NOASC
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for Defendant, Davin M. Toney

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. DAVIN M. TONEY, # 1187296, Defendant.	District Case No.: A-20-821088-W Dept.: XXVIII **NOTICE OF APPEAL**

NOTICE is hereby given that the Defendant, Davin Marvell Toney, by and through his counsel, Terrence M. Jackson, Esquire, hereby appeals to the Nevada Supreme Court, from the Findings of Fact, Conclusions of Law and Order, file-stamped and dated July 8, 2021.

Defendant, Davin M. Toney, further states he is indigent and requests that the filing fees be waived.

Respectfully submitted this 15th day of July, 2021.

/s/ Terrence M. Jackson
Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for Defendant, Davin M. Toney

...

CERTIFICATE OF SERVICE

I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and on the 15th day of July, 2021, I served a true, correct and e-filed stamped copy of the foregoing: Defendant, Davin M. Toney's, NOTICE OF APPEAL as follows:

[X] Via Odyssey eFile and Serve to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals, located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

BERNARD ZADROWSKI
Chief Deputy D.A. - Criminal
bernard.zadrowski@clarkcountyda.com

DAVIN M. TONEY
ID # 1187296
Southern Desert Correctional Ctr.
P.O. Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, NV 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

ASTA
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
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Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com

Counsel for Defendant, Davin M. Toney

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. DAVIN M. TONEY, # 1187296, Defendant.	District Case No.: A-20-821088-W Dept.: XXVIII **CASE APPEAL STATEMENT**

1. Appellant(s): DAVIN MARVELL TONEY

2. Judge: RONALD J. ISRAEL

3. Appellant(s): DAVIN MARVELL TONEY

Counsel:

Terrence M. Jackson

624 South Ninth Street

Las Vegas, NV 89101

(702) 386-0001

4. Respondent: STATE OF NEVADA

Counsel:

Steven B. Wolfson, District Attorney

200 Lewis Avenue

Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: YES

Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: YES

Permission Granted: N/A

6. Appellant Represented by Appointed Counsel in District Court: YES

7. Appellant Represented by Appointed Counsel on Appeal: YES

8. Appellant Granted Leave to Proceed in Forma Pauperis: YES

9. Date Commenced in District Court: May 1, 2017.

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed:

Denial of Petition for Post-Conviction Writ of Habeas Corpus.

11. NO.

Supreme Court Docket Number(s): 76765

12. Child Custody or Visitation: N/A

Dated this 15th day of July, 2021.

/s/ Terrence M. Jackson

Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for Defendant, Davin Marvell Toney

. . .

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. . .

CERTIFICATE OF SERVICE

I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and on the 15th day of July, 2021, I served a true, correct and e-filed stamped copy of the foregoing: Defendant, DAVIN M. TONEY'S, CASE APPEAL STATEMENT as follows:

[X] Via Odyssey eFile and Serve to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals, located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] and by United States first class mail to the Nevada Attorney General and the Defendant as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

BERNARD ZADROWSKI
Chief Deputy D.A. - Criminal
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DAVIN M. TONEY
1187296
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

REQT
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Nevada Bar No. 00854
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624 South Ninth Street
Las Vegas, NV 89101
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Terry.jackson.esq@gmail.com

Counsel for Defendant, Davin M. Toney

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, v. DAVIN M. TONEY, # 1187296, Defendant.	District Case No.: A-20-821088-W Dept.: XXVIII **REQUEST FOR TRANSCRIPTS**

TO: Judy Chappell, Court Recorder

District Court, Department No.: XXVIII

Courtroom 15C

Davin Marvell Toney, Defendant named above, requests preparation of the transcripts entered below, before the District Court, Department XXVIII, JUDGE RONALD ISRAEL, as follows:

06/21/2021

Argument with Hearing held on **June 21, 2021**.

Judy Chappell - Please prepare transcripts of any and all proceedings.

This Notice requests a transcript of only those portions of the District Court proceedings which Counsel reasonably and in good faith believes are necessary to determine whether Appellate issues are present. Voir dire examination of jurors, opening statements and closing arguments of trial counsel and reading of jury instructions shall not be transcribed unless specifically requested above.

I recognize that I must personally serve a copy of this form on the above-named court recorder and opposing counsel.

That the above-named court recorder shall have thirty (30) days from the date of service of this document to prepare an original plus two copies at State expense and file with the District Court Clerk the original transcript(s) requested herein.

Further, pursuant to NRAP 9(a)(3)(iii), the court recorder shall also deliver copies of the transcript to Appellate's counsel and Respondent counsel no more than thirty (30) days after the date of the Appellate's request.

Dated this 15th day of July, 2021.

/s/ Terrence M. Jackson

Terrence M. Jackson, Esquire
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
Terry.jackson.esq@gmail.com
Counsel for Defendant, Davin M. Toney

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2021, I served a true and correct copy of the foregoing Request for Transcripts on:

TO: Judy Chappell, Court Recorder
District Court, Department No.: XXVIII
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89101

Dated this 15th day of July, 2021.

By: */s/ Ila C. Wills*

Assistant to Terrence M. Jackson, Esq.

CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that she is an assistant in the office of Terrence M. Jackson, Esquire, and a person of such age and discretion as to be competent to serve papers and that on this 15th day of July, 2021, she served the Transcript Request upon the parties to this action:

[X] Via Electronic Service (*Odyssey* eFile NV) to the Eighth Judicial District Court;

[X] Via the NSC Drop Box on the 1st floor of the Nevada Court of Appeals , located at 408 E. Clark Avenue in Las Vegas, Nevada;

[X] Via email to the court recorder for EJDC, Dept. 28.

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

BERNARD ZADROWSKI
Chief Deputy D. A. - Criminal
bernard.zadrowski@clarkcountyda.com

JUDY CHAPPELL
Certified Court Recorder
ChappellJ@clarkcountycourts.us

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-20-821088-W

Davin Toney, Plaintiff(s)	§	Location:	**Department 28**
vs.	§	Judicial Officer:	**Israel, Ronald J.**
William Hutchings, Warden, Defendant(s)	§	Filed on:	**09/14/2020**
	§	Cross-Reference Case Number:	**A821088**

CASE INFORMATION

Related Cases
C-17-323151-1 (Writ Related Case)

Statistical Closures
07/13/2021 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Status: **07/13/2021 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-20-821088-W
Court	Department 28
Date Assigned	09/14/2020
Judicial Officer	Israel, Ronald J.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Toney, Davin**	**Jackson, Terrence Michael** *Retained* 702-386-0001(W)
Defendant	**William Hutchings, Warden**	**Wolfson, Steven B** *Retained* 702-455-5320(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

09/14/2020 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Toney, Davin
Post Conviction

09/14/2020 Order for Petition for Writ of Habeas Corpus
Order For Petition For Writ Of Habeas Corpus

01/26/2021 Supplemental Points and Authorities
Filed by: Plaintiff Toney, Davin
Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief

03/03/2021 Ex Parte Motion
Filed By: Plaintiff Toney, Davin
Ex Parte Motion and Order to Extend Time to File State's Response to Defendant's Supplemental Points and Authorities in Support of Writ of Habeas Corpus for Post Conviction Relief

03/08/2021 Order
Filed By: Plaintiff Toney, Davin
Order

04/19/2021 Response
State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary Hearing

05/13/2021 Reply
Filed by: Plaintiff Toney, Davin
Reply to State's Response

05/25/2021 Order for Production of Inmate
Order For Production Of Inmate Davin M. Toney, BAC #1187296 - June 21, 2021

07/08/2021 Finding of Fact and Conclusions of Law
Filed By: Defendant William Hutchings, Warden
Findings of Fact, Conclusions of Law and Order

07/15/2021 Notice of Appeal (Criminal)
Party: Plaintiff Toney, Davin
Notice of Appeal

07/15/2021 Case Appeal Statement
Filed By: Plaintiff Toney, Davin
Case Appeal Statement

07/15/2021 Request
Filed by: Plaintiff Toney, Davin
Request for Transcript

07/15/2021 Notice of Entry of Findings of Fact, Conclusions of Law
Filed By: Defendant William Hutchings, Warden
Notice of Entry of Findings of Fact, Conclusions of Law and Order

HEARINGS

10/14/2020 **Appointment of Counsel** (1:45 PM) (Judicial Officer: Israel, Ronald J.)
Appointment of Counsel (Terry Jackson)
Counsel Confirmed; Appointment of Counsel (Terry Jackson)
Journal Entry Details:
Petitioner/Deft. TONEY, not present, in custody. Mr. Jackson confirmed as counsel and requested additional time to receive the file from the Public Defender before setting a briefing schedule. COURT ORDERED, Matter set for a status check to set briefing scheduled. 10/28/2020 12:00 PM STATUS CHECK: SET BRIEFING SCHEDULE;

10/28/2020 **Status Check** (12:00 PM) (Judicial Officer: Israel, Ronald J.)
Status Check: Set Briefing Schedule for Petition for Writ of Habeas Corpus
Briefing Schedule Set; Status Check: Set Briefing Schedule for Petition for Writ of Habeas Corpus
Journal Entry Details:
Deft./Petitioner HUTCHINGS not present, in the Nevada Department of Corrections (NDC). Colloquy regarding scheduling. COURT ORDERED, Briefing Schedule: Deft's supplemental Brief 01/27/2021, State's Opposition 03/10/2021, Deft's Reply 04/14/2021 and hearing RESET. NDC 05/12/2021 9:00 AM/12:00 PM PETITION FOR WRIT OF HABEAS CORPUS;

05/24/2021 **Petition for Writ of Habeas Corpus** (11:00 AM) (Judicial Officer: Israel, Ronald J.)
05/24/2021, 06/21/2021
Matter Continued;

Denied;
Journal Entry Details:
Petitioner / Deft. DAVIN present, in custody in the Nevada Department of Corrections (NDC). Argument by Mr. Jackson in support of the Petition. Mr. Jackson pointed out the Deft. filed is Pro Per Petition and it should not be denied as procedurally barred and the gun was a toy gun and should not have been considered as a delay weapon. Court advised counsel of the weapon being a BB gun. Further arguments. State submitted. Court noted findings and noted no good cause was shown for the delay. COURT ORDERED, Petition DENIED as procedurally barred. Court stated further findings of bare and naked allegations, belied by the record regarding points within the petition. Mr. Jackson inquired of his request for an evidentiary hearing. Court noted the Petition was Denied as procedurally barred, Counsel did not state what would be added that would change the issues, There being no good cause, request for hearing, Denied. Further discussions by Mr. Jackson and Deft. Court directed the State to prepare the order. NDC;

Matter Continued;
Denied;
Journal Entry Details:
Counsel appeared via Bluejeans; Deft. not present; not transported from Nevada Department of Corrections (NDC). Colloquy regarding Deft. appearing, setting an Evidentiary Hearing, and current NDC protocols due to the Covid-19 pandemic. COURT ORDERED, matter CONTINUED; State to prepare a Transport Order. CONTINUED TO: 06.21.21 11:00 A.M.;

DISTRICT COURT CIVIL COVER SHEET

A-20-821088-W
Dept. 28

County, Nevada

Case No. _____
(Assigned by Clerk's Office)

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

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Davin Toney	William Hutchings, Warden
Attorney (name/address/phone):	Attorney (name/address/phone):

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

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
■ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

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

September 14, 2020
Date

PREPARED BY CLERK
Signature of initiating party or representative

See other side for family-related case filings.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVIN M. TONEY, aka,
Davin Marvell Toney, #2508918

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-821088-W

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 21, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 21st day of June, 2021, the Petitioner present, represented by TERRENCE MICHAEL JACKSON, ESQ., 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

From February 18, 2017 to February 22, 2017, Petitioner robbed five (5) different businesses at gun point. On February 27, 2017, the State filed a Criminal Complaint against DAVIN TONEY (hereinafter "Petitioner"), charging him with five (5) counts of Burglary while in Possession of a Deadly Weapon, five (5) counts of Robbery with Use of a Deadly Weapon, and one (1) count of Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older. On April 3, 2017, a preliminary hearing was held, and at the conclusion, the justice court held Petitioner to answer the above charges in district court. An Amended Criminal Complaint was filed that same day.

On April 28, 2017, the State filed an Information charging Petitioner with the above charges as well as two (2) counts of Conspiracy to Commit Robbery. On August 23, 2017, a Guilty Plea Agreement (hereinafter "GPA") was filed and Petitioner pled guilty to: Count 1 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); and Count 4 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060). The terms of the GPA were as follows:

> The Parties stipulate to an aggregate term of imprisonment of eight (8) years to thirty-five (35) years (96 to 420 months) in the Nevada Department of Corrections structured as follows: Count 1 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement. Count 2 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement, to run consecutive to Counts 1 and 2. Count 4 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.

On October 18, 2017, Petitioner was sentenced to the Nevada Department of Corrections ("NDOC") as follows: Count 1 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty six (66) months for the use of a deadly weapon; Count 2 – a minimum of forty eight (48) months and a maximum of one hundred ninety five (195) months, concurrent with Count 1; Count 3 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty-six (66) months for the use of a deadly weapon, consecutive to Counts 1 and 2; Count 4 – a minimum of forty eight (48) months and a maximum of one hundred ninety-five (195) months, consecutive to Counts 1 and 2 and concurrent with Count 3. Petitioner received a total aggregate sentence of a minimum of ninety-six (96) months and a maximum of four hundred twenty (420) months in the NDOC and two hundred thirty-eight (238) days credit for time served. The Judgment of Conviction was filed on October 30, 2017. No appeal or prior post-conviction petition was filed.

On September 14, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Pro Per Petition"). On October 14, 2020, counsel Terrence Jackson, Esq. was appointed. On January 26, 2021, counsel filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief (hereinafter "Supplemental Petition"). The State filed its Response on April 19, 2021. On May 13, 2021, Petitioner filed a Reply. On May 24, 2021, the Court denied Petitioner's Pro Per Petition, Supplemental Petition, and Request for an Evidentiary Hearing and found as follows.

FACTS

From February 18, 2017 to February 22, 2017, Petitioner committed five (5) robberies at five (5) smoke shops in Las Vegas, Nevada. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 97-99. At his preliminary hearing on April 2017, eyewitnesses from each of the smoke shops testified. Id. at 4, 23, 37, 51, 82.

On February 18, 2017, Chinthana Thennakoon was robbed while he was working at the 99 Center Plus Smoke Shop. Id. at 5. He described the person that robbed him as a six (6) foot

eight (8), a little overweight, African American male who was wearing a white baseball hat, black sunglasses, and a brown jacket. Id. at 6.

Right before Thennakoon was robbed, the robber entered the front door of the store and asked about purchasing a blunt wrap as well as a cigar. Id. at 7. Thennakoon turned around to retrieve those items from behind and when he turned back around the robber pointed a gun at him. Id. While pointing the gun at Thennakoon, the robber aggressively asked him to open the register and give him the money. Id. at 8. Thennakoon opened the register, the robber grabbed about $350 to $400 from the register, and placed the money inside of a brown paper bag. Id. 8-10, 13. Thennakoon then opened the second register and the robber took money out of that register as well. Id. Subsequently, one (1) or two (2) customers entered the store. Id. at 10. The robber told the customers that the smoke shop was closed, but the customers did not pay attention. Id. at 10-12. Petitioner then put his gun back inside of his jacket and, while carrying the paper bag filled with cash from the register, slowly exited the through the front door of the store. Id. at 10-12. When asked at the preliminary hearing about the firearm that the robber pointed at him, Thennakoon testified that he was not sure whether the gun was a toy gun or a real gun. Id. at 19.

That night, Salman Akram was working at Mr. Kay's Smoke Shop also located in Las Vegas, Nevada. Id. at 23. At approximately 10:40 PM, while he was working, two (2) males entered the store. Id. at 23-24. One (1) of the men stood by a jewelry display located near the front door, while the other approached the register at the counter. Id. at 24. Akram identified Petitioner as the man that approached the register and described him as an African American man who was wearing a baseball cap and sunglasses. Id. at 24-25.

As Petitioner approached Akram at the cash register, he asked for a pack of Newports and then asked for a pack of Swishers. Id. at 26-27. Petitioner then said he was not going to get the cigarettes, took change out from his pocket, and began to count the change. Id. at 27. As soon as Akram opened the register, Petitioner pulled out a gun, pointed it at Akram, and told him to shut up or he would shoot him. Id. at 27.

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Akram stepped back from the register as Petitioner took about $400 from inside of the register. Id. at 27. After Petitioner grabbed the cash, he began to walk towards the door, pointed the gun at Akram, and told him that he better not pull anything from the counter or he would shoot him. Id. at 28. Petitioner then unlocked the front door, which Akram never locked, and both individuals exited the store. Id. at 28. At the preliminary hearing, Akram testified that the gun Petitioner pointed at him that day appeared to be a real gun. Id. at 31.

A few days later, on February 22, 2017, Sujan Narasingehe was working at AS smoke shop in Las Vegas, Nevada. Id. at 37. At about 10:04 AM, a man he identified as Petitioner at the preliminary hearing, entered the store with Narasingehe's neighbor. Id. at 38. Eventually, Petitioner asked for Swishers cigars. Id. at 40. Narasingehe grabbed the cigars while Petitioner waited by the register. Id. Once Narasingehe's neighbor left the store, he asked if he could get Petitioner anything else. Id. at 41. Petitioner stated he wanted to purchase a pipe and walked to the cabinet holding the pipes as Narasingehe followed. Id. at 41.

After a couple of seconds, Petitioner pointed out the one he wanted, which Narasingehe said was very unusual in a smoke shop because customers usually take longer to examine the pipes for purchase. Id. Narasingehe retrieved the pipe and Petitioner told him to go over by the register. Id. Once they got to the register, Petitioner pulled out a gun and pointed it at Narasingehe. Id. at 42. While pointing the gun at Narasingehe, Petitioner aggressively requested that he open the register. Id. At this point, Narasingehe was so nervous he struggled to open the register, but eventually was able to do so. Id. at 42-43. Petitioner then grabbed all of the money out of the register, which amounted to approximately $140. Id. at 43. Petitioner asked if there was more money, but since it was the early morning, Narasingehe told him that is all the store had. Id. at 44. Petitioner finished grabbing the money from the register and then walked slowly back toward the store and ran out. Id. at 44. At that point, other customers were in the store and appeared to Narasingehe not to know what had happened or were pretending not to know. Id.

Narasingehe testified at that preliminary hearing that he was not sure if the gun Petitioner pointed at him that day was a toy or real gun, but he recalled that he was scared

because he thought he was going to die that day. Id. at 49. He was however able to describe the firearm as black in color and was the type of gun one would load from the top as the top would slide back. Id. at 50. Most importantly, he testified that at the time Petitioner pulled out the gun, he did not think it was a toy gun and thought he was going to get shot. Id.

Later that same day, Harbehej Singh was working at the USA Smoke Shop and Mini Mart also located in Las Vegas, Nevada when he was robbed at gunpoint. Id. at 51-54. At about 3:00 PM, Singh was working with another employee who was sixty-seven (67) years old. Id. at 52. At that time, Singh's employee was stocking items in the back of the shop and Singh was in the front portion of the shop completing paperwork and helping customers. Id. When Singh finished helping some customers, he saw a man, who he identified as Petitioner, standing in line. Id. at 53.

Petitioner had entered the store wearing a beanie and asked Singh for cigars. Id. at 54. Petitioner gave Singh a little over $1 and as Singh thought Petitioner was reaching in his pocket to pull out more change, Petitioner instead pulled out a gun and pointed it at Singh's head. Id. Singh attempted to grab the firearm from Petitioner but was unsuccessful, and, as a result, Petitioner told Singh he would shoot him. Id. After this, Singh stepped back, told Petitioner to take whatever he wanted, and Petitioner went over to the register and retrieved the cash out of the register. Id. at 55-56. At that time, Singh's co-worker came to the front of the store. Id. at 55. Petitioner then pointed the gun at Singh's co-worker, told him not move or Petitioner would shoot him. Id. Petitioner then finished grabbing the approximately $2,000 in cash and ran. Id. at 56-58.

After Petitioner left the store, Singh looked to see if he could identify Petitioner's vehicle. Id. at 58. Singh was able to see Petitioner get inside of a blue vehicle and he wrote down the vehicle's license plate number. Id. at 58. Singh recalled seeing a white bald man in the driver's seat and an African American female in the back as Petitioner entered the vehicle and sat in the passenger seat. Id. at 59. The white male then drove the vehicle away. Id. at 59.

At the preliminary hearing, Singh recalled the license plate number to be: 79E092. Id. at 60. Singh also testified that while Petitioner was in the store, he touched some Oreo Cookies

packages and Swishers. Id. at 60. Singh also recalled that the firearm Petitioner pointed at him that day was a black Glock semiautomatic firearm. Id. at 55. Singh later testified that while he did not have more firearm knowledge than knowing the difference between a revolver and semiautomatic, he knew the firearm he saw was similar to the firearm police carry and was not a toy. Id. at 74. Moreover, Singh testified that he knew the firearm was not a toy because Petitioner would not be able to shoot with a toy gun. Id. at 75. Singh later clarified that he was very familiar with small firearms and that he was one hundred (100) percent certain that the firearm Petitioner pointed at him that day was a Glock. Id. at 78. He was also certain it was not a toy gun because he knew what toy guns and BB guns look like and that the gun Petitioner used was real. Id. at 79.

Later that night, at approximately 10:30 PM, Norma Escobar was working at Texas Liquor located in Las Vegas, Nevada. Id. at 82. At that time, Escobar was standing behind the register inside of the store when an African American man, wearing a brown leather jacket, and beanie walked in. Id. at 83. Escobar recalled that the man, who was not her regular customer, was acting weirdly nervous as he asked for a bottle and Swishers cigars. Id. Escobar handed him the Swishers and bottle. Id. at 83-84. The man then gave Escobar a $20 bill, Escobar opened the register, the man then pointed his black gun at her, and took all of the money out of the register, which amounted to approximately $200. Id. at 84-85. Escobar explained that at this point she was in shock and could not recall what the man said to her. Id. The man then ran out of the store. Id. at 85.

In addition to this eyewitness testimony, there was also physical evidence presented that linked Petitioner to the five (5) robberies. Id. at 93-114. LVMPD Detective David Miller, who was assigned to investigate the robbery series, retrieved surveillance camera footage from the stores. Id. at 98-100. Detective Miller took note of certain similarities among the robberies, including that the robberies occurred at the same type of business, the description of the suspect was similar, the suspect was wearing the same unique jacket, and had the same method of operation. Id. Based on these similarities, Detective Miller believed it was the same suspect that conducted all five (5) of the robberies. Id. at 100. Indeed, in all five (5) of the robberies,

the suspect wore blue jeans and wore what appeared to be a unique, leather jacket with white along the collar and the sleeve cuffs as well as a type of leather material on the shoulder. Id. at 102. The suspect also wore a white ball cap, with a sticker on the brim and a black line along a black symbol on the left upper part of the cap. Id. at 102-03. The suspect was also seen wearing a gray beanie in some of the robberies as well as sunglasses. Id. at 104. Detective Miller also reviewed a map showing the locations of the robberies which further confirmed that the five (5) robberies amounted to a series. Id. at 105.

While reviewing the surveillance camera footage from the USA Smoke Shop robbery, Detective Miller noticed the suspect in the video approaching the front doors, taking a sip from a tall can, and throwing it in the trash outside of the store before entering. Id. at 100. The investigating officers later looked in the trash can and saw that there was only one can that fit the description inside and collected it for processing. Id. at 101. Testing conducted on the Arizona green tea can revealed that the two (2) fingerprints lifted were a match for Petitioner's right middle finger and his right index finger. Id. at 95. Officers also retrieved the Oreo cookie package Petitioner touched at one of the crime scenes to conduct testing. Id. Testing of that package revealed that the fingerprint found on the Oreo cookie package matched Petitioner's right middle finger. Id. at 95-96.

Officers also searched the records for the license plate on the vehicle provided by one of the eyewitnesses. Id. at 106. Petitioner's address was associated with the vehicle's registration and a search warrant was executed. Id. at 106. A search warrant was also eventually executed at Petitioner's apartment where officers located a .177 Daisy Powerline BB gun, and a ball cap, which appeared to be consistent with one of the hats worn in the first robbery, in Petitioner's bedroom. Id. at 109-110. Detective Miller testified that the gun appeared to be a black semiautomatic firearm but did not look like a Glock. Id. at 111.

When Detective Miller eventually took Petitioner into custody, he was wearing what appeared to be the same leather jacket from the robberies. Id. at 108. Petitioner told Detective Miller that he could find toy guns in his bedroom. Id. at 114. When Detective Miller spoke with Petitioner, Detective Miller pointed to the surveillance picture from one (1) of the

robberies in which the suspect wore a gray beanie and asked Petitioner where they could find that gray beanie. Id. Petitioner told him that the beanie would probably be inside of a drawer in his bedroom. Id. Petitioner also stated he had toy guns in his bedroom. Id.

ANALYSIS

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. Petitioner's Petition is Time-barred

A petition challenging a judgment of conviction's validity must be filed within one year of the judgment or within one year of the remittitur, unless there is good cause to excuse delay. NRS 34.726(1). The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). The one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is issued. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)). Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In this case, Petitioner's Judgment of Conviction was filed on October 30, 2017. Petitioner did not file a direct appeal. Thus, Petitioner had until October 30, 2018 to file his Petition. Petitioner did not file the instant Petition until September 14, 2020. As such, he was over two (2) years too late. This delay exceeds the two (2) day delay discussed in Gonzales. Thus, dismissal of the Petition is required absent a showing of good cause or prejudice.

B. Application of the Procedural Bars is Mandatory

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's

petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Because Petitioner's Petition is untimely and because he cannot show good cause or prejudice to overcome the mandatory procedural bar, it must be dismissed.

II. PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE OR PREJUDICE TO OVERCOME THE PROCEDURAL BARS

In his Pro Per Petition, Petitioner requests that this Court vacate his deadly weapon enhancement sentences for various reasons. Pro Per Petition at 7-9. First, he claims that pursuant to U.S. v. Davis, 139 S.Ct. 2319 (2019), his sentences for the use of a deadly weapon are unconstitutional as the U.S. Supreme Court concluded that such enhancement is vague. Id. at 7. Under Ground 2, he appears to argue that based on the Supremacy Clause Davis should apply to his case. Id. at 8. Finally, under Ground 3, he argues that his Fifth Amendment Right to Due Process has been violated because the ruling in Davis was not applied to his case, and, had it been, he would have faced a shorter sentence. Pro Per Petition at 9.

In his Supplemental Petition, Petitioner argues that he can establish good cause and prejudice because his counsel failed to adequately investigate or prepare prior to Petitioner pleading guilty which prevented Petitioner from knowingly and intelligently entering his guilty plea. Supplemental Petition at 3-7. Second, Petitioner argues that counsel was ineffective for failing to move to dismiss the case or effectively challenge the use of a toy gun as a deadly weapon under NRS 193.165. Id. at 7-9. Third, Petitioner lists additional reasons why he believes he can establish good cause and prejudice including that: (1) counsel failed to appropriately advise Petitioner of the law and that Petitioner was factually innocent because it was a toy gun, (2) the State committed misconduct in improperly pleading the case, (3) Petitioner failed to timely file his Pro Per Petition because he was not aware of the Davis case, (4) the State would not be prejudiced under laches because it would benefit by its wrongdoing. Supplemental Petition at 9-13. However, as discussed below, each of these claims are meritless and are therefore denied.

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "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) (emphasis added).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726. To meet the first requirement, "a petitioner *must* show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available *at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see

generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Moreover, 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.

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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).

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. Petitioner's Pro Per Claim That His Deadly Weapon Enhancement Sentences Are Unconstitutional Fails

Under Grounds 1 through 3 of Petitioner's Pro Per Petition, he argues that his deadly weapon enhancement sentences should be vacated because they are unconstitutional pursuant

to United States v. Davis, 139 S. Ct. 2319 (2019). Pro Per Petition at 7-11. However, this claim is both waived and meritless.

As an initial matter, Petitioner's pro per claim, that his deadly weapon enhancement sentences are unconstitutional, is waived in two (2) ways. First, his claim is substantively waived because he failed to raise the claim on direct appeal. 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).

Second, Petitioner cannot raise constitutional claims that occurred prior to his guilty plea. A defendant cannot enter a guilty plea then later raise independent claims alleging a deprivation of his rights before entry of the 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).

Notwithstanding Petitioner's claim being waived, it is also meritless because Davis is inapplicable. In Davis, 139 S. Ct. at 2323–24, the U.S. Supreme Court reviewed whether 18 U.S.C. § 924(c), i.e. a federal statute which required longer prison sentences for those individuals that used, carried, or possessed a firearm in the commission of a federal "crime of violence or drug trafficking crime," was void for vagueness. The Court explained that "crime of violence" was defined in two (2) of the statute's subparts: the elements clause, 18 U.S.C. § 924(c)(3)(A), and the residual clause, 18 U.S.C. § 924(c)(3)(B). The Court concluded that the residual clause of such federal statute, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague because there was "no reliable way to determine which offenses qualify as crimes of violence" for application of the increased penalty. Id. at 2324. Notably, despite this conclusion, the Court did not conclude that vacating the defendant's sentences was the appropriate remedy, but instead remanded the case to the Fifth Circuit Court for further proceedings:

> We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth Circuit vacated their convictions and sentences on one of the two § 924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

Id. at 2336.

Petitioner's reliance on Davis is misplaced because the U.S. Supreme Court's decision was based on an interpretation of a federal statute that had no application to Nevada law, let alone NRS 193.165. However, even if Davis was applicable, the appropriate remedy would not necessarily be to vacate Petitioner's deadly weapon enhancements as the U.S. Supreme Court was silent regarding the appropriate remedy for error.

Regardless, even if the Court decided to apply Davis to this case, which would not be appropriate, Petitioner would still not be able to demonstrate good cause because he failed to file his Petition within one (1) year of the decision. Indeed, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions). Additionally, Petitioner cannot demonstrate prejudice as he stipulated to sentences for his use of a deadly weapon when he entered his plea, which was knowingly, intelligently, and voluntarily entered as discussed *infra*. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; GPA, filed Aug. 23, 2017, at 1-2. Therefore, Petitioner's claim is denied.

B. Counsel Was Not Ineffective for Failing to Investigate or Prepare Prior to Petitioner Pleading Guilty and Petitioner Knowingly and Intelligently Entered His Plea

Petitioner argues that counsel was ineffective for failing to: (1) investigate, (2) fully explain Petitioner's constitutional rights, defenses, and the consequences of his plea, and (3) failed to have adequate contact with Petitioner. Supplemental Petition at 3-7. Additionally, he argues that these failures resulted in Petitioner unknowingly and unintelligently entering his guilty plea. However, Petitioner's claims fail. Supplemental Petition at 6-7.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

Moreover, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id.

Indeed, 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). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). 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).

As a preliminary matter, Petitioner's claims that counsel failed to investigate and fully explain matters to Petitioner are bare and naked assertions so devoid of meaning that the State cannot effectively respond. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Petitioner's argument could be applied to any defendant as he has offered no specific allegations to support his claims. Thus, these claims are denied.

Petitioner's claim that Petitioner did not knowingly and intelligently enter his guilty plea equally fails because it is belied by the record. Id. 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).

Here, Petitioner's claim that he did not knowingly and intelligently enter his plea is belied by both his signing of his GPA and the answers he gave during his plea canvass. First, Petitioner acknowledged that he understood the parties' negotiation by acknowledging and signing the GPA. Notably, by signing the GPA, Petitioner also acknowledged that he "discussed with his attorney any possible defenses, defense strategies and circumstances which might be in [his] favor." GPA, filed Aug. 23, 2017, at 6.

Second, the Court's canvass of Petitioner demonstrates that Petitioner reviewed the GPA in its entirety with counsel and understood the nature of his plea:

> MR. LOGAN: So the matter is resolved today. Today Mr. Toney will be pleading guilty to Robbery with Use of a Deadly Weapon, a Category B felony. Burglary while Possession of a Deadly Weapon, two counts of each. We'll be looking at an aggregate sentence of 8 to 35 years in NDOC.
> THE COURT: Okay.
> MR. DICKERSON: Correct, Your Honor. The GPA lays out the structure for that sentencing.
> THE COURT: Okay. I see. So specifically Count 1, Robbery With Use would be a 36 to 144, plus consecutive 12 to 66. Count 2 would be, is Burglary with a Deadly 48 to 195, to run concurrent with Count 1. Count 3, Robbery With Use would be 36 to 144, plus consecutive 12 to 66, consecutive to Counts 1 and 2. Count 4 would be Burglary While in Possession, a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.
> MR. DICKERSON: Correct.
> THE COURT: Mr. Toney, have you had an opportunity to go over this entirely with your attorney?
> THE DEFENDANT: Yes, I have.

Recorder's Transcript of Hearing Entry of Plea, Aug. 23, 2017, at 3. Petitioner also unequivocally stated that he understood the charge he was pleading to:

> THE COURT: All right. Mr. Toney, have you been given a copy of an amended information charging you with Count 1, Robbery With Use of a Deadly Weapon; Count 2, Burglary While in Possession of a Deadly Weapon; Count 3, Robbery With Use of a Deadly Weapon; Count 4, Burglary While in Possession of a Deadly Weapon?

THE DEFENDANT: Yes.
THE COURT: Have you had an opportunity to read that amended information and to discuss it fully with your attorney --
THE DEFENDANT: Yes.
THE COURT: -- so that he could answer any questions that you may have?
THE DEFENDANT: Yes.
THE COURT: You have any -- do you understand what's in the amended information? What it's charging you with?
THE DEFENDANT: Yes.
THE COURT: Do you have any questions about the meaning of any of the charges that are in the amended information?
THE DEFENDANT: No.

Id. at 4-5. Further, Petitioner affirmed that he understood the rights he was forfeiting by pleading guilty and was entering his plea voluntarily:

THE COURT: Okay. That's, you know, that's what, 6, 7 pages long. It talks about various things, consequences of the plea. It talks about if you were in the country illegally or if you were an immigrant, what potential it could have. Talks about the rights that you're waiving. You understand you're waiving your constitutional right against self-incrimination? I'm going to ask you what you did that causes you enter a guilty plea in just a minute here. You'd be waiving the constitutional right to a speedy trial, to confront cross-examine any witnesses who would testify against you, as well as some other things. You read that part?
THE DEFENDANT: Yes.
THE COURT: And the voluntariness part. Is there anything, I mean, let me put it this way, other than what's in this Guilty Plea Agreement and what we've discussed in court, has anyone made you any threats or any promises in order to get you to enter a Guilty Plea here?
THE DEFENDANT: No.

Id. at 5-6. Thus, the record demonstrates that Petitioner's plea was knowingly and voluntarily entered and his claim is denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. Counsel Was Not Ineffective For Not Moving to Dismiss or Effectively Challenge the Use of a Toy Gun as a Deadly Weapon Under NRS 193.165

In Petitioner's Supplemental Petition, he argues that counsel was ineffective for failing to recognize or challenge the deadly weapon enhancement because he alleges he used a toy gun to commit the charged crimes. Supplemental Petition at 7-9. As a result, he claims, counsel

ineffectively permitted Petitioner to plead guilty and he was prejudiced by the increased sentence. Id. However, Petitioner's claims fail.

NRS 193.165 provides in relevant part:

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.
> […]
> 6. As used in this section, "deadly weapon" means:
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

Additionally, NRS 202.253 defines a "firearm" as "any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion."

In Manning v. State, 107 Nev. 337, 339, 810 P.2d 1216, 1216 (1991), the Nevada Supreme Court reviewed whether a BB gun constituted a deadly weapon even when it did not have deadly capabilities and could not inflict death or great bodily harm. Although the Court relied on a past version of NRS 202.253, which defined a firearm as "any weapon with a caliber of .177 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air or other force," it ultimately concluded that the BB gun used by the defendant fit that definition and no additional showing of its deadly capabilities was necessary. Id.

In this case, Petitioner argues that the Court inappropriately rendered the deadly weapon enhancements because toy guns were used. However, there is no evidence that toy guns were used in the commission of the crime. Petitioner's self-serving statement that police could find

toy guns in his room, does not negate that law enforcement found a .177 Daisy Powerline BB gun in his bedroom. PSI, filed Sept. 29, 2017, at 7; Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Just because Petitioner stated officers would find some toy guns does not mean the firearm used in all five (5) of the robberies was a toy gun. Indeed, although Petitioner was not arrested immediately after committing each of the robberies so the actual firearm used was not recovered at the scene of the crimes, officers only found the BB gun. Moreover, while some of the eyewitnesses could not testify whether the firearm Petitioner pointed at them was a toy gun or a real gun, Singh testified he was certain it was not a toy gun. Id. at 75-78.

Thus, Petitioner's citation to Nevada Supreme Court precedent, where the Court found that toy guns and other items did not necessarily constitute firearms for purposes of the statutory deadly weapon enhancement, does not advance his argument. McIntyre v. State, 104 Nev. 622, 764 P.2d 482 (1988); Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989); Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994); Milton v. State, 111 Nev. 1487, 908 P.2d 684 (1998). In each of these cases the Nevada Supreme Court concluded that various items, including toy guns, hammers, and scissors might not be deadly weapons, which is distinguishable from the instant case in which a .177 Daisy Powerline BB gun was found. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Like the BB gun in Manning, 107 Nev. at 339, 810 P.2d at 1216, Petitioner's firearm fits the current statutory definition of firearm as it is a "device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion." NRS 202.253.

Accordingly, any effort by counsel to move to dismiss the case on this basis would have been futile and, thus, he did not fall below an objective standard of reasonableness. See Ennis, 122 Nev. at 706, 137 P.3d at 1103; Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For the foregoing reasons, Petitioner also has not and cannot demonstrate that even if there was error, he would have not pled guilty and proceeded to 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 v. State, 120 Nev.

at 190-91, 87 P.3d at 537. Therefore, this claim is denied.

D. Petitioner's Additional Claims for Good Cause Fail

Under Section III of Petitioner's Supplemental Petition, Petitioner has repeated his argument regarding the deadly weapon enhancement and has argued that: (1) counsel failed to appropriately advise Petitioner of the law and that Petitioner was factually innocent because he used a toy gun, (2) the State committed prosecutorial error in improperly pleading the case, (3) Petitioner failed to timely file his Pro Per Petition because he was not aware of the Davis case, (4) the State would not be prejudiced under laches because it would benefit by its wrongdoing. Supplemental Petition at 9-13.

1. Petitioner was not factually innocent

First, as discussed *supra*, Petitioner cannot establish that counsel failed to appropriately advise him of the law because he was not factually innocent. Indeed, Petitioner attempts to mislead this Court by arguing that Petitioner used a toy gun to commit the charged crimes in this case, but neglects to apprise this Court that a firearm constituting a deadly weapon, as discussed supra, was found in Petitioner's bedroom. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110; NRS 202.253.

Regardless, actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

"Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims

of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has made a showing of actual innocence, he may then use the claim as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Id.

Here, Petitioner cannot establish that he is actually innocent because he is not alleging newly discovered facts. Therefore, his claim is denied.

2. The State did not commit misconduct or prosecutorial error

Petitioner argues that the State committed misconduct or prosecutorial error when it improperly pled the case. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Not only is this a bare and naked assertion so devoid of meaning for the State to effectively respond, but also his claim is meritless because the State properly pleaded the case as discussed *supra*.

3. Petitioner cannot establish good cause based on his discovery of the Davis case

Petitioner argues that he can establish good cause to forgive his untimely filing of his Pro Per Petition because he filed his Petition as soon as he discovered the Davis case. As discussed *supra* in Section II.B., Petitioner cannot establish good cause because he failed to file his Petition within one (1) year of the Davis case. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26.

4. Laches does not apply

Petitioner argues that laches does not apply because the State is not prejudiced by the Court considering the instant Petition. However, contrary to counsel's argument, the doctrine of laches has no application in this case because it has not been five (5) years since the Judgment of Conviction was filed on October 30, 2017.

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

III. 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, his claims are legal not factual, counsel's testimony would not aid Petitioner, the Petition can be disposed of with the existing record, and counsel has failed to indicate what would be added that could

change the issues. 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 Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary Hearing shall be, and are, hereby denied.

DATED this _____ day of July, 2021.

Dated this 8th day of July, 2021

Ronald J. Israel

DISTRICT JUDGE

A-20-821088-SC

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Ronald J. Israel
District Court Judge

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

BY Taleen Pandukht
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

jm/L2

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Davin Toney, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-20-821088-W DEPT. NO. Department 28

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Finding of Fact and Conclusions of Law 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: 7/8/2021

Terrence Jackson	terry.jackson.esq@gmail.com

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Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVIN TONEY,

Petitioner,

vs.

WILLIAM HUTCHINGS, WARDEN,

Respondent,

Case No: A-20-821088-W

Dept No: XXVIII

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

PLEASE TAKE NOTICE that on July 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 July 15, 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 15 day of July 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:
Davin Toney # 1187296
P.O. Box 208
Indian Springs, NV 89070

Terrence M. Jackson, Esq.
624 S. Ninth St.
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

DAVIN M. TONEY, aka,
Davin Marvell Toney, #2508918

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-20-821088-W

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 21, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 21st day of June, 2021, the Petitioner present, represented by TERRENCE MICHAEL JACKSON, ESQ., 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

From February 18, 2017 to February 22, 2017, Petitioner robbed five (5) different businesses at gun point. On February 27, 2017, the State filed a Criminal Complaint against DAVIN TONEY (hereinafter "Petitioner"), charging him with five (5) counts of Burglary while in Possession of a Deadly Weapon, five (5) counts of Robbery with Use of a Deadly Weapon, and one (1) count of Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older. On April 3, 2017, a preliminary hearing was held, and at the conclusion, the justice court held Petitioner to answer the above charges in district court. An Amended Criminal Complaint was filed that same day.

On April 28, 2017, the State filed an Information charging Petitioner with the above charges as well as two (2) counts of Conspiracy to Commit Robbery. On August 23, 2017, a Guilty Plea Agreement (hereinafter "GPA") was filed and Petitioner pled guilty to: Count 1 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); and Count 4 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060). The terms of the GPA were as follows:

> The Parties stipulate to an aggregate term of imprisonment of eight (8) years to thirty-five (35) years (96 to 420 months) in the Nevada Department of Corrections structured as follows: Count 1 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement. Count 2 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement, to run consecutive to Counts 1 and 2. Count 4 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.

On October 18, 2017, Petitioner was sentenced to the Nevada Department of Corrections ("NDOC") as follows: Count 1 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty six (66) months for the use of a deadly weapon; Count 2 – a minimum of forty eight (48) months and a maximum of one hundred ninety five (195) months, concurrent with Count 1; Count 3 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty-six (66) months for the use of a deadly weapon, consecutive to Counts 1 and 2; Count 4 – a minimum of forty eight (48) months and a maximum of one hundred ninety-five (195) months, consecutive to Counts 1 and 2 and concurrent with Count 3. Petitioner received a total aggregate sentence of a minimum of ninety-six (96) months and a maximum of four hundred twenty (420) months in the NDOC and two hundred thirty-eight (238) days credit for time served. The Judgment of Conviction was filed on October 30, 2017. No appeal or prior post-conviction petition was filed.

On September 14, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Pro Per Petition"). On October 14, 2020, counsel Terrence Jackson, Esq. was appointed. On January 26, 2021, counsel filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief (hereinafter "Supplemental Petition"). The State filed its Response on April 19, 2021. On May 13, 2021, Petitioner filed a Reply. On May 24, 2021, the Court denied Petitioner's Pro Per Petition, Supplemental Petition, and Request for an Evidentiary Hearing and found as follows.

FACTS

From February 18, 2017 to February 22, 2017, Petitioner committed five (5) robberies at five (5) smoke shops in Las Vegas, Nevada. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 97-99. At his preliminary hearing on April 2017, eyewitnesses from each of the smoke shops testified. Id. at 4, 23, 37, 51, 82.

On February 18, 2017, Chinthana Thennakoon was robbed while he was working at the 99 Center Plus Smoke Shop. Id. at 5. He described the person that robbed him as a six (6) foot

eight (8), a little overweight, African American male who was wearing a white baseball hat, black sunglasses, and a brown jacket. Id. at 6.

Right before Thennakoon was robbed, the robber entered the front door of the store and asked about purchasing a blunt wrap as well as a cigar. Id. at 7. Thennakoon turned around to retrieve those items from behind and when he turned back around the robber pointed a gun at him. Id. While pointing the gun at Thennakoon, the robber aggressively asked him to open the register and give him the money. Id. at 8. Thennakoon opened the register, the robber grabbed about $350 to $400 from the register, and placed the money inside of a brown paper bag. Id. 8-10, 13. Thennakoon then opened the second register and the robber took money out of that register as well. Id. Subsequently, one (1) or two (2) customers entered the store. Id. at 10. The robber told the customers that the smoke shop was closed, but the customers did not pay attention. Id. at 10-12. Petitioner then put his gun back inside of his jacket and, while carrying the paper bag filled with cash from the register, slowly exited the through the front door of the store. Id. at 10-12. When asked at the preliminary hearing about the firearm that the robber pointed at him, Thennakoon testified that he was not sure whether the gun was a toy gun or a real gun. Id. at 19.

That night, Salman Akram was working at Mr. Kay's Smoke Shop also located in Las Vegas, Nevada. Id. at 23. At approximately 10:40 PM, while he was working, two (2) males entered the store. Id. at 23-24. One (1) of the men stood by a jewelry display located near the front door, while the other approached the register at the counter. Id. at 24. Akram identified Petitioner as the man that approached the register and described him as an African American man who was wearing a baseball cap and sunglasses. Id. at 24-25.

As Petitioner approached Akram at the cash register, he asked for a pack of Newports and then asked for a pack of Swishers. Id. at 26-27. Petitioner then said he was not going to get the cigarettes, took change out from his pocket, and began to count the change. Id. at 27. As soon as Akram opened the register, Petitioner pulled out a gun, pointed it at Akram, and told him to shut up or he would shoot him. Id. at 27.

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Akram stepped back from the register as Petitioner took about $400 from inside of the register. Id. at 27. After Petitioner grabbed the cash, he began to walk towards the door, pointed the gun at Akram, and told him that he better not pull anything from the counter or he would shoot him. Id. at 28. Petitioner then unlocked the front door, which Akram never locked, and both individuals exited the store. Id. at 28. At the preliminary hearing, Akram testified that the gun Petitioner pointed at him that day appeared to be a real gun. Id. at 31.

A few days later, on February 22, 2017, Sujan Narasingehe was working at AS smoke shop in Las Vegas, Nevada. Id. at 37. At about 10:04 AM, a man he identified as Petitioner at the preliminary hearing, entered the store with Narasingehe's neighbor. Id. at 38. Eventually, Petitioner asked for Swishers cigars. Id. at 40. Narasingehe grabbed the cigars while Petitioner waited by the register. Id. Once Narasingehe's neighbor left the store, he asked if he could get Petitioner anything else. Id. at 41. Petitioner stated he wanted to purchase a pipe and walked to the cabinet holding the pipes as Narasingehe followed. Id. at 41.

After a couple of seconds, Petitioner pointed out the one he wanted, which Narasingehe said was very unusual in a smoke shop because customers usually take longer to examine the pipes for purchase. Id. Narasingehe retrieved the pipe and Petitioner told him to go over by the register. Id. Once they got to the register, Petitioner pulled out a gun and pointed it at Narasingehe. Id. at 42. While pointing the gun at Narasingehe, Petitioner aggressively requested that he open the register. Id. At this point, Narasingehe was so nervous he struggled to open the register, but eventually was able to do so. Id. at 42-43. Petitioner then grabbed all of the money out of the register, which amounted to approximately $140. Id. at 43. Petitioner asked if there was more money, but since it was the early morning, Narasingehe told him that is all the store had. Id. at 44. Petitioner finished grabbing the money from the register and then walked slowly back toward the store and ran out. Id. at 44. At that point, other customers were in the store and appeared to Narasingehe not to know what had happened or were pretending not to know. Id.

Narasingehe testified at that preliminary hearing that he was not sure if the gun Petitioner pointed at him that day was a toy or real gun, but he recalled that he was scared

because he thought he was going to die that day. Id. at 49. He was however able to describe the firearm as black in color and was the type of gun one would load from the top as the top would slide back. Id. at 50. Most importantly, he testified that at the time Petitioner pulled out the gun, he did not think it was a toy gun and thought he was going to get shot. Id.

Later that same day, Harbehej Singh was working at the USA Smoke Shop and Mini Mart also located in Las Vegas, Nevada when he was robbed at gunpoint. Id. at 51-54. At about 3:00 PM, Singh was working with another employee who was sixty-seven (67) years old. Id. at 52. At that time, Singh's employee was stocking items in the back of the shop and Singh was in the front portion of the shop completing paperwork and helping customers. Id. When Singh finished helping some customers, he saw a man, who he identified as Petitioner, standing in line. Id. at 53.

Petitioner had entered the store wearing a beanie and asked Singh for cigars. Id. at 54. Petitioner gave Singh a little over $1 and as Singh thought Petitioner was reaching in his pocket to pull out more change, Petitioner instead pulled out a gun and pointed it at Singh's head. Id. Singh attempted to grab the firearm from Petitioner but was unsuccessful, and, as a result, Petitioner told Singh he would shoot him. Id. After this, Singh stepped back, told Petitioner to take whatever he wanted, and Petitioner went over to the register and retrieved the cash out of the register. Id. at 55-56. At that time, Singh's co-worker came to the front of the store. Id. at 55. Petitioner then pointed the gun at Singh's co-worker, told him not move or Petitioner would shoot him. Id. Petitioner then finished grabbing the approximately $2,000 in cash and ran. Id. at 56-58.

After Petitioner left the store, Singh looked to see if he could identify Petitioner's vehicle. Id. at 58. Singh was able to see Petitioner get inside of a blue vehicle and he wrote down the vehicle's license plate number. Id. at 58. Singh recalled seeing a white bald man in the driver's seat and an African American female in the back as Petitioner entered the vehicle and sat in the passenger seat. Id. at 59. The white male then drove the vehicle away. Id. at 59.

At the preliminary hearing, Singh recalled the license plate number to be: 79E092. Id. at 60. Singh also testified that while Petitioner was in the store, he touched some Oreo Cookies

packages and Swishers. Id. at 60. Singh also recalled that the firearm Petitioner pointed at him that day was a black Glock semiautomatic firearm. Id. at 55. Singh later testified that while he did not have more firearm knowledge than knowing the difference between a revolver and semiautomatic, he knew the firearm he saw was similar to the firearm police carry and was not a toy. Id. at 74. Moreover, Singh testified that he knew the firearm was not a toy because Petitioner would not be able to shoot with a toy gun. Id. at 75. Singh later clarified that he was very familiar with small firearms and that he was one hundred (100) percent certain that the firearm Petitioner pointed at him that day was a Glock. Id. at 78. He was also certain it was not a toy gun because he knew what toy guns and BB guns look like and that the gun Petitioner used was real. Id. at 79.

Later that night, at approximately 10:30 PM, Norma Escobar was working at Texas Liquor located in Las Vegas, Nevada. Id. at 82. At that time, Escobar was standing behind the register inside of the store when an African American man, wearing a brown leather jacket, and beanie walked in. Id. at 83. Escobar recalled that the man, who was not her regular customer, was acting weirdly nervous as he asked for a bottle and Swishers cigars. Id. Escobar handed him the Swishers and bottle. Id. at 83-84. The man then gave Escobar a $20 bill, Escobar opened the register, the man then pointed his black gun at her, and took all of the money out of the register, which amounted to approximately $200. Id. at 84-85. Escobar explained that at this point she was in shock and could not recall what the man said to her. Id. The man then ran out of the store. Id. at 85.

In addition to this eyewitness testimony, there was also physical evidence presented that linked Petitioner to the five (5) robberies. Id. at 93-114. LVMPD Detective David Miller, who was assigned to investigate the robbery series, retrieved surveillance camera footage from the stores. Id. at 98-100. Detective Miller took note of certain similarities among the robberies, including that the robberies occurred at the same type of business, the description of the suspect was similar, the suspect was wearing the same unique jacket, and had the same method of operation. Id. Based on these similarities, Detective Miller believed it was the same suspect that conducted all five (5) of the robberies. Id. at 100. Indeed, in all five (5) of the robberies,

the suspect wore blue jeans and wore what appeared to be a unique, leather jacket with white along the collar and the sleeve cuffs as well as a type of leather material on the shoulder. Id. at 102. The suspect also wore a white ball cap, with a sticker on the brim and a black line along a black symbol on the left upper part of the cap. Id. at 102-03. The suspect was also seen wearing a gray beanie in some of the robberies as well as sunglasses. Id. at 104. Detective Miller also reviewed a map showing the locations of the robberies which further confirmed that the five (5) robberies amounted to a series. Id. at 105.

While reviewing the surveillance camera footage from the USA Smoke Shop robbery, Detective Miller noticed the suspect in the video approaching the front doors, taking a sip from a tall can, and throwing it in the trash outside of the store before entering. Id. at 100. The investigating officers later looked in the trash can and saw that there was only one can that fit the description inside and collected it for processing. Id. at 101. Testing conducted on the Arizona green tea can revealed that the two (2) fingerprints lifted were a match for Petitioner's right middle finger and his right index finger. Id. at 95. Officers also retrieved the Oreo cookie package Petitioner touched at one of the crime scenes to conduct testing. Id. Testing of that package revealed that the fingerprint found on the Oreo cookie package matched Petitioner's right middle finger. Id. at 95-96.

Officers also searched the records for the license plate on the vehicle provided by one of the eyewitnesses. Id. at 106. Petitioner's address was associated with the vehicle's registration and a search warrant was executed. Id. at 106. A search warrant was also eventually executed at Petitioner's apartment where officers located a .177 Daisy Powerline BB gun, and a ball cap, which appeared to be consistent with one of the hats worn in the first robbery, in Petitioner's bedroom. Id. at 109-110. Detective Miller testified that the gun appeared to be a black semiautomatic firearm but did not look like a Glock. Id. at 111.

When Detective Miller eventually took Petitioner into custody, he was wearing what appeared to be the same leather jacket from the robberies. Id. at 108. Petitioner told Detective Miller that he could find toy guns in his bedroom. Id. at 114. When Detective Miller spoke with Petitioner, Detective Miller pointed to the surveillance picture from one (1) of the

robberies in which the suspect wore a gray beanie and asked Petitioner where they could find that gray beanie. Id. Petitioner told him that the beanie would probably be inside of a drawer in his bedroom. Id. Petitioner also stated he had toy guns in his bedroom. Id.

ANALYSIS

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. Petitioner's Petition is Time-barred

A petition challenging a judgment of conviction's validity must be filed within one year of the judgment or within one year of the remittitur, unless there is good cause to excuse delay. NRS 34.726(1). The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). The one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is issued. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)). Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

In this case, Petitioner's Judgment of Conviction was filed on October 30, 2017. Petitioner did not file a direct appeal. Thus, Petitioner had until October 30, 2018 to file his Petition. Petitioner did not file the instant Petition until September 14, 2020. As such, he was over two (2) years too late. This delay exceeds the two (2) day delay discussed in Gonzales. Thus, dismissal of the Petition is required absent a showing of good cause or prejudice.

B. Application of the Procedural Bars is Mandatory

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's

petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Because Petitioner's Petition is untimely and because he cannot show good cause or prejudice to overcome the mandatory procedural bar, it must be dismissed.

II. PETITIONER HAS NOT DEMONSTRATED GOOD CAUSE OR PREJUDICE TO OVERCOME THE PROCEDURAL BARS

In his Pro Per Petition, Petitioner requests that this Court vacate his deadly weapon enhancement sentences for various reasons. Pro Per Petition at 7-9. First, he claims that pursuant to U.S. v. Davis, 139 S.Ct. 2319 (2019), his sentences for the use of a deadly weapon are unconstitutional as the U.S. Supreme Court concluded that such enhancement is vague. Id. at 7. Under Ground 2, he appears to argue that based on the Supremacy Clause Davis should apply to his case. Id. at 8. Finally, under Ground 3, he argues that his Fifth Amendment Right to Due Process has been violated because the ruling in Davis was not applied to his case, and, had it been, he would have faced a shorter sentence. Pro Per Petition at 9.

In his Supplemental Petition, Petitioner argues that he can establish good cause and prejudice because his counsel failed to adequately investigate or prepare prior to Petitioner pleading guilty which prevented Petitioner from knowingly and intelligently entering his guilty plea. Supplemental Petition at 3-7. Second, Petitioner argues that counsel was ineffective for failing to move to dismiss the case or effectively challenge the use of a toy gun as a deadly weapon under NRS 193.165. Id. at 7-9. Third, Petitioner lists additional reasons why he believes he can establish good cause and prejudice including that: (1) counsel failed to appropriately advise Petitioner of the law and that Petitioner was factually innocent because it was a toy gun, (2) the State committed misconduct in improperly pleading the case, (3) Petitioner failed to timely file his Pro Per Petition because he was not aware of the Davis case, (4) the State would not be prejudiced under laches because it would benefit by its wrongdoing. Supplemental Petition at 9-13. However, as discussed below, each of these claims are meritless and are therefore denied.

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "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) (emphasis added).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726. To meet the first requirement, "a petitioner *must* show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available *at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see

generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Moreover, 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.

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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).

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. Petitioner's Pro Per Claim That His Deadly Weapon Enhancement Sentences Are Unconstitutional Fails

Under Grounds 1 through 3 of Petitioner's Pro Per Petition, he argues that his deadly weapon enhancement sentences should be vacated because they are unconstitutional pursuant

to United States v. Davis, 139 S. Ct. 2319 (2019). Pro Per Petition at 7-11. However, this claim is both waived and meritless.

As an initial matter, Petitioner's pro per claim, that his deadly weapon enhancement sentences are unconstitutional, is waived in two (2) ways. First, his claim is substantively waived because he failed to raise the claim on direct appeal. 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).

Second, Petitioner cannot raise constitutional claims that occurred prior to his guilty plea. A defendant cannot enter a guilty plea then later raise independent claims alleging a deprivation of his rights before entry of the 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).

Notwithstanding Petitioner's claim being waived, it is also meritless because Davis is inapplicable. In Davis, 139 S. Ct. at 2323–24, the U.S. Supreme Court reviewed whether 18 U.S.C. § 924(c), i.e. a federal statute which required longer prison sentences for those individuals that used, carried, or possessed a firearm in the commission of a federal "crime of violence or drug trafficking crime," was void for vagueness. The Court explained that "crime of violence" was defined in two (2) of the statute's subparts: the elements clause, 18 U.S.C. § 924(c)(3)(A), and the residual clause, 18 U.S.C. § 924(c)(3)(B). The Court concluded that the residual clause of such federal statute, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague because there was "no reliable way to determine which offenses qualify as crimes of violence" for application of the increased penalty. Id. at 2324. Notably, despite this conclusion, the Court did not conclude that vacating the defendant's sentences was the appropriate remedy, but instead remanded the case to the Fifth Circuit Court for further proceedings:

> We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth Circuit vacated their convictions and sentences on one of the two § 924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

Id. at 2336.

Petitioner's reliance on Davis is misplaced because the U.S. Supreme Court's decision was based on an interpretation of a federal statute that had no application to Nevada law, let alone NRS 193.165. However, even if Davis was applicable, the appropriate remedy would not necessarily be to vacate Petitioner's deadly weapon enhancements as the U.S. Supreme Court was silent regarding the appropriate remedy for error.

Regardless, even if the Court decided to apply Davis to this case, which would not be appropriate, Petitioner would still not be able to demonstrate good cause because he failed to file his Petition within one (1) year of the decision. Indeed, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions). Additionally, Petitioner cannot demonstrate prejudice as he stipulated to sentences for his use of a deadly weapon when he entered his plea, which was knowingly, intelligently, and voluntarily entered as discussed *infra*. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; GPA, filed Aug. 23, 2017, at 1-2. Therefore, Petitioner's claim is denied.

B. Counsel Was Not Ineffective for Failing to Investigate or Prepare Prior to Petitioner Pleading Guilty and Petitioner Knowingly and Intelligently Entered His Plea

Petitioner argues that counsel was ineffective for failing to: (1) investigate, (2) fully explain Petitioner's constitutional rights, defenses, and the consequences of his plea, and (3) failed to have adequate contact with Petitioner. Supplemental Petition at 3-7. Additionally, he argues that these failures resulted in Petitioner unknowingly and unintelligently entering his guilty plea. However, Petitioner's claims fail. Supplemental Petition at 6-7.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

Moreover, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id.

Indeed, 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). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). 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).

As a preliminary matter, Petitioner's claims that counsel failed to investigate and fully explain matters to Petitioner are bare and naked assertions so devoid of meaning that the State cannot effectively respond. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Petitioner's argument could be applied to any defendant as he has offered no specific allegations to support his claims. Thus, these claims are denied.

Petitioner's claim that Petitioner did not knowingly and intelligently enter his guilty plea equally fails because it is belied by the record. Id. 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).

Here, Petitioner's claim that he did not knowingly and intelligently enter his plea is belied by both his signing of his GPA and the answers he gave during his plea canvass. First, Petitioner acknowledged that he understood the parties' negotiation by acknowledging and signing the GPA. Notably, by signing the GPA, Petitioner also acknowledged that he "discussed with his attorney any possible defenses, defense strategies and circumstances which might be in [his] favor." GPA, filed Aug. 23, 2017, at 6.

Second, the Court's canvass of Petitioner demonstrates that Petitioner reviewed the GPA in its entirety with counsel and understood the nature of his plea:

> MR. LOGAN: So the matter is resolved today. Today Mr. Toney will be pleading guilty to Robbery with Use of a Deadly Weapon, a Category B felony. Burglary while Possession of a Deadly Weapon, two counts of each. We'll be looking at an aggregate sentence of 8 to 35 years in NDOC.
> THE COURT: Okay.
> MR. DICKERSON: Correct, Your Honor. The GPA lays out the structure for that sentencing.
> THE COURT: Okay. I see. So specifically Count 1, Robbery With Use would be a 36 to 144, plus consecutive 12 to 66. Count 2 would be, is Burglary with a Deadly 48 to 195, to run concurrent with Count 1. Count 3, Robbery With Use would be 36 to 144, plus consecutive 12 to 66, consecutive to Counts 1 and 2. Count 4 would be Burglary While in Possession, a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.
> MR. DICKERSON: Correct.
> THE COURT: Mr. Toney, have you had an opportunity to go over this entirely with your attorney?
> THE DEFENDANT: Yes, I have.

Recorder's Transcript of Hearing Entry of Plea, Aug. 23, 2017, at 3. Petitioner also unequivocally stated that he understood the charge he was pleading to:

> THE COURT: All right. Mr. Toney, have you been given a copy of an amended information charging you with Count 1, Robbery With Use of a Deadly Weapon; Count 2, Burglary While in Possession of a Deadly Weapon; Count 3, Robbery With Use of a Deadly Weapon; Count 4, Burglary While in Possession of a Deadly Weapon?

THE DEFENDANT: Yes.
THE COURT: Have you had an opportunity to read that amended information and to discuss it fully with your attorney --
THE DEFENDANT: Yes.
THE COURT: -- so that he could answer any questions that you may have?
THE DEFENDANT: Yes.
THE COURT: You have any -- do you understand what's in the amended information? What it's charging you with?
THE DEFENDANT: Yes.
THE COURT: Do you have any questions about the meaning of any of the charges that are in the amended information?
THE DEFENDANT: No.

Id. at 4-5. Further, Petitioner affirmed that he understood the rights he was forfeiting by pleading guilty and was entering his plea voluntarily:

THE COURT: Okay. That's, you know, that's what, 6, 7 pages long. It talks about various things, consequences of the plea. It talks about if you were in the country illegally or if you were an immigrant, what potential it could have. Talks about the rights that you're waiving. You understand you're waiving your constitutional right against self-incrimination? I'm going to ask you what you did that causes you enter a guilty plea in just a minute here. You'd be waiving the constitutional right to a speedy trial, to confront cross-examine any witnesses who would testify against you, as well as some other things. You read that part?
THE DEFENDANT: Yes.
THE COURT: And the voluntariness part. Is there anything, I mean, let me put it this way, other than what's in this Guilty Plea Agreement and what we've discussed in court, has anyone made you any threats or any promises in order to get you to enter a Guilty Plea here?
THE DEFENDANT: No.

Id. at 5-6. Thus, the record demonstrates that Petitioner's plea was knowingly and voluntarily entered and his claim is denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. Counsel Was Not Ineffective For Not Moving to Dismiss or Effectively Challenge the Use of a Toy Gun as a Deadly Weapon Under NRS 193.165

In Petitioner's Supplemental Petition, he argues that counsel was ineffective for failing to recognize or challenge the deadly weapon enhancement because he alleges he used a toy gun to commit the charged crimes. Supplemental Petition at 7-9. As a result, he claims, counsel

ineffectively permitted Petitioner to plead guilty and he was prejudiced by the increased sentence. Id. However, Petitioner's claims fail.

NRS 193.165 provides in relevant part:

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.
> […]
> 6. As used in this section, "deadly weapon" means:
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

Additionally, NRS 202.253 defines a "firearm" as "any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion."

In Manning v. State, 107 Nev. 337, 339, 810 P.2d 1216, 1216 (1991), the Nevada Supreme Court reviewed whether a BB gun constituted a deadly weapon even when it did not have deadly capabilities and could not inflict death or great bodily harm. Although the Court relied on a past version of NRS 202.253, which defined a firearm as "any weapon with a caliber of .177 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air or other force," it ultimately concluded that the BB gun used by the defendant fit that definition and no additional showing of its deadly capabilities was necessary. Id.

In this case, Petitioner argues that the Court inappropriately rendered the deadly weapon enhancements because toy guns were used. However, there is no evidence that toy guns were used in the commission of the crime. Petitioner's self-serving statement that police could find

toy guns in his room, does not negate that law enforcement found a .177 Daisy Powerline BB gun in his bedroom. PSI, filed Sept. 29, 2017, at 7; Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Just because Petitioner stated officers would find some toy guns does not mean the firearm used in all five (5) of the robberies was a toy gun. Indeed, although Petitioner was not arrested immediately after committing each of the robberies so the actual firearm used was not recovered at the scene of the crimes, officers only found the BB gun. Moreover, while some of the eyewitnesses could not testify whether the firearm Petitioner pointed at them was a toy gun or a real gun, Singh testified he was certain it was not a toy gun. Id. at 75-78.

Thus, Petitioner's citation to Nevada Supreme Court precedent, where the Court found that toy guns and other items did not necessarily constitute firearms for purposes of the statutory deadly weapon enhancement, does not advance his argument. McIntyre v. State, 104 Nev. 622, 764 P.2d 482 (1988); Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989); Smith v. State, 110 Nev. 1094, 881 P.2d 649 (1994); Milton v. State, 111 Nev. 1487, 908 P.2d 684 (1998). In each of these cases the Nevada Supreme Court concluded that various items, including toy guns, hammers, and scissors might not be deadly weapons, which is distinguishable from the instant case in which a .177 Daisy Powerline BB gun was found. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Like the BB gun in Manning, 107 Nev. at 339, 810 P.2d at 1216, Petitioner's firearm fits the current statutory definition of firearm as it is a "device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion." NRS 202.253.

Accordingly, any effort by counsel to move to dismiss the case on this basis would have been futile and, thus, he did not fall below an objective standard of reasonableness. See Ennis, 122 Nev. at 706, 137 P.3d at 1103; Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For the foregoing reasons, Petitioner also has not and cannot demonstrate that even if there was error, he would have not pled guilty and proceeded to 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 v. State, 120 Nev.

at 190-91, 87 P.3d at 537. Therefore, this claim is denied.

D. Petitioner's Additional Claims for Good Cause Fail

Under Section III of Petitioner's Supplemental Petition, Petitioner has repeated his argument regarding the deadly weapon enhancement and has argued that: (1) counsel failed to appropriately advise Petitioner of the law and that Petitioner was factually innocent because he used a toy gun, (2) the State committed prosecutorial error in improperly pleading the case, (3) Petitioner failed to timely file his Pro Per Petition because he was not aware of the Davis case, (4) the State would not be prejudiced under laches because it would benefit by its wrongdoing. Supplemental Petition at 9-13.

1. Petitioner was not factually innocent

First, as discussed *supra*, Petitioner cannot establish that counsel failed to appropriately advise him of the law because he was not factually innocent. Indeed, Petitioner attempts to mislead this Court by arguing that Petitioner used a toy gun to commit the charged crimes in this case, but neglects to apprise this Court that a firearm constituting a deadly weapon, as discussed supra, was found in Petitioner's bedroom. Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110; NRS 202.253.

Regardless, actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

"Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims

of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has made a showing of actual innocence, he may then use the claim as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Id.

Here, Petitioner cannot establish that he is actually innocent because he is not alleging newly discovered facts. Therefore, his claim is denied.

2. The State did not commit misconduct or prosecutorial error

Petitioner argues that the State committed misconduct or prosecutorial error when it improperly pled the case. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Not only is this a bare and naked assertion so devoid of meaning for the State to effectively respond, but also his claim is meritless because the State properly pleaded the case as discussed *supra*.

3. Petitioner cannot establish good cause based on his discovery of the Davis case

Petitioner argues that he can establish good cause to forgive his untimely filing of his Pro Per Petition because he filed his Petition as soon as he discovered the Davis case. As discussed *supra* in Section II.B., Petitioner cannot establish good cause because he failed to file his Petition within one (1) year of the Davis case. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26.

4. Laches does not apply

Petitioner argues that laches does not apply because the State is not prejudiced by the Court considering the instant Petition. However, contrary to counsel's argument, the doctrine of laches has no application in this case because it has not been five (5) years since the Judgment of Conviction was filed on October 30, 2017.

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

III. 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, his claims are legal not factual, counsel's testimony would not aid Petitioner, the Petition can be disposed of with the existing record, and counsel has failed to indicate what would be added that could

change the issues. 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 Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary Hearing shall be, and are, hereby denied.

DATED this _____ day of July, 2021.

Dated this 8th day of July, 2021

Ronald J. Israel

DISTRICT JUDGE

A-20-821088-SC

708 CCC A8E2 DE71
Ronald J. Israel
District Court Judge

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

BY Taleen Pandukht
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

jm/L2

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Davin Toney, Plaintiff(s) vs. William Hutchings, Warden, Defendant(s)	CASE NO: A-20-821088-W DEPT. NO. Department 28

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Finding of Fact and Conclusions of Law 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: 7/8/2021

Terrence Jackson	terry.jackson.esq@gmail.com

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**October 14, 2020**

A-20-821088-W Davin Toney, Plaintiff(s)
vs.
William Hutchings, Warden, Defendant(s)

October 14, 2020	**1:45 PM**	**Appointment of Counsel**	**Appointment of Counsel (Terry Jackson)**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Jackson, Terrence Michael	Attorney
Zadrowski, Bernard B.	Attorney

JOURNAL ENTRIES

- Petitioner/Deft. TONEY, not present, in custody. Mr. Jackson confirmed as counsel and requested additional time to receive the file from the Public Defender before setting a briefing schedule. COURT ORDERED, Matter set for a status check to set briefing scheduled.

10/28/2020 12:00 PM STATUS CHECK: SET BRIEFING SCHEDULE

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**October 28, 2020**

A-20-821088-W Davin Toney, Plaintiff(s)
vs.
William Hutchings, Warden, Defendant(s)

October 28, 2020	**12:00 AM**	**Status Check**	**Status Check: Set Briefing Schedule for Petition for Writ of Habeas Corpus**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Jackson, Terrence Michael	Attorney
Zadrowski, Bernard B.	Attorney

JOURNAL ENTRIES

- Deft./Petitioner HUTCHINGS not present, in the Nevada Department of Corrections (NDC). Colloquy regarding scheduling. COURT ORDERED, Briefing Schedule: Deft's supplemental Brief 01/27/2021, State's Opposition 03/10/2021, Deft's Reply 04/14/2021 and hearing RESET.

NDC

05/12/2021 9:00 AM/12:00 PM PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**May 24, 2021**

A-20-821088-W Davin Toney, Plaintiff(s)
vs.
William Hutchings, Warden, Defendant(s)

May 24, 2021 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK:

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Jackson, Terrence Michael	Attorney
Zadrowski, Bernard B.	Attorney

JOURNAL ENTRIES

- Counsel appeared via Bluejeans; Deft. not present; not transported from Nevada Department of Corrections (NDC).

Colloquy regarding Deft. appearing, setting an Evidentiary Hearing, and current NDC protocols due to the Covid-19 pandemic. COURT ORDERED, matter CONTINUED; State to prepare a Transport Order.

CONTINUED TO: 06.21.21 11:00 A.M.

DISTRICT COURT

CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**June 21, 2021**

A-20-821088-W Davin Toney, Plaintiff(s)
vs.
William Hutchings, Warden, Defendant(s)

June 21, 2021 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Jackson, Terrence Michael	Attorney
Toney, Davin	Plaintiff
Zadrowski, Bernard B.	Attorney

JOURNAL ENTRIES

- Petitioner / Deft. DAVIN present, in custody in the Nevada Department of Corrections (NDC). Argument by Mr. Jackson in support of the Petition. Mr. Jackson pointed out the Deft. filed is Pro Per Petition and it should not be denied as procedurally barred and the gun was a toy gun and should not have been considered as a delay weapon. Court advised counsel of the weapon being a BB gun. Further arguments. State submitted. Court noted findings and noted no good cause was shown for the delay. COURT ORDERED, Petition DENIED as procedurally barred. Court stated further findings of bare and naked allegations, belied by the record regarding points within the petition. Mr. Jackson inquired of his request for an evidentiary hearing. Court noted the Petition was Denied as procedurally barred, Counsel did not state what would be added that would change the issues, There being no good cause, request for hearing, Denied. Further discussions by Mr. Jackson and Deft. Court directed the State to prepare the order.

NDC

Certification of Copy

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

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

NOTICE OF APPEAL; CASE APPEAL STATEMENT; REQUEST FOR TRANSCRIPTS; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

DAVIN MARVELL TONEY,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS (WARDEN),

Defendant(s),

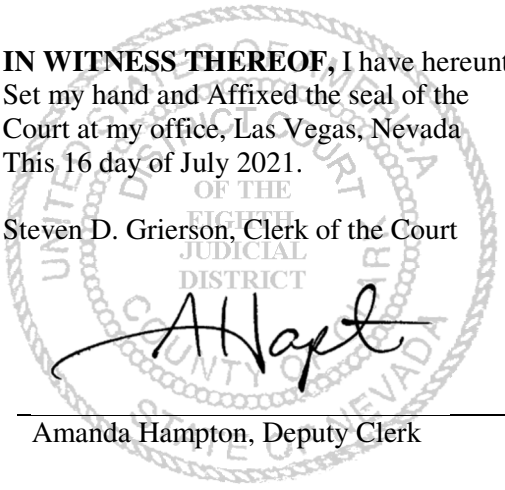
Case No: A-20-821088-W

Dept No: XXVIII

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 16 day of July 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk