IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

TONEY ANTHONY WHITE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-20-824261-W

Docket No: 82889

RECORD ON APPEAL
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A-20-824261-W TONEY WHITE vs. CALVIN JOHNSON, WARDEN

I N D E X

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

I N D E X

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

I N D E X

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DISTRICT COURT
CLARK COUNTY, NEVADA

TONEY A. WHITE,
#8270790

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-16-313216-2
A-20-824261-W

DEPT NO: XII

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through ALEXANDER CHEN, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On March 9, 2016, ANTHONY WHITE (hereinafter "Petitioner") was charged by way of Grand Jury Indictment with the following charges: CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147), BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060 – NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 – NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS 199.430 – NOC 53013).

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

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

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

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

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

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

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

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

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

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

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

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

On November 5, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). Petitioner also filed a Motion to File Under Seal Exhibits 1 Thru 4, Appendix Volume I, and Appendix Volume II. On January 7, 2021, Petitioner filed Amended Petitioner's Motion for Filing Exhibits 1-4 Under Seal. The State's Response follows.

STATEMENT OF FACTS

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

> On January 20, 2016, Henderson Police dispatch received a call for service at a local Henderson apartment community in reference to a loud verbal dispute taking place in an apartment and a possible home invasion. Upon the officer's arrival, he observed a male standing behind a Jeep Cherokee. The officer briefly spoke with the male, identified as one of the co-defendants, Kevin Wong, as the officer approached the door. Screaming was heard from the apartment and a male victim **(Victim 2)** was found lying on the floor 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.
>
> **Victim 2** was transported to the hospital with significant head injuries to 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 injuries. A detective arrived at the scene and interviewed **Victim 1**. She stated she was sitting on the couch and heard someone knocking at the door. She

> answered and there was a female, identified as codefendant, Amanda Sexton and two male suspects, identified as co-defendants Marland Dean, and Toney White who forcibly opened the door and entered the apartment. Firearms were drawn and aimed at both of the victims. Ms. Sexton placed **Victim 1** in handcuffs and Mr. White and Mr. Dean began to yell at **Victim 2** stating, "We have a search warrant, US Marshals; get on the ground." Mr. White and Mr. Dean began beating **Victim 2** with metal batons and struck him in the head and face.
>
> A detective responded to a traffic stop location involving Mr. Wong. Mr. Wong gave the detective consent to search his vehicle. The detective observed a purse on the passenger seat and located a Nevada Identification card with Amanda Sexton's name on it. Mr. White, Mr. Dean, and Ms. Sexton met up with Mr. Wong and forced their way into the victim's apartment. Mr. Wong stated he observed officers arriving so he left the complex when he saw Mr. White, Mr. Dean, and Ms. Sexton flee the residence.
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> All four subjects were arrested, transported to the Henderson Detention Center and booked accordingly.

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

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 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 counsel's errors, there is a reasonable probability that the result of the proceedings would have

been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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

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

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

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

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

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

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

However, to establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a 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 compete 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 McNelton 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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CONST. Art. VI § 6. Here, the Nevada Court of Appeals concluded such claim was meritless and stated:

> A district court may properly deny a request for self-representation if the request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion requesting to withdraw his guilty plea and for either the appointment of substitute counsel or permission to represent himself. The district court held a hearing concerning White's motion, discussed the motion with White, and clarified White's desire to move for the withdrawal of his guilty plea. Following the discussion, the district court decided to appoint substitute counsel. White acknowledged he understood the district court's decision to 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.

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

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

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

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

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

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

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

Moreover, Petitioner's allegation 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 is waived, belied by the record, and meritless. Petition at 9. As a preliminary matter, this is a substantive claim that is waived. NRS 34.810(1) reads:

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

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

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

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

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

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

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

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

As a preliminary matter Petitioner's claims are waived in two (2) ways. First, Petitioner's claims are substantive and therefore waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222. Second, Petitioner's claims are waived

because he is alleging a deprivation of rights that would have occurred prior to entry of his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claims are meritless.

1. Alleged Warrantless Search

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

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

2. Pre-arrest Surreptitious Surveillance of Petitioner

In addition to being waived, Petitioner's argument that his rights were violated because law enforcement conducted a warrantless "surreptitious surveillance" of Petitioner's residence is meritless. Petitioner cites to one (1) of the law enforcement incident reports which states

that the officers surveilled an apartment on foot, from their vehicle, and searched the apartment with consent. Petitioner has not and cannot cite any legal authority that states that surveilling from a lawful position is a violation of an individual's fourth amendment right. Regardless, Petitioner has not alleged that he would have proceeded with trial and not pled guilty. Therefore, Petitioner's claim fails.

3. Oath or Affirmation

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

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

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

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

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

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

Petitioner argues that the State breached its duty under Brady v. Maryland for failing to disclose the following: (1) criminal histories of victims and the State's witnesses; (2) the search 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.

As a preliminary matter, Petitioner's claim is substantive and thus waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222. Additionally, the claim is waived because Petitioner is asserting a constitutional claim that occurred prior to entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112

P.3d at 1070, n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164. Regardless, Petitioner's claim is belied by the record as well as bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995), *citing* United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. 1565.

Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the

State's witnesses. See Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

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

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence which was available to the defendant from other sources, including diligent investigation by the defense. Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made. This Court held that the defendant certainly had knowledge of the calls that he made and through diligent investigation the defendant's counsel could have obtained the phone records independently. Id. Based on that finding, this Court found that there was no Brady violation when the State did not provide the phone records to the defense. Id.

First, Petitioner's claim that the State failed to provide certain discovery is belied by the record as counsel for the State, an officer of the court, stated that the State provided all discovery to defense counsel. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Defendant White's Pro Per Motion for Trial Extension for 180 Days; Motion to Recuse Counsel and Application

to Proceed in Propria Personam Hearing Minutes, Apr. 18, 2017. To the extent Petitioner claims that the State's record was false, he has failed to provide any support for why he believes such record was false. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Petitioner has not demonstrated the materiality of the information he now self-servingly claims he did not receive and whether it truly would have resulted in him not pleading guilty.

D. Ground 4: Ineffective Assistance of Counsel Claims

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

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

1. Harvey Gruber Complaints

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

First, Petitioner complains that counsel was ineffective for failing to ensure Petitioner was provided a timely Marcum notice and was given an opportunity to testify as well as present evidence at the grand jury hearing. Petition at 36. However, Petitioner cannot claim ineffective assistance of counsel for an action taken by the State. Indeed, Petitioner's claim appears to be

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

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

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

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

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

> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.

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

alone whether hiring an expert would have rendered a better outcome. Id. Therefore, Petitioner's claim fails.

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

Seventh, Petitioner complains that counsel was ineffective for failing to investigate facts surrounding Deann's alleged threats and coercion that induced Petitioner's October 19, 2017 later withdrawn guilty plea. Petition at 37. However, this claim fails as Petitioner cannot demonstrate prejudice because his first plea withdrawal request was granted. As it relates to his second plea, Petitioner cannot demonstrate how investigating his prior plea would have changed the outcome of his later guilty plea. In other words, regardless of whether counsel investigated Deann's alleged threats prior to Petitioner's first guilty plea, Petitioner cannot demonstrate how investigating this prior plea allegation would have caused him not to enter his second guilty plea and proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim fails.

Eighth, Petitioner claims counsel was ineffective for failing to pursue a mental health defense in light of Petitioner's mental health records. Petition at 37. Petitioner's claim fails as he cannot demonstrate that had counsel pursued such a defense, he would not have pled guilty and proceeded to trial because he does not know if such defense would have been successful.

Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Regardless, Petitioner acknowledged during his plea canvass with the Court that he went over all defenses with counsel and still proceeded to enter his guilty plea. Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 13. Therefore, Petitioner's claim fails.

2. Michael Sanft Complaints

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

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

Third, Petitioner again complains that counsel was ineffective for failing to investigate Petitioner's mental health history, medical history, diminished capacity, intoxication, duress, and competency defenses as well as failed to hire an expert to evaluate Petitioner. Petition at 38. This claim fails because, as discussed *supra*, Mr. Gruber obtained some of Petitioner's medical records. Thus, Mr. Sanft obtaining the same record would have been futile. Moreover, to the extent Petitioner complains that counsel should have investigated further, he has not proven what that investigation would have shown whether the information received would have caused him not to plead guilty or more importantly provided a better outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. Similarly, Petitioner has not demonstrated what an expert would have said, let alone whether hiring an expert would have rendered a better outcome. Id. Therefore, Petitioner's claim fails.

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

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

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

Seventh, Petitioner argues that counsel failed to impeach the following State's witnesses with their criminal histories: Burkhalter, White, Cliff, Burton, Perry, and Cousert. Petition at 38. As a preliminary matter, out of the aforementioned list only Burkhalter and Cliff had testified before Petitioner decided to end his trial and plead guilty. Thus, as discussed with his previous claim, Petitioner can only attempt to demonstrate prejudice as to Burkhalter and Cliff. Regardless, Petitioner's claim fails because it is a bare and naked claim suitable only for summary denial. Indeed, Petitioner does not provide the crimes of moral turpitude to which he is referring and fails to provide any indication that such witnesses were convicted of such crimes. Hargrove, 100 Nev. at 502, 686 P.2d at 225. It bears noting that the State did question

Cliff about his 2016 conviction for attempt grand larceny and 2017 conviction for using and possession of identification of another. Regardless, Petitioner cannot demonstrate that had Burkhalter and Cliff been questioned about the crimes of moral turpitude they allegedly committed, he would not have pled guilty and permitted his trial to proceed. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim fails.

Eighth, Petitioner complains that counsel was ineffective for failing to call a single witness at trial. Petition at 38. However, his claim fails because it is a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Petitioner has failed to indicate which witnesses he believes should have been called in addition to the State's witnesses, let alone whether such witnesses would have been willing to testify. While it appears that counsel stated he did not anticipate that he would call witnesses to the stand, but instead would cross-examine the State's witness, it bears noting that counsel later requested Co-Defendant Marland be transported from the prison as a potential witness for the defense. Recorder's Transcript of Hearing: Jury Trial – Day 1, filed July 12, 2019, at 7-8, 38-40. Ultimately, however, which witnesses to call is counsel's responsibility and Petitioner has failed to demonstrate that he would have elected to proceed with trial instead of pleading guilty had these unnamed witnesses testified. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537.

Ninth, Petitioner complains that counsel based all of Petitioner's defenses on the State's evidence and witnesses in its case in chief. Petition at 38. This is also a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has failed to indicate how counsel was ineffective in basing Petitioner's defense on the State's evidence and witnesses and that doing so was "gross error." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). Indeed, which defenses to pursue it ultimately a strategic decision and counsel's responsibility. Rhyne, 118 Nev. at 8, 38 P.3d at 167; Dawson, 108 Nev. at 117, 825 P.2d at 596; see also Ford, 105 Nev. at 853, 784 P.2d at 953. More importantly, he has not

demonstrated that he would have elected to proceed with trial instead of pleading guilty. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim fails.

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

Eleventh, Petitioner argues counsel was ineffective for failing to file a Sentencing Memorandum on Petitioner's behalf for mitigation purposes. Petition at 38. While counsel did not file a Sentencing Memorandum, he did argue on Petitioner's behalf during the sentencing hearing to mitigate the State's requested sentence. Recorder's Transcript of Hearing: Sentencing, filed July 10, 2019, at 8-11. Ultimately, Petitioner cannot demonstrate that filing a Sentencing Memorandum with the specific points he now alleges counsel should have raised, would have changed the sentencing outcome as he plead guilty to the charges. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Thus, Petitioner's claim fails.

Twelfth, Petitioner asserts that counsel was ineffective for counsel failing to object to the Court imposition of restitution. As discussed *infra* in Section I, Petitioner's claim, that the Court improperly imposed restitution when he was not specifically canvassed on restitution,

is meritless because Petitioner acknowledged he understood the consequences of his plea and the sentencing decision, including the restitution imposed, was ultimately in the Court's discretion. Moreover, due to the sentence being in the Court's ultimate discretion, any error would have been harmless. Thus, any objection by counsel would have been futile. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioners claim fails.

3. Appellate Counsel Complaints

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

As for Petitioner's complaint regarding appellate counsel failing to obtain the complete record on appeal and expanding his Faretta claim, as discussed *supra* in Section A, such claim is meritless. Although Petitioner asserts that counsel improperly framed the Faretta issue on direct appeal and failed to obtain more transcripts, he has not and cannot demonstrate that such claim would have been meritorious as he was making the same request to represent himself. He has not indicated how the Nevada Court of Appeals' analysis would have changed had counsel referenced the other hearings in which Petitioner requested to represent himself. Accordingly, Petitioner cannot demonstrate how obtaining additional transcripts would have changed the futility in appellate counsel framing the issue the way Petitioner now believes was the correct way to frame the issue. See Ennis, 122 Nev. at 706, 137 P.3d at 1103. For this same reason, Petitioner cannot demonstrate prejudice.

As for Petitioner's claim regarding the Ann White Affidavit, Petitioner's claim also fails. Motion for Seal, at Exhibit 1, Exhibit A, Exhibit B. Although Petitioner and the author of such affidavit claim that appellate counsel was sent the affidavit, Petitioner has failed to provide proof that appellate counsel did in fact receive such document. Regardless, briefing such document would have been futile as Petitioner failed to pursue a challenge to his guilty plea prior to the entry of his Judgment of Conviction. See Ennis, 122 Nev. at 706, 137 P.3d at 1103; Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (186), superseded by statute on

other grounds as stated in Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000) (concluding that a defendant may not "challenge the validity of a guilty plea on direct appeal from the judgment of conviction" in the first instance). Therefore, Petitioner's claim fails.

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

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

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

Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The law in Nevada establishes that a plea of guilty is presumptively valid, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

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

Furthermore, the Nevada Supreme Court has explained:

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

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

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

> THE COURT: Are you entering into this plea today freely and voluntarily?
> THE DEFENDANT: Yeah.
> THE COURT: Did anyone threaten or coerce you into entering into this plea? THE DEFENDANT: No.
> THE COURT: So, you're entering into this plea today of your own free will? THE DEFENDANT: Yeah.
> [...]
> THE COURT: Has anyone made you any promises?
> THE DEFENDANT: No.
> [...]
> THE COURT: Okay. And Mr. White, you are pleading guilty today because you are in truth and in fact guilty of these offenses?
> THE DEFENDANT: Yeah.
> THE COURT: And you do not want to proceed and go to trial?
> THE DEFENDANT: No.
> 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?
> THE DEFENDANT: Yeah.
> THE COURT: Okay. And, again, you are doing this freely and voluntarily?
> THE DEFENDANT: Yeah.
> [...]
> THE COURT: Okay. And, again, this is what you want to do and you're entering into this plea freely and voluntarily?

THE DEFENDANT: Yeah.
THE COURT: Okay.

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

THE COURT: Okay. So, no one has threatened or coerced you into entering into this plea, correct?
THE DEFENDANT: No.
THE COURT: No one in the Clark County Detention Center?
THE DEFENDANT: No.
THE COURT: No one in the Nevada Department of Corrections?
THE DEFENDANT: No.
THE COURT: No one on the planet earth?
THE DEFENDANT: No.
THE COURT: Okay, no one has threatened you, correct?
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?
THE DEFENDANT: No.
THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
THE DEFENDANT: Yeah.
THE COURT: Okay. And you're satisfied with how the trial has gone so far?
THE DEFENDANT: Yeah.
THE COURT: I guess with the exception that the victims testified. I mean I'm --
THE DEFENDANT: Yeah.
THE COURT: But, again, you think this is in your best interest?
THE DEFENDANT: Yeah.
THE COURT: And you want me to accept your plea?
THE DEFENDANT: Yeah.
MR. SCHWARTZER: Thank you, Your Honor.

Id. at 19-21.

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

> THE COURT: And you've had a chance to talk to your attorney? Is that a yes -- I've got to make sure you're paying attention to me --
> THE DEFENDANT: Yeah. I am.
> THE COURT: -- because you've already withdrawn one plea with me. So, I just want to make sure you're paying attention. So, you let me know when you are done looking at that document.
> [...]
> 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.
> THE COURT: You understand that you do have a right to a speedy and public trial; that if the matter went to trial the State would be required to prove each of the elements as alleged in their charging document by proof beyond a reasonable doubt. Do you understand that?
> THE DEFENDANT: Yeah.
> THE COURT: And, your attorney did explain to you on each count what the State would have to prove. Is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: Okay. Do you have any questions about what the State would have to prove if this matter went to trial?
> THE DEFENDANT: No.
> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.
> THE COURT: You understand at the time of trial you would have the right 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?
> THE DEFENDANT: Yeah.
> THE COURT: And you understand that you will be giving them up by entering into this plea today?
> THE DEFENDANT: Yeah.
> [...]
> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.

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

> THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
> THE DEFENDANT: Yeah.

Id. at 21.

Additionally, Petitioner's claim that he was not competent when he entered his plea because he was not administered his medications is unsupported and suitable only for summary 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 attempt to assist his attorney, however illegally. Id. The Court further concluded that "[t]he record contains no evidence that [the defendant] was unable to remember the events relating to his drug arrest, communicate with his attorney or otherwise assist in his own defense." Id. Similarly, in Graham, the Nevada Supreme Court concluded that based on the psychiatric evaluations and the defendant's actions in court, specifically during the guilty plea canvass, there was no indication that the defendant was incompetent. 93 Nev. at 278, 564 P.2d at 187. However, in Olivares v. State, 124 Nev. 1142, 1148-49, 195 P.3d 864, 868-69 (2008), the Court held that the district court erred in finding the defendant competent when doctors concluded that he was incompetent to stand trial and statements from the defendant indicated that he believed his attorneys were colluding with the court and the State.

To the extent Petitioner claims that counsel was ineffective for allowing him to proceed with his guilty plea despite his alleged medical ailments, Petitioner provides no evidence that

his counsel was aware Petitioner was suffering from any actual mental health issues. Counsel cannot be deemed ineffective when she had no information or reason to believe that Petitioner had "particular psychological conditions or disorders that may have shown prior mental disturbance or impaired mental state." Riley v. State, 110 Nev. 638, 650, 878 P.2d 272, 280 (1994), overruled on other grounds by Riley v. McDaniel, 786 F.3d 719 (9th Cir. 2015).

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

> MR. SANFT: [...] *I believe that, at this particular point, that Mr. White is not under any type of influence of alcohol or drugs that would impair his thinking here today with regards to his decision to enter into this plea.* And I don't believe as well that, based upon my communication with Mr. White, that there's been any type of threat made against him. I have not received that as well. I just want to make sure that that's on the record because I know that was a concern the last time we were in court with regards to that.
> THE COURT: Okay. And that's all true, correct?
> THE DEFENDANT: Yeah.
> THE COURT: You're not on any kind of medication?
> THE DEFENDANT: *Just the medication that I take, my meds, but they're not impacting my decision to plead.*
> THE COURT: *What kind of medication are you on?*
> THE DEFENDANT: *Psych meds.*
> THE COURT: *Okay. And you don't think it's affecting your ability to enter into this plea today?*
> THE DEFENDANT: *No.*
> THE COURT: Okay. And, again, you want to stop the trial and you just want to accept responsibility. Is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: Well, why did you decide to do it today?
> THE DEFENDANT: I just -- I slept on it. After seeing the victims yesterday and then hearing what – hearing from the victim.
> THE COURT: So, after hearing the victims' testimony you just -- you'd heard enough?
> THE DEFENDANT: Yeah.

Recorder's Transcript of Hearing: Jury Trial – Day 3, filed July 12, 2019, at 22-23 (emphasis added). Regardless, mental health issues do not provide automatic mitigation at sentencing. In Ford v. State, the Nevada Supreme Court affirmed the murder convictions and death sentence

for a defendant who drove her car onto a crowded sidewalk in downtown Reno. 102 Nev. 126, 127–28, 717 P.2d 27, 28 (1986). Despite her known significant mental health and competency issues, the Court held that the defendant's mental health issues did not diminish the imposed sentence. Id. at 137, 717 P.2d at 35. The facts of this case sufficiently outweigh any mitigating effect and the sentence would have been the same. Thus, not only did Petitioner enter his plea knowingly and voluntarily, counsel was not ineffective. Therefore, Petitioner's claims fail.

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

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

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

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

at sentencing. His failure to do so waives his ability to challenge it on a post-conviction habeas matter.

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

> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.
> [...]
> THE COURT: And you understand that sentencing is completely within the discretion of the Court, that no one can make you any promises regarding what will happen at the time of sentencing. Do you understand that?
> THE DEFENDANT: Yeah.

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

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

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

As an initial matter, Petitioner's claim is waived because it is substantive. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. at 148, 979 P.2d at 222.

Additionally, it is waived because it is an allegation that his rights were deprived prior to entering his guilty plea. Eighth Judicial District Court, 121 Nev. at 225, 112 P.3d at 1070, n.24; See Webb, 91 Nev. at 469, 538 P.2d at 164.

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

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

> 1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file 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, 1005-1006, 923 P.2d 1102, 1118 (1996) (citations omitted). A judge must "'preside to the conclusion of all proceedings, in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary.'" City of Las Vegas v. Eighth Judicial Dist. Ct., 116 Nev. 640, 643, 5 P.3d 1059, 1061 (2000) (quoting Ham v. Dist. Ct., 93 Nev. 409, 415, 566 P.2d 420, 424 (1977)); accord CJC 2.7 ("A judge shall hear and decide all matters assigned to the judge except when disqualification is required by Rule 2.11 or other law.").

It was Petitioner's burden to establish that the Court "displays 'a deep-seated favoritism or antagonism that would make fair judgment impossible[,]'" Walker v. State, 113 Nev. 853, 864, 944 P.2d 762, 769 (1997) (quoting Liteky v. United States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994)), cert. denied, 525 U.S. 950, 119 S. Ct. 377 (1998), and must set "forth facts and reasons sufficient to cause a reasonable person to question the judge's impartiality." Towbin Dodge, 121 Nev. at 260, 112 P.3d at 1069. A reviewing court should look for actual manifestations of bias on the part of the judicial officer. A Minor v. State, 86 Nev. 691, 695,

476 P.2d 11, 12 (1970). "Disqualification must be based on facts, rather than mere speculation." Rippo v. State, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997) (*citing* PETA v. Bobby Berosini, 111 Nev. 431, 437, 894 P.2d 337, 341 (1995)).

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

In this case, it is clear that Petitioner did not follow the mandated procedures for judicial recusal. Moreover, Petitioner has failed to demonstrate how the Court, counsel Guber, or the State acted in a manner that demonstrated a conflict of interest. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Jefferson v. State, 133 Nev. 874, 879, 410 P.3d 1000, 1004 (Nev. App. 2017) (internal citations omitted) ("a criminal defendant's decision to file such an action against appointed counsel does not require disqualification unless the circumstances demonstrate an actual conflict of interest."). Also, Petitioner has not demonstrated that had another Court, other counsel, or another district attorney handled his case he would not have pled guilty and decided to proceed with trial. Hill, 474 U.S. at 59, 106 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina, 120 Nev. at 190-91, 87 P.3d at 537. Therefore, Petitioner's claim fails.

II. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

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

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

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

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus Post-Conviction and associated filings be DENIED.

DATED this 9th day of March, 2021.

Respectfully submitted,

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

BY */s/ ALEXANDER CHEN*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 9th day of March, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

BY /s/ L.M.
Secretary for the District Attorney's Office

16FH0191B/AC/bg/lm/GU

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03/22/2021
CLERK OF THE COURT

27

TONEY A. WHITE
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HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NV,
89070

PETITIONER IN PRO SE

DISTRICT COURT
CLARK COUNTY NEVADA

TONEY A. WHITE,	CASE NUMBER A-20-824261-W
PETITIONER,	DEPARTMENT NO. 12
VS.	PETITIONER'S MOTION FOR EXTENSION OF TIME OF 60 DAYS FROM MARCH 25, 2021 HEARING TO FILE REPLY TO STATES RESPONSE TO PCR PETITION.
CALVIN JOHNSON, WARDEN,	
RESPONDENT.	

ON NOVEMBER 05, 2020 PETITIONER FILED THE UNDERLYING PETITION PURSUANT TO CHAPTER 34 OF NRS. THE COURT ON DECEMBER 08, 2020 ISSUED ITS ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS PROVIDING THE STATE 45 DAYS AND UNTIL JANUARY 28, 2021 TO RESPOND AND SETTING HEARING ON THE PETITION FOR JANUARY 28, 2021 AT 10:15 HOURS. SAID TIME ELAPSED AND ON FEBRUARY 07TH AND 14TH, 2021 PETITIONER MOVED FOR APPOINTMENT OF PCR COUNSEL.

RECEIVED
MAR 15 2021
CLERK OF THE COURT

BELATEDLY, ON MARCH 09, 2021 THE STATE RESPONDED TO PETITIONERS PCR WHICH IS TYPICAL NOTICING HIM OF A HEARING DATE OF MARCH 25, 2021. PETITIONER RECEIVED THE STATE'S RESPONSE CONTAINING SOME 43 PAGES OF TEXT ON MARCH 15, 2021 AND GIVEN ITS BREADTH AND LENGTH, IS COMPLETELY INCAPABLE OF REPLYING BY THE NOTICED HEARING DATE.

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GIVEN THE PENDENCY OF PETITIONER'S DUAL MOTIONS FOR APPOINTMENT OF PCR COUNSEL AND THE NEED FOR ADDITIONAL TIME TO BE ABLE TO REPLY TO THE STATES LENGTHY RESPONSE, HE SEEKS THAT THE MARCH 25, 2021 HEARING BE EXTENDED FOR 60 DAYS TO PERMIT RESOLUTION OF HIS MOTIONS AND TO PERMIT HIS REPLY.

RESPECTFULLY SUBMITTED,

DATED: MARCH 15, 2021

BY: _____
(TONEY A. WHITE, III)
PETITIONER IN PRO SE

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TONEY A. WHITE 1214172
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

LAS VEGAS NV 890
16 MAR 2021 PM 3 L

MAR 15 2021

CLERK OF THE COURT
CLARK COUNTY DISTRICT COURT
8TH JUDICIAL DISTRICT
DEPARTMENT NO. 12
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE
LAS VEGAS, NV, 89155

LEGAL MAIL

RECEIVED
MAR 18 2021
CLERK OF THE COURT

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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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On March 9, 2016, ANTHONY WHITE (hereinafter "Petitioner") was charged by way of Grand Jury Indictment with the following charges: CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147), BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060 – NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 – NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS 199.430 – NOC 53013).

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTS

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

> On January 20, 2016, Henderson Police dispatch received a call for service at a local Henderson apartment community in reference to a loud verbal dispute taking place in an apartment and a possible home invasion. Upon the officer's arrival, he observed a male standing behind a Jeep Cherokee. The officer briefly spoke with the male, identified as one of the co-defendants, Kevin Wong, as the officer approached the door. Screaming was heard from the apartment and a male victim **(Victim 2)** was found lying on the floor 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.
>
> **Victim 2** was transported to the hospital with significant head injuries to 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

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

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

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

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

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 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

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

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

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

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

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

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

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

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

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

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

However, to establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a 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 compete 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 McNelton 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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CONST. Art. VI § 6. Here, the Nevada Court of Appeals concluded such claim was meritless and stated:

> A district court may properly deny a request for self-representation if the request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion requesting to withdraw his guilty plea and for either the appointment of substitute counsel or permission to represent himself. The district court held a hearing concerning White's motion, discussed the motion with White, and clarified White's desire to move for the withdrawal of his guilty plea. Following the discussion, the district court decided to appoint substitute counsel. White acknowledged he understood the district court's decision to 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.

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

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

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

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

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

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

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

Moreover, Petitioner's allegation 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 is waived, belied by the record, and meritless. Petition at 9. As a preliminary matter, this is a substantive claim that is waived. NRS 34.810(1) reads:

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

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

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

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

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

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

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

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

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

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

1. Alleged Warrantless Search

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

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

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2. Pre-arrest Surreptitious Surveillance of Petitioner

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

3. Oath or Affirmation

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

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

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

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

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

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

Petitioner argues that the State breached its duty under Brady v. Maryland for failing to disclose the following: (1) criminal histories of victims and the State's witnesses; (2) the search 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.

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

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

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

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

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

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

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

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

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

D. Ground 4: Ineffective Assistance of Counsel Claims

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

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

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1. Harvey Gruber Complaints

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

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

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

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

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

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

> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.

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

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

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

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

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

2. *Michael Sanft Complaints*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Appellate Counsel Complaints

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

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

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

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

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

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

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

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

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

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

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

Furthermore, the Nevada Supreme Court has explained:

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

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

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

> THE COURT: Are you entering into this plea today freely and voluntarily?
> THE DEFENDANT: Yeah.
> THE COURT: Did anyone threaten or coerce you into entering into this plea? THE DEFENDANT: No.
> THE COURT: So, you're entering into this plea today of your own free will? THE DEFENDANT: Yeah.
> [...]

THE COURT: Has anyone made you any promises?
THE DEFENDANT: No.
[…]
THE COURT: Okay. And Mr. White, you are pleading guilty today because you are in truth and in fact guilty of these offenses?
THE DEFENDANT: Yeah.
THE COURT: And you do not want to proceed and go to trial?
THE DEFENDANT: No.
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?
THE DEFENDANT: Yeah.
THE COURT: Okay. And, again, you are doing this freely and voluntarily?
THE DEFENDANT: Yeah.
[…]
THE COURT: Okay. And, again, this is what you want to do and you're entering into this plea freely and voluntarily?
THE DEFENDANT: Yeah.
THE COURT: Okay.

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

THE COURT: Okay. So, no one has threatened or coerced you into entering into this plea, correct?
THE DEFENDANT: No.
THE COURT: No one in the Clark County Detention Center?
THE DEFENDANT: No.
THE COURT: No one in the Nevada Department of Corrections?
THE DEFENDANT: No.
THE COURT: No one on the planet earth?
THE DEFENDANT: No.
THE COURT: Okay, no one has threatened you, correct?
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?

THE DEFENDANT: No.
THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
THE DEFENDANT: Yeah.
THE COURT: Okay. And you're satisfied with how the trial has gone so far?
THE DEFENDANT: Yeah.
THE COURT: I guess with the exception that the victims testified. I mean I'm --
THE DEFENDANT: Yeah.
THE COURT: But, again, you think this is in your best interest?
THE DEFENDANT: Yeah.
THE COURT: And you want me to accept your plea?
THE DEFENDANT: Yeah.
MR. SCHWARTZER: Thank you, Your Honor.

Id. at 19-21.

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

THE COURT: And you've had a chance to talk to your attorney? Is that a yes -- I've got to make sure you're paying attention to me --
THE DEFENDANT: Yeah. I am.
THE COURT: -- because you've already withdrawn one plea with me. So, I just want to make sure you're paying attention. So, you let me know when you are done looking at that document.
[...]
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.

> THE COURT: You understand that you do have a right to a speedy and public trial; that if the matter went to trial the State would be required to prove each of the elements as alleged in their charging document by proof beyond a reasonable doubt. Do you understand that?
> THE DEFENDANT: Yeah.
> THE COURT: And, your attorney did explain to you on each count what the State would have to prove. Is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: Okay. Do you have any questions about what the State would have to prove if this matter went to trial?
> THE DEFENDANT: No.
> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.
> THE COURT: You understand at the time of trial you would have the right 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?
> THE DEFENDANT: Yeah.
> THE COURT: And you understand that you will be giving them up by entering into this plea today?
> THE DEFENDANT: Yeah.
> [...]
> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.

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

> THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
> THE DEFENDANT: Yeah.

Id. at 21.

Additionally, Petitioner's claim that he was not competent when he entered his plea because he was not administered his medications is unsupported and suitable only for summary 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

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

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

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

> MR. SANFT: [...] *I believe that, at this particular point, that Mr. White is not under any type of influence of alcohol or drugs that would impair his thinking here today with regards to his decision to enter into this plea.* And I don't believe as well that, based upon my communication with Mr. White, that there's been any type of threat made against him. I have not received that as well. I just want to make sure that that's on the record because I know that was a concern the last time we were in court with regards to that.
> THE COURT: Okay. And that's all true, correct?
> THE DEFENDANT: Yeah.
> THE COURT: You're not on any kind of medication?

THE DEFENDANT: *Just the medication that I take, my meds, but they're not impacting my decision to plead.*
THE COURT: *What kind of medication are you on?*
THE DEFENDANT: *Psych meds.*
THE COURT: *Okay. And you don't think it's affecting your ability to enter into this plea today?*
THE DEFENDANT: *No.*
THE COURT: Okay. And, again, you want to stop the trial and you just want to accept responsibility. Is that correct?
THE DEFENDANT: Yeah.
THE COURT: Well, why did you decide to do it today?
THE DEFENDANT: I just -- I slept on it. After seeing the victims yesterday and then hearing what – hearing from the victim.
THE COURT: So, after hearing the victims' testimony you just -- you'd heard enough?
THE DEFENDANT: Yeah.

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

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

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

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

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

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

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

> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.
> [...]

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

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

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

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

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

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

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

> 1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file 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

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

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

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

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

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

II. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

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

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

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

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

ORDER

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

DATED this _____ day of April, 2021.

Dated this 8th day of April, 2021

DISTRICT JUDGE

A7A 653 C606 A19E
Michelle Leavitt
District Court Judge

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

BY */s/ ALEXANDER CHEN*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

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

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

BY /s/ L.M.
Secretary for the District Attorney's Office

16FH0191B/AC/bg/lm/GU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Toney White, Plaintiff(s) vs. Calvin Johnson, Warden, Defendant(s)	CASE NO: A-20-824261-W DEPT. NO. Department 12

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 4/8/2021

Dept 12 Law Clerk	dept12lc@clarkcountycourts.us

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

TONEY WHITE,

Petitioner,

vs.

CALVIN JOHNSON, WARDEN,

Respondent,

Case No: A-20-824261-W

Dept No: XII

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

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.

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Toney White # 1214172
P.O. Box 650
Indain Springs, NV 89070

/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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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On March 9, 2016, ANTHONY WHITE (hereinafter "Petitioner") was charged by way of Grand Jury Indictment with the following charges: CONSPIRACY TO COMMIT ROBBERY (Category B Felony – NRS 200.380, 199.480 – NOC 50147), BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060 – NOC – 50426), FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310, 200.320, 193.165 – NOC 50055), ATTEMPT ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.330, 193.165 – NOC 50145), BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481 – NOC 50226), and IMPERSONATION OF AN OFFICER (Gross Misdemeanor – NRS 199.430 – NOC 53013).

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

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

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

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

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

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

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

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

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

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

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

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

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

FACTS

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

> On January 20, 2016, Henderson Police dispatch received a call for service at a local Henderson apartment community in reference to a loud verbal dispute taking place in an apartment and a possible home invasion. Upon the officer's arrival, he observed a male standing behind a Jeep Cherokee. The officer briefly spoke with the male, identified as one of the co-defendants, Kevin Wong, as the officer approached the door. Screaming was heard from the apartment and a male victim **(Victim 2)** was found lying on the floor 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.
>
> **Victim 2** was transported to the hospital with significant head injuries to 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

> injuries. A detective arrived at the scene and interviewed **Victim 1**. She stated she was sitting on the couch and heard someone knocking at the door. She answered and there was a female, identified as codefendant, Amanda Sexton and two male suspects, identified as co-defendants Marland Dean, and Toney White who forcibly opened the door and entered the apartment. Firearms were drawn and aimed at both of the victims. Ms. Sexton placed **Victim 1** in handcuffs and Mr. White and Mr. Dean began to yell at **Victim 2** stating, "We have a search warrant, US Marshals; get on the ground." Mr. White and Mr. Dean began beating **Victim 2** with metal batons and struck him in the head and face.
>
> A detective responded to a traffic stop location involving Mr. Wong. Mr. Wong gave the detective consent to search his vehicle. The detective observed a purse on the passenger seat and located a Nevada Identification card with Amanda Sexton's name on it. Mr. White, Mr. Dean, and Ms. Sexton met up with Mr. Wong and forced their way into the victim's apartment. Mr. Wong stated he observed officers arriving so he left the complex when he saw Mr. White, Mr. Dean, and Ms. Sexton flee the residence.
>
> All four subjects were arrested, transported to the Henderson Detention Center and booked accordingly.

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

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL STANDARD

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 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

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

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

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

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

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

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

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

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

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

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

However, to establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a 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 compete 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 McNelton 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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CONST. Art. VI § 6. Here, the Nevada Court of Appeals concluded such claim was meritless and stated:

> A district court may properly deny a request for self-representation if the request is equivocal. *Lyons v. State*, 106 Nev. 438, 443, 796 P.2d 210, 213 (1990), *clarified on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1171-72 (2001). The record reveals that White filed a motion requesting to withdraw his guilty plea and for either the appointment of substitute counsel or permission to represent himself. The district court held a hearing concerning White's motion, discussed the motion with White, and clarified White's desire to move for the withdrawal of his guilty plea. Following the discussion, the district court decided to appoint substitute counsel. White acknowledged he understood the district court's decision to 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.

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

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

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

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

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

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

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

Moreover, Petitioner's allegation 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 is waived, belied by the record, and meritless. Petition at 9. As a preliminary matter, this is a substantive claim that is waived. NRS 34.810(1) reads:

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

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

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

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

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

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

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

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

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

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

1. Alleged Warrantless Search

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

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

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2. Pre-arrest Surreptitious Surveillance of Petitioner

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

3. Oath or Affirmation

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

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

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

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

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

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

Petitioner argues that the State breached its duty under Brady v. Maryland for failing to disclose the following: (1) criminal histories of victims and the State's witnesses; (2) the search 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.

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

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

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

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

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

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

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

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

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

D. Ground 4: Ineffective Assistance of Counsel Claims

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

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

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1. Harvey Gruber Complaints

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

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

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

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

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

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

> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.

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

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

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

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

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

2. Michael Sanft Complaints

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Appellate Counsel Complaints

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

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

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

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

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

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

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

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

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

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

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

Furthermore, the Nevada Supreme Court has explained:

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

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

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

> THE COURT: Are you entering into this plea today freely and voluntarily?
> THE DEFENDANT: Yeah.
> THE COURT: Did anyone threaten or coerce you into entering into this plea? THE DEFENDANT: No.
> THE COURT: So, you're entering into this plea today of your own free will? THE DEFENDANT: Yeah.
> [...]

THE COURT: Has anyone made you any promises?
THE DEFENDANT: No.
[…]
THE COURT: Okay. And Mr. White, you are pleading guilty today because you are in truth and in fact guilty of these offenses?
THE DEFENDANT: Yeah.
THE COURT: And you do not want to proceed and go to trial?
THE DEFENDANT: No.
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?
THE DEFENDANT: Yeah.
THE COURT: Okay. And, again, you are doing this freely and voluntarily?
THE DEFENDANT: Yeah.
[…]
THE COURT: Okay. And, again, this is what you want to do and you're entering into this plea freely and voluntarily?
THE DEFENDANT: Yeah.
THE COURT: Okay.

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

THE COURT: Okay. So, no one has threatened or coerced you into entering into this plea, correct?
THE DEFENDANT: No.
THE COURT: No one in the Clark County Detention Center?
THE DEFENDANT: No.
THE COURT: No one in the Nevada Department of Corrections?
THE DEFENDANT: No.
THE COURT: No one on the planet earth?
THE DEFENDANT: No.
THE COURT: Okay, no one has threatened you, correct?
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?

THE DEFENDANT: No.
THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
THE DEFENDANT: Yeah.
THE COURT: Okay. And you're satisfied with how the trial has gone so far?
THE DEFENDANT: Yeah.
THE COURT: I guess with the exception that the victims testified. I mean I'm --
THE DEFENDANT: Yeah.
THE COURT: But, again, you think this is in your best interest?
THE DEFENDANT: Yeah.
THE COURT: And you want me to accept your plea?
THE DEFENDANT: Yeah.
MR. SCHWARTZER: Thank you, Your Honor.

Id. at 19-21.

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

THE COURT: And you've had a chance to talk to your attorney? Is that a yes -- I've got to make sure you're paying attention to me --
THE DEFENDANT: Yeah. I am.
THE COURT: -- because you've already withdrawn one plea with me. So, I just want to make sure you're paying attention. So, you let me know when you are done looking at that document.
[...]
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.

> THE COURT: You understand that you do have a right to a speedy and public trial; that if the matter went to trial the State would be required to prove each of the elements as alleged in their charging document by proof beyond a reasonable doubt. Do you understand that?
> THE DEFENDANT: Yeah.
> THE COURT: And, your attorney did explain to you on each count what the State would have to prove. Is that correct?
> THE DEFENDANT: Yeah.
> THE COURT: Okay. Do you have any questions about what the State would have to prove if this matter went to trial?
> THE DEFENDANT: No.
> THE COURT: Okay. And you had a chance to discuss any defenses that you would have to these charges?
> THE DEFENDANT: Yeah.
> THE COURT: You discussed them with your attorney?
> THE DEFENDANT: Yeah.
> THE COURT: You understand at the time of trial you would have the right 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?
> THE DEFENDANT: Yeah.
> THE COURT: And you understand that you will be giving them up by entering into this plea today?
> THE DEFENDANT: Yeah.
> [...]
> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.

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

> THE COURT: Okay. And you are satisfied with your representation of Mr. Sanft?
> THE DEFENDANT: Yeah.

Id. at 21.

Additionally, Petitioner's claim that he was not competent when he entered his plea because he was not administered his medications is unsupported and suitable only for summary 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

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

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

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

> MR. SANFT: [...] *I believe that, at this particular point, that Mr. White is not under any type of influence of alcohol or drugs that would impair his thinking here today with regards to his decision to enter into this plea.* And I don't believe as well that, based upon my communication with Mr. White, that there's been any type of threat made against him. I have not received that as well. I just want to make sure that that's on the record because I know that was a concern the last time we were in court with regards to that.
> THE COURT: Okay. And that's all true, correct?
> THE DEFENDANT: Yeah.
> THE COURT: You're not on any kind of medication?

THE DEFENDANT: *Just the medication that I take, my meds, but they're not impacting my decision to plead.*
THE COURT: *What kind of medication are you on?*
THE DEFENDANT: *Psych meds.*
THE COURT: *Okay. And you don't think it's affecting your ability to enter into this plea today?*
THE DEFENDANT: *No.*
THE COURT: Okay. And, again, you want to stop the trial and you just want to accept responsibility. Is that correct?
THE DEFENDANT: Yeah.
THE COURT: Well, why did you decide to do it today?
THE DEFENDANT: I just -- I slept on it. After seeing the victims yesterday and then hearing what – hearing from the victim.
THE COURT: So, after hearing the victims' testimony you just -- you'd heard enough?
THE DEFENDANT: Yeah.

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

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

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

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

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

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

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

> THE COURT: You had a chance to discuss all this with your lawyer and all the consequences?
> THE DEFENDANT: Yeah.
> [...]

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

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

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

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

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

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

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

> 1. Any party to an action or proceeding pending in any court other than the Supreme Court or the Court of Appeals, who seeks to disqualify a judge for actual or implied bias or prejudice must file 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

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

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

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

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

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

II. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

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

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

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

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

ORDER

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

DATED this _____ day of April, 2021.

Dated this 8th day of April, 2021

DISTRICT JUDGE

A7A 653 C606 A19E
Michelle Leavitt
District Court Judge

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

BY */s/ ALEXANDER CHEN*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539

CERTIFICATE OF MAILING

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

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

BY /s/ L.M.
Secretary for the District Attorney's Office

16FH0191B/AC/bg/lm/GU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Toney White, Plaintiff(s) vs. Calvin Johnson, Warden, Defendant(s)	CASE NO: A-20-824261-W DEPT. NO. Department 12

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 4/8/2021

Dept 12 Law Clerk	dept12lc@clarkcountycourts.us

27

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04/22/2021
CLERK OF THE COURT

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

PETITIONER IN PRO SE

DISTRICT COURT
COUNTY OF CLARK, NEVADA

TONEY A. WHITE, III, PETITIONER, VS. CALVIN JOHNSON, WARDEN, RESPONDENT.	CASE NUMBER A-20-824261-W DEPT. NO.: 12 HEARING REQUESTED PETITIONER'S RENEWED REQUEST FOR APPOINTMENT OF PCR COUNSEL.

UNABLE TO EMPLOY COUNSEL DUE TO INDIGENCY, PETITIONER PROCEEDS PRO SE IN THIS PCR PROCEEDING. PRIOR TO ACTUALLY FILING A PCR PETITION ON NOVEMBER 05, 2020, ON JUNE 19, 2020 FOLLOWING HIS DIRECT APPEAL BEING AFFIRMED BY THE NEVADA SUPREME COURT ON JUNE 05, 2020 IN NSC NO. 78483, PETITIONER MOTIONED TO RELIEVE APPELLATE COUNSEL TERRANCE M. JACKSON FROM THE CASE AND SOUGHT THAT THE COURT APPOINT PCR COUNSEL. HE JUSTIFIED THE NEED FOR PCR COUNSEL ON SEVERAL FACTORS ARTICULATED IN HIS JUNE 19, 2020 MOTION AND NAMELY THE COMPLEXITY OF SOME OF THE INVOLVED ISSUES AND FURTHER FACT DEVELOPEMENT AND INVESTIGATION AS WELL AS DISCOVERY WHICH LIES OUTSIDE OF THE SCOPE OF THE RECORD. ADDITIONALLY HE BASED IT ON THE NECESSITY OF OBTAINING THE FULL AND ENTIRE TRIAL COURT RECORD NOT ORDERED BY APPEAL COUNSEL OR PROVIDED DURING THE DIRECT APPEAL AND NECESSARY FOR PURSUING THE PANOPLY OF ISSUES ANTICIPATED TO BE RAISED BY HIS PCR PETITION.

PETITIONER FURTHER SUPPORTED HIS REQUEST FOR PCR COUNSEL ON THE NECESSITY OF OBTAINING PERTINENT MEDICAL AND MENTAL HEALTH TREATMENT RECORDS OF TREATING FACILITIES IN THE STATES OF WASHINGTON, NEVADA AND CALIFORNIA. ON JULY 02, 2020 THE COURT GRANTED PETITIONERS MOTION TO WITHDRAW APPEAL COUNSEL BUT REMAINED SILENT ON HIS MOTION FOR PCR COUNSEL PROMPTING HIS AUGUST 19, 2020 RENEWED MOTION FOR APPOINTMENT OF PCR COUNSEL.

APR - 7 2021

CLERK OF THE COURT

THE STATE THEREAFTER ON SEPTEMBER 02, 2020 ENTERED OPPOSITION TO THE APPOINTMENT OF PCR COUNSEL FOR THE REASONS ARTICULATED IN SAID OPPOSITIONS. SUBSEQUENTLY, ON SEPTEMBER 15, 2020 THE COURT DENIED PETITIONER'S MOTION FOR PCR COUNSEL ON THE GROUNDS OF PREMATURITY NOTING THAT AS OF THE DATE OF ITS DENIAL PETITIONER HAD NO PENDING PCR PETITION IN THIS COURT. THE ACTUAL ORDER WAS NEVER SERVED ON PETITIONER. SUBSEQUENTLY, ON NOVEMBER 05, 2020 LESS THAN 2 MONTHS FOLLOWING THE COURTS DENIAL, PETITIONER FILED A PCR PETITION IN THIS CASE WHICH RAISES A SMORGASBORD OF GROUNDS FOR RELIEF INCLUDING THE FOLLOWINGS:

1). THE COURTS DENIAL OF HIS 6TH AMENDMENT RIGHTS TO PROCEED PRO SE UNDER FARETTA;

2). FRANKS VIOLATIONS;

3). FOURTH AMENDMENT VIOLATIONS;

4). BRADY VIOLATIONS;

5). IAC OF PRE-TRIAL COUNSEL GRUBER;

6). IAC OF TRIAL COUNSEL SANFT;

7). IAC OF APPELLATE COUNSEL JACKSON;

8). INVOLUNTARINESS OF MID-TRIAL PLEA DUE TO INTERVENING MENTAL HEALTH FACTORS AND COERCION;

9). IMPROPER ADJUDICATION AS A HABITUAL OFFENDER;

10). FAILURE TO ADVISE PETITIONER OF COLLATERAL CONSEQUENCES OF HIS PLEA (IE., RESTITUTION IMPOSITION);

11). TRIAL JUDGE'S OPERATION UNDER CONFLICT IN PRESIDING ON THE CASE.

ISSUES OUTLINED AT 2-8 AND 11 WILL REQUIRE DISCOVERY AND REST ON MATTERS OUTSIDE THE RECORD AND WHICH REQUIRE INVESTIGATION AND DISCOVERY. ALTHOUGH THE STATE ARGUED IN ITS SEPTEMBER 02, 2020 OPPOSITION THAT PETITIONER HAS ACCESS TO REQUEST HIS MEDICAL RECORDS AND DOES NOT NEED COUNSEL FOR THIS ENDEAVOR, SUCH IS DIRECTLY CONTROVERTED BY ADMINISTRATIVE REGULATION 639 WHICH PROHIBITS NDOC INMATES FROM POSSESSING MEDICAL RECORDS.

ON DECEMBER 08, 2020 THIS COURT ISSUED AN ORDER ENTITLED "ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS." NOTING PETITIONER'S NOVEMBER 05, 2020 FILING OF A PCR PETITION THE COURT ORDERED THE STATE TO RESPOND WITHIN 45 DAYS AFTER THE ORDER AND FILE A RETURN IN ACCORDANCE WITH THE PROVISIONS OF NRS §§ 34.360-34.830.

IT ORDERED THE PLACEMENT OF THIS MATTER ON THE COURTS CALENDAR FOR JANUARY 28, 2021. BOTH THE STATES RESPONSE TIME AND THE COURTS JANUARY 28, 2021 CALENDAR DATE HAS SINCE ELAPSED. NOR HAS THE STATE FILED A TIMELY ENLARGEMENT OF TIME. AS OF THE CURRENT DATE THE STATE HAS NOT RESPONDED IN ACCORDANCE WITH THE COURT'S ORDER NOR HAS THE COURT PLACED THE MATTER UNDER SUBMISSION NOR IS THERE EVIDENCE THAT THE MATTER WAS EVER SUBMITTED ON THE COURTS JANUARY 28, 2021 CALENDAR.

GIVEN THE COMPLEXITY OF THE ISSUES PRESENTED BY PETITIONER'S INITIAL PCR PETITION AND GIVEN COLLATERAL ISSUES DISCOVERED AFTER ITS FILING WHICH ARE ALSO OF CONSTITUTIONAL SIGNIFICANCE WHICH WILL RESULT IN A SECOND PCR PETITION, PETITIONER HEREBY RENEWS HIS APPLICATION FOR APPOINTMENT OF PCR COUNSEL.

IN SUPPORT OF HIS RENEWED MOTION FOR APPOINTMENT OF PCR COUNSEL PETITIONER SUBMITS THAT HE IS UNABLE TO EMPLOY COUNSEL AND THAT HIS PCR ISSUES ARE MERITORIOUS AND CANNOT BE SUMMARILY DISMISSED AND AT ITS DISCRETION UNDER NRS § 34.750 THIS COURT IS VESTED WITH THE INHERENT AUTHORITY AND DISCRETION IN APPOINTING COUNSEL. AS PRESENTED, THE PCR PETITION CONTAINS DIFFICULT ISSUES AND COUNSEL IS NECESSARY TO PROCEED WITH DISCOVERY BEYOND THE RECORD. SEE RENTERIA-NOVOA V. STATE, 133 NEV. 75 (2017).

THE STAKES ARE SUFFICIENTLY ENORMOUS (IE., PETITIONER IS IN EXECUTION OF AN AGGREGATE SENTENCE OF LIFE WITH PAROLE ELIGIBILITY AFTER 20 YEARS); THE PCR PETITION CANNOT BE SUMMARILY DISMISSED AND COUNSEL IS WARRANTED FOR FURTHER FULL FACT DEVELOPMENT AND INVESTIGATION WHICH LIES OUTSIDE THE RECORD.

LASTLY, THE COMPLEXITY OF THE INVOLVED ISSUES AND NECESSITY TO FURTHER BRIEF POST CONVICTION DISCOVERED VIOLATIONS ALSO WARRANTS THE APPOINTMENT OF COUNSEL IN THE INTEREST OF FAIRNESS AND JUSTICE. FOR THESE REASONS PETITIONER MOTIONS FOR THE APPOINTMENT OF PCR COUNSEL.

RESPECTFULLY SUBMITTED,

DATED: FEBRUARY 07, 2021

BY: _____
(TONEY A. WHITE, III)
PETITIONER IN PRO SE

3

TONEY A. WHITE 1214172
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

LEGAL MAIL

CLERK OF THE COURT
~~8TH JUDICIAL DISTRICT COURT~~
DEPARTMENT NO. 12
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE
LAS VEGAS, NV, 89115

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DISTRICT COURT
CLARK COUNTY, NEVADA
****

Toney White, Plaintiff(s) vs. Calvin Johnson, Warden, Defendant(s)	Case No.: A-20-824261-W Department 12

NOTICE OF HEARING

Please be advised that the Petitioner's Renewed Request for Appointment of Counsel in the above-entitled matter is set for hearing as follows:

Date: April 27, 2021

Time: 11:00 AM

Location: RJC Courtroom 14D
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

27

Electronically Filed
04/22/2021
CLERK OF THE COURT

Case No. A-20-824261-W

Dept. No. 12

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

TONEY A. WHITE, III,
Petitioner,

-vs-

CALVIN JOHNSON,
Respondents.

MOTION FOR THE APPOINTMENT OF COUNSEL

REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Petitioner, TONEY A. WHITE, III, proceeding pro se, within the above entitled cause of action and respectfully requests this Court to consider the appointment of counsel for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and documents on file within this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This action commenced by Petitioner TONEY A. WHITE, III, in state custody, pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

II. STATEMENT OF THE FACTS

To support the Petitioner's need for the appointment of counsel in this action, he states the following:

1. The merits of claims for relief in this action are of Constitutional dimension, and Petitioner is likely to succeed in this case.

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2. Petitioner is incarcerated at the HIGH DESERT STATE PRISON Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.

3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.

4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.

5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.

6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.

7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.

8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.

9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.

10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

II. ARGUMENT

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

III. CONCLUSION

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this 14th day of FEBRUARY, 2021.

Petitioner.

VERIFICATION

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 14th day of FEBRUARY, 2021.

Petitioner, pro per.

JONEY A. WHITE 76171
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV
89070

LAS VEGAS NV 890
16 FEB 2021 PM 4 L

USA FOREVER

CLERK OF THE COURT
8TH JUDICIAL DISTRICT COURT
DEPARTMENT NO. 12
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE
LAS VEGAS, NV, 89115

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

****

Toney White, Plaintiff(s)	Case No.: A-20-824261-W
vs.	Department 12
Calvin Johnson, Warden, Defendant(s)	

NOTICE OF CHANGE OF HEARING

The hearing on the Request, presently set for April 27, 2021, at 8:30 AM, has been moved to the 25th day of May, 2021, at 8:30 AM and will be heard by Judge Michelle Leavitt.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that this 22nd day of April, 2021

☒ The foregoing Notice of Change of Hearing was electronically served to all registered parties for case number A-20-824261-W.

☒ I mailed, via first-class, postage fully prepaid, the foregoing Clerk of the Court, Notice of Change of Hearing to:

Toney White
#1214172
HDSP
PO Box 650
Indian Springs NV 89070

/s/ Michelle McCarthy
Michelle McCarthy
Deputy Clerk of the Court

Case No. A-20-824261-W

Dept. No. 12

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR
THE COUNTY OF CLARK.

TONEY A. WHITE, III,
Petitioner,

-vs-

CALVEN JOHNSON,
Respondents.

ORDER APPOINTING COUNSEL

Petitioner, TONEY A. WHITE, III, has filed a proper person REQUEST FOR APPOINTMENT OF COUNSEL, to represent him on his Petition for Writ of Habeas Corpus (Post-Conviction), in the above-entitled action.

The Court has reviewed Petitioner's Request and the entire file in this action, and Good Cause Appearing, IT IS HEREBY ORDERED, that petitioner's Request for Appointment of Counsel is GRANTED.

IT IS FURTHER ORDERED that _____, Esq., is appointed to represent Petitioner on his Post-Conviction for Writ of Habeas Corpus.

Dated this _____ day of _____, 20__.

_____
DISTRICT COURT JUDGE

Submitted by:

_____
Petitioner, In Proper Person

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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 PURSUANT TO NRAP 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 INDIGENCY AND INABILITY TO EMPLOY COUNSEL FOR APPEAL HE SEEKS 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)
PETITIONER/DEFENDANT
IN PRO SE

TONEY A. WHITE 2141172

HDSP
P.O. BOX 650
INDIAN SPRINGS, NV, 89070

LAS VEGAS NV 890
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CLERK OF THE COURT
8TH JUDICIAL DISTRICT COURT
REGIONAL JUSTICE CENTER
DEPARTMENT NO. 12
200 LEWIS AVENUE
LAS VEGAS, NV, 89155

89101-630080

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

TONEY A. WHITE, III,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-20-824261-W

Dept No: XII

CASE APPEAL STATEMENT

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

2. Judge: Michelle Leavitt

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

Counsel:

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

4. Respondent (s): Calvin Johnson, Warden

Counsel:

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

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

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

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 7 day of May 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Toney A. White, III

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

TONEY A. WHITE, III,

Plaintiff(s),

vs.

CALVIN JOHNSON, WARDEN,

Defendant(s),

Case No: A-20-824261-W

Dept No: XII

Amended

AMENDED CASE APPEAL STATEMENT

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

2. Judge: Michelle Leavitt

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

Counsel:

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

4. Respondent (s): Calvin Johnson, Warden

Counsel:

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

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

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

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 7 day of May 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Toney A. White, III

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

PETITIONER/APPELLANT
IN PRO SE

DISTRICT COURT
CLARK COUNTY, NEVADA

TONEY A. WHITE, PETITIONER, VS. CALVIN JOHNSON, WARDEN, RESPONDENT.	CASE NUMBER A-20-824261-W C-16-313216-2 DEPT NO.: 12 PETITIONER'S SECOND NOTICE OF APPEAL AND REQUEST FOR APPOINTMENT OF COUNSEL ON APPEAL.

ALL PARTIES OF RECORD ARE HEREBY NOTIFIED A SECOND TIME (FIRST NOTICE OF APPEAL MAILED APRIL 20, 2021) THAT PETITIONER HEREBY ELECTS TO APPEAL THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FILED APRIL 08, 2021 AS ERRONEOUS AND IMPROPER.

AS PETITIONER IS INCAPABLE OF EMPLOYING COUNSEL HE REQUESTS THAT COUNSEL BE APPOINTED ON PCR APPEAL.

RESPECTFULLY SUBMITTED,

DATED: MAY 09, 2021

BY: _____
(TONEY A. WHITE, III
PETITIONER/DEFENDANT
IN PRO SE

JUNIOR A. WHITE #1214177
HDSP
P.O. BOX 650
INDIAN SPRINGS, NV,
89070

LAS VEGAS NV 890
10 MAY 2021 PM 3 L

FOREVER / USA

LEGAL MAIL

CLERK OF THE COURT
8TH JUDICIAL DISTRICT COURT
REGIONAL JUSTICE CENTER
DEPARTMENT NO. 12
200 LEWIS AVENUE
LAS VEGAS, NV 89155

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ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

TONEY A. WHITE, III,

Plaintiff(s),

vs.

CALVIN JOHNSON, WARDEN,

Defendant(s),

Case No: A-20-824261-W

Dept No: XII

CASE APPEAL STATEMENT

1. Appellant(s): Toney A. White

2. Judge: Michelle Leavitt

3. Appellant(s): Toney A. White

Counsel:

Toney A. White #1214172
P.O. Box 650
Indian Springs, NV 89070

4. Respondent (s): Calvin Johnson, Warden

Counsel:

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

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: November 5, 2021

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

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

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 82889

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 14 day of May 2021.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Toney A. White

DISTRICT COURT
CLARK COUNTY, NEVADA

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 AM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: Haly Pannullo

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

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

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 25, 2021**

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

May 25, 2021	**12:30 AM**	**Request**	**Petitioner's Renewed Request for Appointment of Counsel**

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

COURT CLERK: Haly Pannullo

RECORDER: Sara Richardson

REPORTER:

PARTIES PRESENT: Iscan, Ercan E Attorney

JOURNAL ENTRIES

- Petitioner not present. COURT ORDERED, Motion DENIED as the Petition was previously denied and the Petitioner is not entitled to counsel; State to prepare the Order.

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated May 19, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises three volumes with pages numbered 1 through 665.

TONEY A. WHITE, III,

Plaintiff(s),

vs.

STATE OF NEVADA,

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 27 day of May 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk