On January 19, 2017, Petitioner
15 withdrew his Motion to Recuse Counsel And Proceed In Pro Pria Personam In Light Of
16 Counsels Demonstrated Ineffectiveness And Case Neglect And In Light Of Existing Conflict
17 filed on December 28, 2016 in open court. On April 18, 2017, the Court denied Petitioner’s
18 Motion for Trial Extension for 180 Days; Motion to Recuse Counsel and Application to
19 Proceed in Propria Personam filed on March 27, 2017. Petitioner alleges the Court failed to
20 address a December 14, 2017, but the record does not show that Petitioner filed a pleading that
21 day. On February 6, 2018, the Court addressed his Motions for Withdrawal of Guilty Plea and
22 for Appointment of New Counsel or Alternatively to Proceed in Pro Per filed on January 9,
23 2018 and January 12, 2018. The only filing by Petitioner on March 28, 2019 was a Notice of
24 Appeal to the Nevada Supreme Court, which was not a matter this Court could address.

25 The only two (2) filings the Court did not address prior to Petitioner’s trial was his
26 pretrial petition for writ of habeas corpus filed on December 6, 2016 and his petition for writ
27 of habeas corpus as well as his Objection to Court’s Denial of Motion filed May 3, 2017.
28 However, as discussed *supra*, not only is this a substantive claim that is waived, but also

1 Petitioner cannot demonstrate prejudice because these pleadings were meritless. Indeed, in his
2 December 6, 2016 Petition, Petitioner's sole claim was that he should be released from custody
3 because the State violated Marcum. As discussed *infra* in Section F, Petitioner was given
4 "reasonable notice." Hargrove, 100 Nev. at 502, 686 P.2d at 225. Thus, even if the Court had
5 addressed this petition, it would have failed. Additionally, Petitioner has not and cannot
6 demonstrate that he was prejudiced by the Court failing to address his Objection to Court's
7 Denial of Motion that he filed on May 3, 2017. Indeed, such document does not amount to a
8 cognizable motion as Petitioner claimed in such document he was merely preserving the issue
9 for appellate review. To the extent Petitioner was seeking rehearing by filing such document,
10 he cannot demonstrate that the Court would have granted rehearing and more importantly
11 whether that would have caused him not to plead guilty and proceed with trial. Hill, 474 U.S.
12 at 59, 106 S.Ct. at 370; *see also* Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
13 at 190-91, 87 P.3d at 537. Likewise, Petitioner's petition for writ of habeas corpus filed on
14 May 3, 2017, is meritless as discussed *infra* in Section B, Petitioner's Fourth Amendment
15 complaints are meritless. Thus, Petitioner cannot demonstrate good cause or prejudice and his
16 claims are denied.

17 **B. Ground 2: Petitioner's Fourth Amendment Violation Claim**

18 Petitioner claims his fourth amendment rights were violated for the following reasons:
19 (1) Wong, the alleged unauthorized driver of Petitioner's vehicle, did not have standing to
20 consent to the search of Petitioner's vehicle as well as Co-Defendant Sexton's purse and thus
21 the items found in such search were fruit of the poisonous tree (Petition at 17-21); (2) law
22 enforcement committed a warrantless "surreptitious surveillance" of one of Petitioner's
23 residences (Petition at 21-22); and (3) the affidavits attached to the search warrants for
24 Petitioner's vehicle and apartment contained "misrepresentations, distortions, omissions,
25 inaccuracies, and/or falsities" (Petition at 22-26).

26 As a preliminary matter Petitioner's claims are waived in two (2) ways. First,
27 Petitioner's claims are substantive and therefore waived. NRS 34.724(2)(a); Evans, 117 Nev.
28 at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other

1 grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222. Second, Petitioner's claims are waived
2 because he is alleging a deprivation of rights that would have occurred prior to entry of his
3 guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See Webb,
4 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claims are meritless and are thus
5 denied.

6 **1. Alleged Warrantless Search**

7 Petitioner's claim that his rights were violated because Wong consented to the search
8 of Petitioner's vehicle during a traffic stop is not only waived, but it is also barred by the
9 doctrine of res judicata. Re-litigation of this issue is precluded by the doctrine of res judicata.
10 Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing
11 Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). "The doctrine
12 is intended to prevent multiple litigation causing vexation and expense to the parties and
13 wasted judicial resources..." Id.; see also Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005)
14 (recognizing the doctrine's availability in the criminal context); York v. State, 342 S.W. 3d
15 528, 553 (Tex. Crim. App. 2011); Bell v. City of Boise, 993 F.Supp.2d 1237 (D. Idaho 2014)
16 (finding res judicata applies in both civil and criminal contexts).

17 Here, Petitioner raised this issue in his Motion for Trial Extension for 180 Days; Motion
18 to Recuse Counsel and Application for Proceed in Properia Personam filed on March 27, 2017.
19 This Court denied the Motion and found that Petitioner's claim regarding Wong was meritless
20 because Petitioner did not have standing to raise another individual's Fourth Amendment
21 Right. Defendant White's Pro Per Motion for Trial Extension for 180 Days; Motion to Recuse
22 Counsel and Application to Proceed in Properia Personam Hearing Minutes, Apr. 18, 2017.
23 Regardless, the claim is meritless as Wong, the driver of the vehicle, could properly give
24 consent to the search. United States v. Eldridge, 984 F.2d 943, 948 (8th Cir. 1993); See United
25 States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). Therefore,
26 Petitioner's claim is denied.

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1 **2. Pre-arrest Surreptitious Surveillance of Petitioner**

2 In addition to being waived, Petitioner’s argument that his rights were violated because
3 law enforcement conducted a warrantless “surreptitious surveillance” of Petitioner’s residence
4 is meritless. Petitioner cites to one (1) of the law enforcement incident reports which states
5 that the officers surveilled an apartment on foot, from their vehicle, and searched the apartment
6 with consent. Petitioner has not and cannot cite any legal authority that states that surveilling
7 from a lawful position is a violation of an individual’s fourth amendment right. Regardless,
8 Petitioner has not alleged that he would have proceeded with trial and not pled guilty.
9 Therefore, Petitioner’s claim is denied.

10 **3. Oath or Affirmation**

11 Also in addition to being waived, Petitioner’s complaint that his Fourth Amendment
12 right was violated because some of the contents of the warrant affidavits were false is meritless.

13 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const.
14 Amend. IV. The Fourth Amendment states that “no warrants shall issue, but upon probable
15 cause, supported by oath or affirmation, and particularly describing the place to be searched,
16 and the persons or things to be seized.” U.S. Const. Amend. IV; Draper v. United States, 358
17 U.S. 307, 79 S. Ct. 329 (1959). “‘Probable cause’ requires that law enforcement officials have
18 trustworthy facts and circumstances which would cause a person of reasonable caution to
19 believe that it is more likely than not that the specific items to be searched for are: seizable
20 and will be found in the place to be searched.” Keesee v. State, 110 Nev. 997, 1002, 879 P.2d
21 63, 66 (1994).

22 While the information contained in every warrant must be truthful, this “does not mean
23 ‘truthful’ in the sense that every fact recited in the warrant affidavit is necessarily correct, for
24 probable cause may be founded upon hearsay and upon information received from informants,
25 as well as upon information within the affiant's own knowledge that sometimes must be
26 garnered hastily.” Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 2681 (1978). Further,
27 in U.S. v. Rettig, 589 F.2d 418 (9th Cir.1979), the Court held:

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1 Where factual inaccuracy of the affidavit is alleged, a warrant is invalidated
2 only if it is established that the affiant was guilty of deliberate falsehood or
3 reckless disregard for the truth, and if with the affidavit's false material set
4 to one side, the information remaining in the affidavit is inadequate to
5 support probable cause. Id. at 422 (Citing Franks v. Delaware, 438 U.S.
6 154, 98 S. Ct 2674 (1978)).

7 Here, Petitioner complains that nowhere in the dispatch records did it state "home
8 invasion." However, Petitioner has omitted information from other reports indicating that
9 officers received information of forcible entry into the apartment. See e.g., Petitioner's
10 Appendix, Volume 1, at 35, 37, 84. Regardless, Petitioner has not explained the relevance of
11 such information or more importantly whether a difference in such information would have
12 caused him to proceed with trial instead of ultimately pleading guilty. Additionally, Petitioner
13 claims there were misrepresentations of what certain individuals observed or did not observe.
14 Not only has Petitioner failed to explain why he believes such information to be false, but also
15 his assertions are pure speculation as he cannot state what other people witnessed. Moreover,
16 Petitioner alleges additional information that he believes to be false, but he has not
17 demonstrated that even if any of the information was indeed false, a point not conceded, the
18 affiant was guilty of deliberate falsehood or had a reckless disregard for the truth. Franks, 438
19 U.S. at 165, 98 S.Ct. at 2681. Indeed, Petitioner cannot show prejudice or that counsel would
20 have succeeded in suppressing the evidence obtained from the Search Warrant Affidavits. The
21 submitting detective based the information on the statements of first responding patrol officers.
22 There is nothing indicating that he intentionally misrepresented the facts. Furthermore,
23 Petitioner has not indicated that the information in the affidavits was so inadequate that they
24 do not support a finding of probable cause. Id. Therefore, Petitioner's claim is denied.

25 **C. Ground 3: The State Did Not Breach its Duty Under Brady v. Maryland**

26 Petitioner argues that the State breached its duty under Brady v. Maryland for failing to
27 disclose the following: (1) criminal histories of victims and the State's witnesses; (2) the search
28 warrant and return on the victim's apartment; (3) police reports and criminal documents
criminally charging Cliff; (4) body camera footage of Petitioner's arrest. Petition at 26-28.

1 As a preliminary matter, Petitioner's claim is substantive and thus waived. NRS
2 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d
3 at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222.
4 Additionally, the claim is waived because Petitioner is asserting a constitutional claim that
5 occurred prior to entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112
6 P.3d at 1070, n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claim
7 is belied by the record as well as bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

8 It is well-settled that Brady and its progeny require a prosecutor to disclose evidence
9 favorable to the defense when that evidence is material either to guilt or to punishment. See
10 Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); Jimenez v. State, 112 Nev. 610, 618-
11 19, 918 P.2d 687 (1996). “[T]here are three components to a Brady violation: (1) the evidence
12 at issue is favorable to the accused; (2) the evidence was withheld by the state, either
13 intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material.”
14 Mazzan 116 Nev. at 67. “Where the state fails to provide evidence which the defense did not
15 request or requested generally, it is constitutional error if the omitted evidence creates a
16 reasonable doubt which did not otherwise exist. In other words, evidence is material if there is
17 a reasonable probability that the result would have been different if the evidence had been
18 disclosed.” Id. at 66 (internal citations omitted). “In Nevada, after a specific request for
19 evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted
20 evidence would have affected the outcome. Id. (original emphasis), *citing Jimenez v. State*,
21 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996); Roberts v. State, 110 Nev. 1121, 1132, 881
22 P.2d 1, 8 (1994).

23 “The mere possibility that an item of undisclosed information might have helped the
24 defense, or might have affected the outcome of the trial, does not establish ‘materiality’ in the
25 constitutional sense.” United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400
26 (1976). Favorable evidence is material, and constitutional error results, “if there is a reasonable
27 probability that the result of the proceeding would have been different.” Kyles v. Whitley, 514
28 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995), *citing United States v. Bagley*, 473 U.S. 667,

1 682, 105 S.Ct. 3375, 3383 (1985). A reasonable probability is shown when the nondisclosure
2 undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. 1565.

3 Due Process does not require simply the disclosure of “exculpatory” evidence.
4 Evidence must also be disclosed if it provides grounds for the defense to attack the reliability,
5 thoroughness, and good faith of the police investigation or to impeach the credibility of the
6 State’s witnesses. See Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot
7 be regarded as “suppressed” by the government when the defendant has access to the evidence
8 before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337
9 (7th Cir. 1992). “Regardless of whether the evidence was material or even exculpatory, when
10 information is fully available to a defendant at the time of trial and his only reason for not
11 obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the
12 defendant has no Brady claim.” United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

13 “While the [United States] Supreme Court in Brady held that the [g]overnment may not
14 properly conceal exculpatory evidence from a defendant, it does not place any burden upon
15 the [g]overnment to conduct a defendant’s investigation or assist in the presentation of the
16 defense’s case.” United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United
17 States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304,
18 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their
19 possession or to which they have access, they cannot miraculously resuscitate their defense
20 after conviction by invoking Brady. White, 970 F.2d at 337.

21 The Nevada Supreme Court has followed the federal line of cases in holding that Brady
22 does not require the State to disclose evidence which was available to the defendant from other
23 sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495,
24 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls
25 that the defendant made. This Court held that the defendant certainly had knowledge of the
26 calls that he made and through diligent investigation the defendant’s counsel could have
27 obtained the phone records independently. Id. Based on that finding, this Court found that

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1 there was no Brady violation when the State did not provide the phone records to the defense.
2 Id.

3 First, Petitioner's claim that the State failed to provide certain discovery is belied by
4 the record as counsel for the State, an officer of the court, stated that the State provided all
5 discovery to defense counsel. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Defendant White's
6 Pro Per Motion for Trial Extension for 180 Days; Motion to Recuse Counsel and Application
7 to Proceed in Propria Personam Hearing Minutes, Apr. 18, 2017. To the extent Petitioner
8 claims that the State's record was false, he has failed to provide any support for why he
9 believes such record was false. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless,
10 Petitioner has not demonstrated the materiality of the information he now self-servingly claims
11 he did not receive and whether it truly would have resulted in him not pleading guilty.
12 Therefore, his claim is denied.

13 **D. Ground 4: Ineffective Assistance of Counsel Claims**

14 Petitioner argues that counsel was ineffective for: (1) "failing to acquire certain
15 information from Petitioner at their initial interviewing of him including his physical and
16 mental health and his immediate medical needs," including his alleged medical, mental health,
17 and duress claims, (2) failing to hire a medical and mental health expert to evaluate Petitioner
18 prior to trial, (3) failing to consult and discuss with Petitioner the grand jury process including
19 Petitioner's right to testify and failing to challenge the Marcum notice error as well as present
20 evidence and impeach victims at such hearing, (4) failing to communicate all anticipated
21 tactics and strategies, including failing to explore Petitioner's desire to suppress evidence and
22 pursuing a diminished capacity defense, (5) failing to retrieve certain witness affidavits and
23 interview witnesses, including Trina Potluck. Petition at 31, 33-36. Additionally, he complains
24 that appellate counsel was ineffective for failing to comply with ADKT 411. Petition at 32.

25 A defendant who contends his attorney was ineffective because he did not adequately
26 investigate must show how a better investigation would have rendered a more favorable
27 outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

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1 *1. Harvey Gruber Complaints*

2 Petitioner argues that counsel was ineffective for several reasons. As an initial threshold
3 matter, Petitioner cannot demonstrate any error by Mr. Gruber prejudiced Petitioner because
4 Mr. Gruber did not represent Petitioner at trial. Regardless, Petitioner's claims are meritless.

5 First, Petitioner complains that counsel was ineffective for failing to ensure Petitioner
6 was provided a timely Marcum notice and was given an opportunity to testify as well as present
7 evidence at the grand jury hearing. Petition at 36. However, Petitioner cannot claim ineffective
8 assistance of counsel for an action taken by the State. Indeed, Petitioner's claim appears to be
9 a waived substantive claim that he attempted to disguise as an ineffective assistance of counsel
10 claim. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at
11 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at
12 222. Regardless, Petitioner's claim is meritless because it is belied by the record. The record
13 indicates that the State served Marcum Notice on February 23, 2016 and Petitioner's counsel
14 acknowledged notification on February 24, 2016. See State's Exhibit A; Henderson Justice
15 Court Minutes, Feb. 24, 2016. Petitioner's Grand Jury Hearing was held March 25, 2016. One
16 month was "reasonable notice" for Petitioner to decide whether he wished to testify or present
17 evidence at the hearing. NRS 172.241. Moreover, Petitioner has not demonstrated what he
18 would have testified about, what evidence he would have presented if given the opportunity,
19 and whether he ultimately would not have pled guilty and proceeded with his trial. Hill, 474
20 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120
21 Nev. at 190-91, 87 P.3d at 537.

22 Second, Petitioner claims that counsel was ineffective for failing to investigate the basis
23 for Petitioner's pre-trial petition for writ of habeas corpus, which sought a Franks and
24 suppression hearing due to the State allegedly illegally obtaining evidence. Petition at 36. As
25 discussed *supra* in Section B, Petitioner has failed to demonstrate that a Franks suppression
26 hearing would have been successful or that the State illegally obtained evidence. Accordingly,
27 counsel cannot be deemed ineffective for not filing frivolous motions and Petitioner cannot
28 establish prejudice. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

1 Third, as discussed in Section C *supra*, Petitioner's claim that the State failed to abide
2 by its discovery obligation and provide discovery pursuant to Brady is belied by the record
3 and he has failed to demonstrate why he believes the State's record on the matter was false,
4 let alone the materiality of the information he was seeking, and whether it would have changed
5 his decision of pleading guilty. Thus, it would have been futile for counsel to pursue the matter
6 and he cannot demonstrate he was prejudiced by counsel's failure to do so. Ennis, 122 Nev. at
7 706, 137 P.3d at 1103.

8 Fourth, Petitioner complains that counsel failed to object, interject, and "treat the
9 record" at the April 18, 2017 hearing to ensure Petitioner's Sixth Amendment right to self-
10 representation. Petition at 36. This is a bare and naked claim suitable only for summary denial
11 as Petitioner has failed to even attempt to allege how counsel should have objected, interjected,
12 and "treated the record." Moreover, the minutes from said hearing show counsel's active
13 participation at the hearing. Regardless, he does not demonstrate that had counsel acted in such
14 a way he would, for a fact, not have pled guilty and proceeded with his trial. Hill, 474 U.S. at
15 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
16 at 190-91, 87 P.3d at 537.

17 Fifth, Petitioner claims counsel was ineffective for failing to conduct pre-trial
18 investigation of Petitioner's mental health history, medical history, diminished capacity,
19 duress defenses, and diminished capacity defenses as well as his competency during the crime.
20 Petition at 36. He also reiterates that counsel should have hired an expert for this purpose. Id.
21 Such claim is belied by the record as Petitioner indicated during his plea canvass with the
22 Court:

23 THE COURT: Okay. And you had a chance to discuss any defenses that you
24 would have to these charges?

25 THE DEFENDANT: Yeah.

26 THE COURT: You discussed them with your attorney?

27 THE DEFENDANT: Yeah.

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1 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 13; Hargrove, 100
2 Nev. at 502, 686 P.2d at 225. Regardless, Petitioner's claim that counsel did not investigate
3 Petitioner's medical history and mental health history is belied by Petitioner's own Exhibit to
4 the instant Petition. Indeed, Petitioner's Appendix, Volume II, pages 314 through 331, reveal
5 that counsel did in fact obtain medical records on Petitioner's behalf. To the extent Petitioner
6 complains that counsel should have investigated further, he has not proven what that
7 investigation would have shown whether the information received would have caused him not
8 to plead guilty or more importantly provided a better outcome. Molina, 120 Nev. at 192, 87
9 P.3d at 538. Similarly, Petitioner has not demonstrated what an expert would have said, let
10 alone whether hiring an expert would have rendered a better outcome. Id. Therefore,
11 Petitioner's claim is denied.

12 Sixth, Petitioner claims counsel failed to investigate evidence and witnesses for his
13 case. Petition at 36. Specifically, he claims that counsel failed to investigate "Sexton, Burton,
14 Cousert, White, Bennett, Hoyer, Cliff, Burkhalter, Portlock, Deann, Perry, and Wong" to assist
15 in Petitioner's defenses even though counsel had the Affidavit from Portluck. Id. Petitioner's
16 claim fails as he has not and cannot demonstrate whether these witnesses would have assisted
17 in his defense and provided a better outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. Thus,
18 Petitioner's claim is bare and naked and suitable only for summary dismissal. Hargrove, 100
19 Nev. at 502, 686 P.2d at 225. Moreover, Petitioner concedes that counsel possessed Portluck's
20 Affidavit, so his claim regarding counsel's investigation of Portluck is also belied by the record
21 he has provided this Court. Id. Regardless, Petitioner does not allege what further investigation
22 Petitioner should have conducted in light of this Affidavit. Therefore, Petitioner's claim is
23 denied.

24 Seventh, Petitioner complains that counsel was ineffective for failing to investigate
25 facts surrounding Deann's alleged threats and coercion that induced Petitioner's October 19,
26 2017 later withdrawn guilty plea. Petition at 37. However, this claim fails as Petitioner cannot
27 demonstrate prejudice because his first plea withdrawal request was granted. As it relates to
28 his second plea, Petitioner cannot demonstrate how investigating his prior plea would have

1 changed the outcome of his later guilty plea. In other words, regardless of whether counsel
2 investigated Deann's alleged threats prior to Petitioner's first guilty plea, Petitioner cannot
3 demonstrate how investigating this prior plea allegation would have caused him not to enter
4 his second guilty plea and proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also
5 Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537.
6 Therefore, Petitioner's claim is denied.

7 Eighth, Petitioner claims counsel was ineffective for failing to pursue a mental health
8 defense in light of Petitioner's mental health records. Petition at 37. Petitioner's claim fails as
9 he cannot demonstrate that had counsel pursued such a defense, he would not have pled guilty
10 and proceeded to trial because he does not know if such defense would have been successful.
11 Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107;
12 Molina, 120 Nev. at 190-91, 87 P.3d at 537. Regardless, Petitioner acknowledged during his
13 plea canvass with the Court that he went over all defenses with counsel and still proceeded to
14 enter his guilty plea. Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019,
15 at 13. Therefore, Petitioner's claim is denied.

16 2. *Michael Sanft Complaints*

17 First, Petitioner claims counsel was ineffective for failing to pursue the basis for his
18 pretrial petition for writ of habeas corpus and request a Franks hearing as well as a suppression
19 hearing regarding allegedly illegally obtained evidence. As discussed *supra* in Section B as well
20 as the previous section, Petitioner cannot demonstrate that the pursuit of such matter would
21 have been successful. Thus, counsel cannot be faulted for failing to pursue a futile motion and
22 Petitioner cannot demonstrate prejudice. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

23 Second, Petitioner again complains that counsel was ineffective for failing to detect and
24 pursue the Marcum notice violation. As discussed *supra*, Petitioner's claim fails because it
25 belied by the record which indicates that Petitioner received "reasonable notice" regarding the
26 grand jury hearing. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

27 Third, Petitioner again complains that counsel was ineffective for failing to investigate
28 Petitioner's mental health history, medical history, diminished capacity, intoxication, duress,

1 and competency defenses as well as failed to hire an expert to evaluate Petitioner. Petition at
2 38. This claim fails because, as discussed *supra*, Mr. Gruber obtained some of Petitioner's
3 medical records. Thus, Mr. Sanft obtaining the same record would have been futile. Moreover,
4 to the extent Petitioner complains that counsel should have investigated further, he has not
5 proven what that investigation would have shown whether the information received would
6 have caused him not to plead guilty or more importantly provided a better outcome. Molina,
7 120 Nev. at 192, 87 P.3d at 538. Similarly, Petitioner has not demonstrated what an expert
8 would have said, let alone whether hiring an expert would have rendered a better outcome. Id.
9 Therefore, Petitioner's claim is denied.

10 Fourth, Petitioner reiterates that counsel was ineffective for failing to investigate the
11 evidence as well as "Sexton, Burton, Cousert, White, Bennett, Hoyer, Cliff, Burkhalter,
12 Portlock, Deann, Perry, and Wong" to assist in Petitioner's defenses. Petition at 38. As
13 discussed *supra*, Petitioner has not and cannot demonstrate whether these witnesses would
14 have assisted in his defense and provided a better outcome. Molina, 120 Nev. at 192, 87 P.3d
15 at 538. Thus, Petitioner's claim is bare and naked and suitable only for summary dismissal.
16 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

17 Fifth, Petitioner repeats that counsel was ineffective for failing to discover the
18 challenged Brady materials. Petition at 38. As discussed *supra* in Section C as well as the
19 previous section, Petitioner's claim, that the State failed to provide discovery pursuant to
20 Brady, is belied by the record. Moreover, he has failed to indicate why he believes the State's
21 record was false, let alone that he would have received information that would have changed
22 his decision to end his trial and plead guilty. Thus, it would have been futile for counsel to
23 pursue this matter and his claim is denied. See Ennis, 122 Nev. at 706, 137 P.3d at 1103.

24 Sixth, Petitioner complains that counsel failed to "adequately cross examine witnesses
25 and subject the prosecutor's case to rigorous testing." Petition at 38. However, Petitioner
26 cannot show counsel was ineffective because Petitioner pled guilty during his trial. Thus, any
27 efforts by counsel was extinguished when Petitioner elected to end his trial early and pled
28 guilty to his charges. Therefore, Petitioner's claim is denied.

1 Seventh, Petitioner argues that counsel failed to impeach the following State's
2 witnesses with their criminal histories: Burkhalter, White, Cliff, Burton, Perry, and Cousert.
3 Petition at 38. As a preliminary matter, out of the aforementioned list only Burkhalter and Cliff
4 had testified before Petitioner decided to end his trial and plead guilty. Thus, as discussed with
5 his previous claim, Petitioner can only attempt to demonstrate prejudice as to Burkhalter and
6 Cliff. Regardless, Petitioner's claim fails because it is a bare and naked claim suitable only for
7 summary denial. Indeed, Petitioner does not provide the crimes of moral turpitude to which he
8 is referring and fails to provide any indication that such witnesses were convicted of such
9 crimes. Hargrove, 100 Nev. at 502, 686 P.2d at 225. It bears noting that the State did question
10 Cliff about his 2016 conviction for attempt grand larceny and 2017 conviction for using and
11 possession of identification of another. Regardless, Petitioner cannot demonstrate that had
12 Burkhalter and Cliff been questioned about the crimes of moral turpitude they allegedly
13 committed, he would not have pled guilty and permitted his trial to proceed. Hill, 474 U.S. at
14 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
15 at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

16 Eighth, Petitioner complains that counsel was ineffective for failing to call a single
17 witness at trial. Petition at 38. However, his claim fails because it is a bare and naked claim
18 suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed,
19 Petitioner has failed to indicate which witnesses he believes should have been called in
20 addition to the State's witnesses, let alone whether such witnesses would have been willing to
21 testify. While it appears that counsel stated he did not anticipate that he would call witnesses
22 to the stand, but instead would cross-examine the State's witness, it bears noting that counsel
23 later requested Co-Defendant Marland be transported from the prison as a potential witness
24 for the defense. Recorder's Transcript of Hearing: Jury Trial – Day 1, filed July 12, 2019, at
25 7-8, 38-40. Ultimately, however, which witnesses to call is counsel's responsibility and
26 Petitioner has failed to demonstrate that he would have elected to proceed with trial instead of
27 pleading guilty had these unnamed witnesses testified. Rhyne, 118 Nev. at 8, 38 P.3d at 167;

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1 Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107;
2 Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

3 Ninth, Petitioner complains that counsel based all of Petitioner's defenses on the State's
4 evidence and witnesses in its case in chief. Petition at 38. This is also a bare and naked claim
5 suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has
6 failed to indicate how counsel was ineffective in basing Petitioner's defense on the State's
7 evidence and witnesses and that doing so was "gross error." Turner v. Calderon, 281 F.3d 851,
8 880 (9th Cir. 2002). Indeed, which defenses to pursue it ultimately a strategic decision and
9 counsel's responsibility. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Dawson, 108 Nev. at 117, 825
10 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953. More importantly, he has not
11 demonstrated that he would have elected to proceed with trial instead of pleading guilty. Hill,
12 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina,
13 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim is denied.

14 Tenth, Petitioner claims counsel was ineffective for failing to detect and acknowledge
15 that he was suffering from mental illness as well as coercion when he entered his plea, failing
16 to detect Petitioner's alleged June 11, 2018 mental health court specialty court referral, and
17 not obtaining a mental health expert to evaluate Petitioner. Petition at 38. As discussed *infra*
18 in Section G, Petitioner's claim that he was suffering from mental illness and coercion at the
19 time he entered his plea is belied by his own responses to the Court. Hargrove, 100 Nev. at
20 502, 686 P.2d at 225. Indeed, Petitioner stated multiple times that he was not facing coercion
21 and was on his medication which did not affect his ability to understand the proceedings.
22 Accordingly, hiring a mental health expert to evaluate Petitioner would have been futile. See
23 Ennis, 122 Nev. at 706, 137 P.3d at 1103. Furthermore, the record is silent as to whether
24 Petitioner had a June 11, 2018 mental health specialty court referral and he has failed to
25 provide any documentation to support his allegation. Hargrove, 100 Nev. at 502, 686 P.2d at
26 225. Therefore, Petitioner's claim is denied.

27 Eleventh, Petitioner argues counsel was ineffective for failing to file a Sentencing
28 Memorandum on Petitioner's behalf for mitigation purposes. Petition at 38. While counsel did

1 not file a Sentencing Memorandum, he did argue on Petitioner's behalf during the sentencing
2 hearing to mitigate the State's requested sentence. Recorder's Transcript of Hearing:
3 Sentencing, filed July 10, 2019, at 8-11. Ultimately, Petitioner cannot demonstrate that filing
4 a Sentencing Memorandum with the specific points he now alleges counsel should have raised,
5 would have changed the sentencing outcome as he plead guilty to the charges. Hill, 474 U.S.
6 at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev.
7 at 190-91, 87 P.3d at 537. Thus, Petitioner's claim is denied.

8 Twelfth, Petitioner asserts that counsel was ineffective for counsel failing to object to
9 the Court imposition of restitution. As discussed *infra* in Section I, Petitioner's claim, that the
10 Court improperly imposed restitution when he was not specifically canvassed on restitution,
11 is meritless because Petitioner acknowledged he understood the consequences of his plea and
12 the sentencing decision, including the restitution imposed, was ultimately in the Court's
13 discretion. Moreover, due to the sentence being in the Court's ultimate discretion, any error
14 would have been harmless. Thus, any objection by counsel would have been futile. See Ennis,
15 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

16 3. *Appellate Counsel Complaints*

17 Petitioner claims appellate counsel was ineffective for failing to obtain the complete
18 record on appeal, expanding Petitioner's Faretta claim, and briefing the facts of Ann White's
19 Affidavit to challenge the involuntariness of Petitioner's guilty plea. Petition at 38-41.
20 However, his claims are meritless.

21 As for Petitioner's complaint regarding appellate counsel failing to obtain the complete
22 record on appeal and expanding his Faretta claim, as discussed *supra* in Section A, such claim
23 is meritless. Although Petitioner asserts that counsel improperly framed the Faretta issue on
24 direct appeal and failed to obtain more transcripts, he has not and cannot demonstrate that such
25 claim would have been meritorious as he was making the same request to represent himself.
26 He has not indicated how the Nevada Court of Appeals' analysis would have changed had
27 counsel referenced the other hearings in which Petitioner requested to represent himself.
28 Accordingly, Petitioner cannot demonstrate how obtaining additional transcripts would have

1 changed the futility in appellate counsel framing the issue the way Petitioner now believes was
2 the correct way to frame the issue. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. For this same
3 reason, Petitioner cannot demonstrate prejudice.

4 As for Petitioner's claim regarding the Ann White Affidavit, Petitioner's claim also
5 fails. Motion for Seal, at Exhibit 1, Exhibit A, Exhibit B. Although Petitioner and the author
6 of such affidavit claim that appellate counsel was sent the affidavit, Petitioner has failed to
7 provide proof that appellate counsel did in fact receive such document. Regardless, briefing
8 such document would have been futile as Petitioner failed to pursue a challenge to his guilty
9 plea prior to the entry of his Judgment of Conviction. See Ennis, 122 Nev. at 706, 137 P.3d at
10 1103; Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (186), superseded by statute on
11 other grounds as stated in Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000)
12 (concluding that a defendant may not "challenge the validity of a guilty plea on direct appeal
13 from the judgment of conviction" in the first instance). Therefore, Petitioner's claim is denied.

14 **E. Ground 5: Petitioner's Plea was Knowingly and Voluntarily Entered**

15 Petitioner argues that his guilty plea should be withdrawn because it was the result of
16 coercion, intervening psychosis due to not being given his alleged anti-psychotic and seizure
17 medications, he was not competent to understand the rights he was forfeiting, and his guilty
18 plea was the result of counsel not advising Petitioner prior to his plea. Petition at 41-45.
19 Specifically, Petitioner claims that a person named "Deann" threatened Petitioner's family the
20 week before his trial. Petition at 41-44.

21 As a preliminary matter, Petitioner cannot raise constitutional claims that occurred prior
22 to his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See
23 Webb, 91 Nev. at 469, 538 P.2d at 164.

24 Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be
25 withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d
26 391, 394 (1990). The law in Nevada establishes that a plea of guilty is presumptively valid,
27 and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v.
28 State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336,

337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

To determine whether a guilty plea was voluntarily entered, the Court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. A proper plea canvass should reflect that:

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

Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)). The presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107, 107 (1975).

This standard requires the court accepting the plea to personally address the defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not rely simply on a written plea agreement without some verbal interaction with a defendant. Id. Thus, a “colloquy” is constitutionally mandated and a “colloquy” is but a conversation in a formal setting, such as that occurring between an official sitting in judgment of an accused at plea. Id. However, the court need not conduct a ritualistic oral canvass. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas “do not require the articulation of talismanic phrases,” but only that the record demonstrates a defendant entered his guilty plea understandingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct. 1463, 1470 (1970).

Nevada precedent reflects “that where a guilty plea is not coerced and the defendant [is] competently represented by counsel at the time it [is] entered, the subsequent conviction

1 is not open to collateral attack and any errors are superseded by the plea of guilty.” Powell v.
2 Sheriff, Clark County, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969) (citing Hall v. Warden, 83
3 Nev. 446, 434 P.2d 425 (1967)). In Woods v. State, the Nevada Supreme Court determined
4 that a defendant lacked standing to challenge the validity of a plea agreement because he had
5 “voluntarily entered into the plea agreement and accepted its attendant benefits.” 114 Nev.
6 468, 477, 958 P.2d 91, 96 (1998).

7 Furthermore, the Nevada Supreme Court has explained:

8 [A] guilty plea represents a break in the chain of events which has preceded it in
9 the criminal process. When a criminal defendant has solemnly admitted in open
10 court that he is in fact guilty of the offense with which he is charged, he may not
11 thereafter raise independent claims relating to the deprivation of constitutional
rights that occurred prior to the entry of the guilty plea.

12 Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollet v. Henderson, 411
13 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). Indeed, entry of a guilty plea “waive[s] all
14 constitutional claims based on events occurring prior to the entry of the plea[], except those
15 involving voluntariness of the plea[] [itself].” Lyons, 100 Nev. at 431, 683 P.2d 505; see also,
16 Kirksey, 112 Nev. at 999, 923 P.2d at 1114 (“Where the defendant has pleaded guilty, the only
17 claims that may be raised thereafter are those involving the voluntariness of the plea itself and
18 the effectiveness of counsel.”).

19 Here, Petitioner’s claim that his plea was involuntary because he was coerced is belied
20 by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During his extensive plea canvass
21 with the Court, the Court repeatedly ensured that Petitioner was entering his plea freely and
22 voluntarily:

23 THE COURT: Are you entering into this plea today freely and
24 voluntarily?

25 THE DEFENDANT: Yeah.

26 THE COURT: Did anyone threaten or coerce you into entering into
27 this plea? THE DEFENDANT: No.

28 THE COURT: So, you’re entering into this plea today of your own
free will? THE DEFENDANT: Yeah.

[...]

1 THE COURT: Has anyone made you any promises?

2 THE DEFENDANT: No.

3 [...]

4 THE COURT: Okay. And Mr. White, you are pleading guilty today
because you are in truth and in fact guilty of these offenses?

5 THE DEFENDANT: Yeah.

6 THE COURT: And you do not want to proceed and go to trial?

7 THE DEFENDANT: No.

8 THE COURT: I mean, we picked a jury, we've gone through several
witnesses; but you think it's in your best interest to just plead straight
up to these charges?

9 THE DEFENDANT: Yeah.

10 THE COURT: Okay. And, again, you are doing this freely and
voluntarily?

11 THE DEFENDANT: Yeah.

12 [...]

13 THE COURT: Okay. And, again, this is what you want to do and
you're entering into this plea freely and voluntarily?

14 THE DEFENDANT: Yeah.

15 THE COURT: Okay.

16 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 6-19. In fact, the
17 State asked the Court to go even further and ensure that no one was coercing Petitioner or his
18 family:

19 THE COURT: Okay. So, no one has threatened or coerced you into
entering into this plea, correct?

20 THE DEFENDANT: No.

21 THE COURT: No one in the Clark County Detention Center?

22 THE DEFENDANT: No.

23 THE COURT: No one in the Nevada Department of Corrections?

24 THE DEFENDANT: No.

25 THE COURT: No one on the planet earth?

26 THE DEFENDANT: No.

27 THE COURT: Okay, no one has threatened you, correct?

28 THE DEFENDANT: Yeah.

THE COURT: Including, has – have you spoken to Marland Dean?

THE DEFENDANT: No.

THE COURT: Okay. I know you indicated to me the other day your
mom had spoken to him.

THE DEFENDANT: Yeah.

THE COURT: Were any threats communicated to you through your
mom?

1 THE DEFENDANT: No.

2 THE COURT: Okay. And you are satisfied with your representation
3 of Mr. Sanft?

4 THE DEFENDANT: Yeah.

5 THE COURT: Okay. And you're satisfied with how the trial has gone
6 so far?

7 THE DEFENDANT: Yeah.

8 THE COURT: I guess with the exception that the victims testified. I
9 mean I'm --

10 THE DEFENDANT: Yeah.

11 THE COURT: But, again, you think this is in your best interest?

12 THE DEFENDANT: Yeah.

13 THE COURT: And you want me to accept your plea?

14 THE DEFENDANT: Yeah.

15 MR. SCHWARTZER: Thank you, Your Honor.

16 Id. at 19-21.

17 Moreover, Petitioner's claim that he did not have the opportunity to discuss his plea
18 with counsel and did not understand the rights he was forfeiting is also belied by the record.
19 Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Petitioner confirmed with the Court
20 multiple times that he had spoken to counsel about his decision to plead guilty during his
21 canvass and he understood the rights he was giving up:

22 THE COURT: And you've had a chance to talk to your attorney? Is that a
23 yes -- I've got to make sure you're paying attention to me --

24 THE DEFENDANT: Yeah. I am.

25 THE COURT: -- because you've already withdrawn one plea with me. So, I
26 just want to make sure you're paying attention. So, you let me know when
27 you are done looking at that document.

28 [...]

THE COURT: Okay. And you had a chance to discuss all this
with Mr. Sanft?

THE DEFENDANT: Yeah.

THE COURT: And that's what you want to do. Correct?

THE DEFENDANT: Yes, ma'am.

[...]

THE COURT: You also understand you are giving up all your trial rights by
entering into this plea today?

THE DEFENDANT: Yeah.

1 THE COURT: You understand that you do have a right to a speedy and
2 public trial; that if the matter went to trial the State would be required to
3 prove each of the elements as alleged in their charging document by proof
beyond a reasonable doubt. Do you understand that?

4 THE DEFENDANT: Yeah.

5 THE COURT: And, your attorney did explain to you on each count what the
State would have to prove. Is that correct?

6 THE DEFENDANT: Yeah.

7 THE COURT: Okay. Do you have any questions about what the State would
have to prove if this matter went to trial?

8 THE DEFENDANT: No.

9 THE COURT: Okay. And you had a chance to discuss any defenses that you
would have to these charges?

10 THE DEFENDANT: Yeah.

11 THE COURT: You discussed them with your attorney?

12 THE DEFENDANT: Yeah.

13 THE COURT: You understand at the time of trial you would have the right
14 to testify, to remain silent, to have others come in and testify for you, to be
confronted by the witnesses against you and crossexamine them, to appeal
any conviction and to be represented by counsel throughout all critical stages
of the proceedings. Do you understand all these trial rights?

15 THE DEFENDANT: Yeah.

16 THE COURT: And you understand that you will be giving them up by
entering into this plea today?

17 THE DEFENDANT: Yeah.

18 [...]

19 THE COURT: You had a chance to discuss all this with your lawyer and all
the consequences?

20 THE DEFENDANT: Yeah.

21 Id. at 4-19. In fact, Petitioner even went to far as to answer that he was satisfied with counsel's
services:

22 THE COURT: Okay. And you are satisfied with your representation of Mr.
23 Sanft?

24 THE DEFENDANT: Yeah.

25 Id. at 21.

26 Additionally, Petitioner's claim that he was not competent when he entered his plea
27 because he was not administered his medications is unsupported and suitable only for summary
28 denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Nevada law requires a court to suspend

proceedings “if doubt arises as to the competence of the defendant...until the question of competence is determined.” NRS 178.405. NRS 178.400 defines an incompetent person who cannot be tried or adjudged guilty:

1. A person may not be tried or adjudged to punishment for a public offense while incompetent.

2. For the purposes of this section, “incompetent” means that the person does not have the present ability to:

(a) Understand the nature of the criminal charges against the person;

(b) Understand the nature and purpose of the court proceedings; or

(c) Aid and assist the person’s counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

Under Dusky, a defendant is competent to stand trial if he “has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “he has a rational as well as factual understanding of the proceedings against him.” Calvin, 147 P.3d at 1100, citing Dusky v. U.S., 362 U.S. 402, 402, 80 S.Ct. 788 (1960). In Calvin, the Nevada Supreme Court held that Nevada’s statutory competency standard conformed to that of Dusky and thus satisfied constitutional requirements. Consistent with Dusky, under Nevada statutory law, a defendant is incompetent to stand trial if he either “is not of sufficient mentality to be able to understand the nature of the criminal charges against him” or he “is not able to aid and assist his counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter.” Calvin, 122 Nev. at 1182-83.

A formal hearing to determine competency is only required “when there is ‘substantial evidence’ that the defendant may not be competent to stand trial”—that is, evidence that “raises a reasonable doubt about the defendant’s competency to stand trial.” Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008).

When reviewing whether a defendant was competent to stand trial, the Nevada Supreme Court will review the record to determine if the defendant has adequately shown that he was incompetent. Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000); Warden v. Graham, 93 Nev. 277, 278, 564 P.2d 186, 187 (1977). In Morales, the defendant broke into his attorney’s office with a gun in an attempt to retrieve a document. 116 Nev. at 22, 992 P.2d at 254. The Court concluded that the defendant’s actions did not indicate incompetency, but an

1 attempt to assist his attorney, however illegally. Id. The Court further concluded that “[t]he
2 record contains no evidence that [the defendant] was unable to remember the events relating
3 to his drug arrest, communicate with his attorney or otherwise assist in his own defense.” Id.
4 Similarly, in Graham, the Nevada Supreme Court concluded that based on the psychiatric
5 evaluations and the defendant’s actions in court, specifically during the guilty plea canvass,
6 there was no indication that the defendant was incompetent. 93 Nev. at 278, 564 P.2d at 187.
7 However, in Olivares v. State, 124 Nev. 1142, 1148-49, 195 P.3d 864, 868-69 (2008), the
8 Court held that the district court erred in finding the defendant competent when doctors
9 concluded that he was incompetent to stand trial and statements from the defendant indicated
10 that he believed his attorneys were colluding with the court and the State.

11 To the extent Petitioner claims that counsel was ineffective for allowing him to proceed
12 with his guilty plea despite his alleged medical ailments, Petitioner provides no evidence that
13 his counsel was aware Petitioner was suffering from any actual mental health issues. Counsel
14 cannot be deemed ineffective when she had no information or reason to believe that Petitioner
15 had “particular psychological conditions or disorders that may have shown prior mental
16 disturbance or impaired mental state.” Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280
17 (1994), overruled on other grounds by Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015).

18 Most importantly, Petitioner’s claim that he was not on his prescribed medications is
19 belied by both his counsel’s representations on the record as an officer of the Court as well as
20 Petitioner’s responses to the Court during his canvass:

21 MR. SANFT: [...] *I believe that, at this particular point, that Mr. White is*
22 *not under any type of influence of alcohol or drugs that would impair his*
23 *thinking here today with regards to his decision to enter into this plea. And*
24 *I don’t believe as well that, based upon my communication with Mr. White,*
25 *that there’s been any type of threat made against him. I have not received that*
26 *as well. I just want to make sure that that’s on the record because I know that*
27 *was a concern the last time we were in court with regards to that.*

28 THE COURT: Okay. And that’s all true, correct?

THE DEFENDANT: Yeah.

THE COURT: You’re not on any kind of medication?

1 THE DEFENDANT: *Just the medication that I take, my meds, but they're*
2 *not impacting my decision to plead.*

3 THE COURT: *What kind of medication are you on?*

4 THE DEFENDANT: *Psych meds.*

5 THE COURT: *Okay. And you don't think it's affecting your ability to enter*
6 *into this plea today?*

7 THE DEFENDANT: *No.*

8 THE COURT: *Okay. And, again, you want to stop the trial and you just want*
9 *to accept responsibility. Is that correct?*

10 THE DEFENDANT: *Yeah.*

11 THE COURT: *Well, why did you decide to do it today?*

12 THE DEFENDANT: *I just -- I slept on it. After seeing the victims yesterday*
13 *and then hearing what -- hearing from the victim.*

14 THE COURT: *So, after hearing the victims' testimony you just -- you'd*
15 *heard enough?*

16 THE DEFENDANT: *Yeah.*

17 Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 22-23 (emphasis
18 added). Regardless, mental health issues do not provide automatic mitigation at sentencing. In
19 Ford v. State, the Nevada Supreme Court affirmed the murder convictions and death sentence
20 for a defendant who drove her car onto a crowded sidewalk in downtown Reno. 102 Nev. 126,
21 127–28, 717 P.2d 27, 28 (1986). Despite her known significant mental health and competency
22 issues, the Court held that the defendant's mental health issues did not diminish the imposed
23 sentence. Id. at 137, 717 P.2d at 35. The facts of this case sufficiently outweigh any mitigating
24 effect and the sentence would have been the same. Thus, not only did Petitioner enter his plea
25 knowingly and voluntarily, counsel was not ineffective. Therefore, Petitioner's claims are
26 denied.

27 **F. Ground 6: Petitioner was not Improperly Adjudicated as a Habitual Offender**

28 Petitioner argues that he was improperly adjudicated a habitual offender because the
State argued that Petitioner had six (6) felonies instead of the four (4) felonies the State listed
in its Notice of Intent to Seek Habitual Criminal Treatment filed October 18, 2016, the State
failed to comply with the habitual criminal statute, and the amendment to the habitual criminal
statute effective July 1, 2020 should apply to Petitioner. Petition at 45-47. However,
Petitioner's claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Despite

1 being canvassed that the State could intend to argue habitual criminal treatment, Petitioner was
2 never adjudicated a habitual criminal. Therefore, Petitioner's claim is denied.

3 **G. Ground 7: Petitioner's Claim He was Not Informed of His Restitution Obligation**

4 Petitioner claims that his guilty plea should be withdrawn because the Court failed to
5 inform Petitioner of his restitution obligation during his plea canvass. Petition at 47-48. As a
6 preliminary matter, this is a substantive claim that is waived. Evans, 117 Nev. at 646-47, 29
7 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,
8 Thomas, 115 Nev. at 148, 979 P.2d at 222. Petitioner failed to challenge the amount of
9 restitution ordered at his sentencing hearing. District courts "are cautioned to rely on reliable
10 and accurate evidence in setting restitution." Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d
11 133, 135 (1999). While defendants are not entitled to a full evidentiary hearing when
12 challenging the amount of restitution ordered; they are entitled to present their own evidence
13 in support of their challenge. Id. Moreover, "[a] defendant's obligation to pay restitution to the
14 victim may not, of course, be reduced because a victim is reimbursed by insurance proceeds."
15 Id. at 12, 974 P.2d at 135. Petitioner had the opportunity challenge the restitution calculation
16 at sentencing. His failure to do so waives his ability to challenge it on a post-conviction habeas
17 matter.

18 Regardless, even though the Court did not specifically canvass Petitioner regarding
19 restitution, the totality of the circumstances demonstrates that Petitioner understood the
20 consequences of his guilty plea. McConnell v. State, 125 Nev. 243, 251, 212 P.3d 307, 313
21 (2009), as corrected (July 24, 2009) (concluding that although a district court did not inform a
22 defendant that restitution was a consequence of his plea, the totality of the circumstances
23 demonstrated the defendant understood the consequences of his plea). Indeed, during its
24 canvass, the Court ensured that Petitioner understood the consequences of his plea and the
25 sentencing decision was strictly up to the Court prior to accepting it:

26 THE COURT: You had a chance to discuss all this with your lawyer and all
27 the consequences?

28 THE DEFENDANT: Yeah.

[...]

1 THE COURT: And you understand that sentencing is completely within the
2 discretion of the Court, that no one can make you any promises regarding
3 what will happen at the time of sentencing. Do you understand that?

4 THE DEFENDANT: Yeah.

5 Recorder's Transcript of Hearing – Jury Trial Day 3, filed July 12, 2019, at 12, 19. Thus,
6 because Petitioner acknowledged he understood the consequences of his plea and the
7 sentencing decision, including the restitution imposed, was ultimately in the Court's
8 discretion, any error would have been harmless. Therefore, Petitioner's claim is denied.

9 **H. Ground 8: The Court, Trial Counsel, and the State Did Not Have a Conflict of
10 Interest**

11 Petitioner argues that because he filed a civil action against the Court, counsel Gruber,
12 and the assigned prosecutor, such individuals had a conflict of interest during the pendency of
13 Petitioner's case. Petition at 48-49.

14 As an initial matter, Petitioner's claim is waived because it is substantive. NRS
15 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d
16 at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222.
17 Additionally, it is waived because it is an allegation that his rights were deprived prior to
18 entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070,
19 n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164.

20 Additionally, Petitioner's claim is a bare and naked allegation that is suitable only for
21 summary denial. Indeed, Petitioner has provided no case law to support his claim that because
22 there is a civil suit pending there is an automatic conflict of interest or bias. Hargrove, 100
23 Nev. at 502, 686 P.2d at 225. Regardless, his claim is meritless.

24 NRS 1.235 mandates the procedure to be followed when seeking judicial recusal:

- 25 1. Any party to an action or proceeding pending in any court other
26 than the Supreme Court or the Court of Appeals, who seeks to
27 disqualify a judge for actual or implied bias or prejudice must file
28 an affidavit specifying the facts upon which the disqualification is
sought. The affidavit of a party represented by an attorney must be
accompanied by a certificate of the attorney of record that the
affidavit is filed in good faith and not interposed for delay.

[. . .]

4. At the time the affidavit is filed, a copy must be served upon the judge sought to be disqualified.

[. . .]

5. The judge against whom an affidavit alleging bias or prejudice is filed shall proceed no further with the matter and shall:

(a) Immediately transfer the case to another department of the court . . . or

(b) File a written answer with the clerk of the court . . . admitting or denying any or all of the allegations contained in the affidavit and setting forth any additional facts which bear on the question of the judge's disqualification.

Further, while Towbin Dodge, L.L.C. v. Eighth Judicial Dist., 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005), contemplated a route to disqualification via the Nevada Code of Judicial Conduct, it set procedural requirements that must be met to make such a motion:

[A] party may file a motion to disqualify based on Canon 3E as soon as possible after becoming aware of the new information. The motion must set forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality, and the challenged judge may contradict the motion's allegations. . . . [T]he motion must be referred to another judge.

Importantly, a party must comply with NRS 1.235 unless the “grounds for a judge’s disqualification are discovered after the time limits in NRS 1.235(1) have passed.” Id. at 260, 112 P.3d at 1069; accord Lioce v. Cohen, 124 Nev. 1, 25 n.44, 174 P.3d 970, 985 n.44 (2008) (“Lioce argues that, should we decide a new trial is warranted, his case must be remanded to a different district court judge because Judge Bell was biased toward him. We conclude that this argument is without merit, and we also direct Lioce to NRS 1.235(1).”).

Considering the standards established by the Nevada Supreme Court, the Nevada Legislature, and the Code of Judicial Conduct, disqualification was unwarranted. “A judge has an obligation not to recuse himself where there is no occasion to do so. . . . A judge's decision not to recuse himself voluntarily is given ‘substantial weight’ and will be affirmed absent an abuse of discretion.” Kirksey v. State, 112 Nev. 980, 1005-06, 923 P.2d 1102, 1118 (1996) (citations omitted). A judge must “‘preside to the conclusion of all proceedings, in the absence

1 of some statute, rule of court, ethical standard, or other compelling reason to the contrary.”
2 City of Las Vegas v. Eighth Judicial Dist. Ct., 116 Nev. 640, 643, 5 P.3d 1059, 1061 (2000)
3 (quoting Ham v. Dist. Ct., 93 Nev. 409, 415, 566 P.2d 420, 424 (1977)); accord CJC 2.7 (“A
4 judge shall hear and decide all matters assigned to the judge except when disqualification is
5 required by Rule 2.11 or other law.”).

6 It was Petitioner’s burden to establish that the Court “displays ‘a deep-seated favoritism
7 or antagonism that would make fair judgment impossible[,]” Walker v. State, 113 Nev. 853,
8 864, 944 P.2d 762, 769 (1997) (quoting Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct.
9 1147, 1157 (1994)), cert. denied, 525 U.S. 950, 119 S. Ct. 377 (1998), and must set “forth
10 facts and reasons sufficient to cause a reasonable person to question the judge’s impartiality.”
11 Towbin Dodge, 121 Nev. at 260, 112 P.3d at 1069. A reviewing court should look for actual
12 manifestations of bias on the part of the judicial officer. A Minor v. State, 86 Nev. 691, 695,
13 476 P.2d 11, 12 (1970). “Disqualification must be based on facts, rather than mere
14 speculation.” Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (citing PETA
15 v. Bobby Berosini, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995)).

16 “[R]ulings and actions of a judge during the course of official judicial proceedings do
17 not establish legally cognizable grounds for disqualification.” In re Petition to Recall
18 Dunleavy, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988). To do otherwise “would nullify
19 the court’s authority and permit manipulation of justice, as well as the court.” Id.

20 In this case, it is clear that Petitioner did not follow the mandated procedures for judicial
21 recusal. Moreover, Petitioner has failed to demonstrate how the Court, counsel Guber, or the
22 State acted in a manner that demonstrated a conflict of interest. Hargrove, 100 Nev. at 502,
23 686 P.2d at 225; Jefferson v. State, 133 Nev. 874, 879, 410 P.3d 1000, 1004 (Nev. App. 2017)
24 (internal citations omitted) (“a criminal defendant’s decision to file such an action against
25 appointed counsel does not require disqualification unless the circumstances demonstrate an
26 actual conflict of interest.”). Also, Petitioner has not demonstrated that had another Court,
27 other counsel, or another district attorney handled his case he would not have pled guilty and
28 decided to proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev.

1 at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's
2 claim is denied.

3 **II. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

4 NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

5 1. The judge or justice, upon review of the return, answer and all supporting
6 documents which are filed, shall determine whether an evidentiary hearing is
7 required. A petitioner must not be discharged or committed to the custody of a
8 person other than the respondent *unless an evidentiary hearing is held*.

9 2. If the judge or justice determines that the petitioner is not entitled to relief
10 and an evidentiary hearing is not required, he shall dismiss the petition without
11 a hearing.

12 3. If the judge or justice determines that an evidentiary hearing is required, he
13 shall grant the writ and shall set a date for the hearing.

14 The Nevada Supreme Court has held that if a petition can be resolved without
15 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
16 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
17 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
18 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
19 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
20 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction
21 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
22 record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it
23 existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
24 improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
25 Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court
26 considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as
27 complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

28 Further, the United States Supreme Court has held that an evidentiary hearing is not
required simply because counsel's actions are challenged as being unreasonable strategic
decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge

1 post hoc rationalization for counsel's decision making that contradicts the available evidence
2 of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis
3 for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain
4 issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing
5 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
6 *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466
7 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

8 Petitioner's Petition does not require an evidentiary hearing. An expansion of the record
9 is unnecessary because Petitioner has failed to assert any meritorious claims and the Petition
10 can be disposed of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605;
11 Mann, 118 Nev. at 356, 46 P.3d at 1231.

12 **ORDER**

13 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief
14 and Request for an Evidentiary Hearing shall be, and are, hereby denied.

15 DATED this ____ day of April, 2021.

Dated this 8th day of April, 2021

16 

17 _____
DISTRICT JUDGE

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

A7A 653 C606 A19E
Michelle Leavitt
District Court Judge

20
21 BY /s/ ALEXANDER CHEN

22 ALEXANDER CHEN
23 Chief Deputy District Attorney
Nevada Bar #010539

1 CERTIFICATE OF MAILING

2 I hereby certify that service of the above and foregoing was made this ____ day of
3 April, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

4 TONEY WHITE, BAC #1214172
5 HIGH DESERT STATE PRISON
6 22010 COLD CREEK ROAD
7 P.O. BOX 650
8 INDIAN SPRINGS, NEVADA 89070

9 BY /s/ L.M.
10 Secretary for the District Attorney's Office
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28 16FH0191B/AC/bg/lm/GU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Toney White, Plaintiff(s)

CASE NO: A-20-824261-W

7 vs.

DEPT. NO. Department 12

8 Calvin Johnson, Warden,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 4/8/2021

16 Dept 12 Law Clerk

dept12lc@clarkcountycourts.us

Writ of Habeas Corpus

COURT MINUTES

March 25, 2021

A-20-824261-W Toney White, Plaintiff(s)
vs.
Calvin Johnson, Warden, Defendant(s)

March 25, 2021 12:30 PM Petition for Writ of Habeas Corpus

HEARD BY: Leavitt, Michelle **COURTROOM:** RJC Courtroom 14D

COURT CLERK: Pannullo, Haly

RECORDER: Richardson, Sara

REPORTER:

PARTIES PRESENT:

Bernard B. Zadrowski Attorney for Defendant

JOURNAL ENTRIES

Petitioner not present. COURT ORDERED, Petition DENIED; State to prepare the Findings of Facts and Conclusions of Law.

NDC

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):

PETITIONER/ DEFENDANT'S NOTICE OF APPEAL PURSUANT TO NRAP R 4.; AMENDED CASE APPEAL STATEMENT; CASE APPEAL STATEMENT; 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

TONEY A. WHITE, III,

Plaintiff(s),

vs.

CALVIN JOHNSON, WARDEN,

Defendant(s),

Case No: A-20-824261-W

Dept No: XII

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 7 day of May 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk