

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVIN MARVELL TONEY,)	Electronically Filed
#1187296,)	Nov 09 2021 11:31 a.m.
Appellant,)	Elizabeth A. Brown
)	Clerk of Supreme Court
v.)	CASE NO.: 83246
STATE OF NEVADA,)	E-FILE
Respondent.)	D.C. Case No.: A-20-821088-W
)	Dept.: XXVIII

APPELLANT'S APPENDIX VOLUME 1

**Appeal from denial of a Post- Conviction Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001
Terry.jackson.esq@gmail.com

STEVEN B. WOLFSON
Nevada Bar No. 001565
Clark County District Attorney
200 E. Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2750
Steven.Wolfson@clarkcountynvda.com

AARON D. FORD
Nevada Bar No. 007704
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

...

Counsel for Appellant

Counsel for Respondent

MASTER INDEX

Case No.: 83246

Document (<u>file stamp date in parenthesis</u>) [hearing date in brackets]	Volume	Page No.
Amended Information (<u>08/23/2017</u>)	1	08-10
Court Minutes: Appointment of Counsel [10-14-2020]	1	48
Court Minutes: Sentencing [10-18-2017]	1	22-23
Court Minutes: Petition for WHC [06-21-2021]	1	109
Findings of Fact, Conclusions of Law & Order Heard [6-21-2021] (<u>07/08/2021</u>)	1	110-139
Guilty Plea Agreement (<u>08/23/2017</u>)	1	11-21
Information (<u>04/28/2017</u>)	1	<u>01</u> -06
Judgment of Conviction [Plea of Guilty] (<u>10/30/2017</u>)	1	24-25
Notice of Appeal, A-20-821088-W (<u>07/15/2021</u>)	1	141-142
Notice of Entry of Finding of Facts (<u>07/15/2021</u>)	1	140
Order for Writ of Habeas Corpus (<u>06/22/2017</u>)	1	07
<i>Pro Per</i> Petition for WHC Post Conviction (<u>09/14/2020</u>) with Exhibits for case no: [A-20-821088-W]	1	26-47
Reply to State's Response to Petitioner's Petition for WHC (Post Conviction) Heard [5-24-2021] (<u>05/13/2021</u>)	1	105-108
State's Response to Petitioner's Petition for WHC (Post Conviction) Supplemental Points & Auth. [5-24-2021] (<u>04/19/2021</u>)	1	76-104

...

Supplemental Points and Authorities in Support of Petition for WHC

for Post Conviction Relief (01/26/2021) 1 49-62

Transcripts Follow:

Entry of Plea: Heard [8-23-2017] (03/12/2021) 1 63-75

Petition for WHC: Heard [6-21-2021] (08/03/2021) 1 143-150

CERTIFICATE OF SERVICE

I certify I am an assistant to Terrence M. Jackson, Esquire; a person competent to serve papers, not a party to the above-entitled action and on the 9th day of November, 2021, I served a copy of the foregoing: Appellant Davin Marvell Toney's Opening Brief and the Appendix and Index, Volumes 1 and, as follows:

[X] Via Electronic Service to the Nevada Supreme Court, to the Eighth Judicial District Court, and by U. S. mail with first class postage affixed to the Nevada Attorney General and the Petitioner/Appellant as follows:

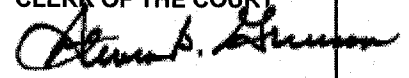
STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

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

ALEXANDER G. CHEN
Chief Deputy D. A. - Criminal
alexander.chen@clarkcountyda.com

DAVIN M. TONEY
ID#1187296
S. D. C. C. - P.O. Box 208
Indian Springs, NV 89070-0208

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



1 INFM
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL R. DICKERSON
6 Deputy District Attorney
7 Nevada Bar #013476
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

12 I.A. 05/01/17

13 10:00 A.M.

14 PD BANKS & LOGAN

15 THE STATE OF NEVADA,

16 Plaintiff,

CASE NO: C-17-323151-1

17 -vs-

DEPT NO: I

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

20 Defendant.

INFORMATION

21 STATE OF NEVADA }
22 COUNTY OF CLARK } ss.

23 STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State
24 of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

25 That DAVIN M. TONEY, aka, Davin Marvell Toney, the Defendant(s) above named,
26 having committed the crimes of **BURGLARY WHILE IN POSSESSION OF A DEADLY**
27 **WEAPON (Category B Felony - NRS 205.060 - NOC 50426); CONSPIRACY TO**
28 **COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147);**
ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380,
193.165 - NOC 50138); and ROBBERY WITH USE OF A DEADLY WEAPON,
VICTIM 60 YEARS OF AGE OR OLDER (Category B Felony - NRS 200.380, 193.165,
193.167 - NOC 50143), on or between February 18, 2017 and February 22, 2017, within the
County of Clark, State of Nevada, contrary to the form, force and effect of statutes in such
cases made and provided, and against the peace and dignity of the State of Nevada,

W:\2017\2017F03197\17F03197-INFM-(TONEY_DAVID)-001.DOCX

AA 001

1 COUNT 1 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

2 did on or about February 18, 2017 then and there willfully, unlawfully, and feloniously
3 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by
4 SMOKE SHOP PLUS 99 CENT STORE, located at 6895 East Lake Mead Boulevard, Las
5 Vegas, Clark County, Nevada, said Defendant did possess and/or gain possession of a firearm
6 and/or pneumatic gun, a deadly weapon, during the commission of the crime and/or before
7 leaving the structure.

8 COUNT 2 - ROBBERY WITH USE OF A DEADLY WEAPON

9 did on or about February 18, 2017 willfully, unlawfully, and feloniously take personal
10 property, to wit: U.S. Currency, from the person of CHINTHANA THENNAKON, or in his
11 presence, by means of force or violence, or fear of injury to, and without the consent and
12 against the will of CHINTHANA THENNAKON, with use of a deadly weapon, to wit: a
13 handgun and/or pneumatic gun.

14 COUNT 3 - CONSPIRACY TO COMMIT ROBBERY

15 did on or about February 18, 2017 willfully, unlawfully, and feloniously conspire with
16 an co-conspirator to commit a robbery, by the defendant/unnamed co-conspirator committing
17 the acts as set forth in Counts 4 and 5, said acts being incorporated by this reference as though
18 fully set forth herein.

19 COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

20 did on or about February 18, 2017 then and there willfully, unlawfully, and feloniously
21 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by MR
22 K SMOKE SHOP, located at 5130 South Fort Apache Road, Las Vegas, Clark County,
23 Nevada, said Defendant did possess and/or gain possession of a firearm and/or pneumatic gun,
24 a deadly weapon, during the commission of the crime and/or before leaving the structure.

25 COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON

26 did on or about February 18, 2017 willfully, unlawfully, and feloniously take personal
27 property, to wit: U.S. Currency, from the person of SALMAN AKRAM, or in his presence,
28 by means of force or violence, or fear of injury to, and without the consent and against the will

1 of SALMAN AKRAM, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun.

2 COUNT 6 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

3 did on or about February 22, 2017 then and there willfully, unlawfully, and feloniously
4 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by A.S.
5 SMOKE SHOP, located at 4566 East Tropicana Avenue, Las Vegas, Clark County, Nevada,
6 said Defendant did possess and/or gain possession of a firearm and/or pneumatic gun, a deadly
7 weapon, during the commission of the crime and/or before leaving the structure.

8 COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON

9 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
10 property, to wit: U.S. Currency, from the person of SUJAN NARASINGHE, or in his
11 presence, by means of force or violence, or fear of injury to, and without the consent and
12 against the will of SUJAN NARASINGHE, with use of a deadly weapon, to wit: a handgun
13 and/or pneumatic gun.

14 COUNT 8 - CONSPIRACY TO COMMIT ROBBERY

15 did on or about February 22, 2017 willfully, unlawfully, and feloniously conspire with
16 unnamed co-conspirator(s) to commit a robbery, by the defendant/unnamed conspirator(s)
17 committing the acts as set forth in Counts 9, 10, and 11, said acts being incorporated by this
18 reference as though fully set forth herein.

19 COUNT 9 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

20 did on or about February 22, 2017 then and there willfully, unlawfully, and feloniously
21 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by USA
22 SMOKE SHOP & MINI MART, located at 9575 West Tropicana Avenue, Las Vegas, Suite
23 No. 6, thereof, Las Vegas, Clark County, Nevada, said Defendant did possess and/or gain
24 possession of a firearm and/or pneumatic gun, a deadly weapon, during the commission of the
25 crime and/or before leaving the structure.

26 COUNT 10 - ROBBERY WITH USE OF A DEADLY WEAPON

27 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
28 property, to wit: U.S. Currency, from the person of HARBHEJ SINGH, or in his presence, by

1 means of force or violence, or fear of injury to, and without the consent and against the will of
2 HARBHEJ SINGH, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun.

3 COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON, VICTIM 60 YEARS OF
4 AGE OR OLDER

5 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
6 property, to wit: U.S. Currency, from the person of ANGULUGAHA PIYADASA, who is 60
7 years of age or older, or in his presence, by means of force or violence, or fear of injury to,
8 and without the consent and against the will of ANGULUGAHA PIYADASA, with use of a
9 deadly weapon, to wit: a handgun and/or pneumatic gun.

10 COUNT 12 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

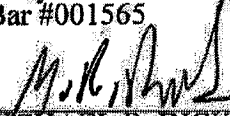
11 did on or about February 22, 2017 then and there willfully, unlawfully, and feloniously
12 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by
13 TEXAS LIQUOR, located at 5020 Broadbent Boulevard, Las Vegas, Clark County, Nevada,
14 said Defendant did possess and/or gain possession of a firearm and/or pneumatic gun, a deadly
15 weapon, during the commission of the crime and/or before leaving the structure.

16 COUNT 13 - ROBBERY WITH USE OF A DEADLY WEAPON

17 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
18 property, to wit: U.S. Currency, from the person of NORMA ESCOBAR, or in her presence,
19 by means of force or violence, or fear of injury to, and without the consent and against the will
20 of NORMA ESCOBAR, with use of a deadly weapon, to wit: a handgun and/or pneumatic
21 gun.

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

25 BY


26 MICHAEL R. DICKERSON
27 Deputy District Attorney
28 Nevada Bar #013476

1 Names of witnesses known to the District Attorney's Office at the time of filing this
2 Information are as follows:

3	<u>NAME</u>	<u>ADDRESS</u>
4	AKRAM, SALMAN	MR K SMOKE SHOP
5		5130 S FORT APACHE DR
6		LV NV 89148
7	ALEXANDER, L.	LVMPD P#15376
8	ANDREWS, D.	LVMPD P#13766
9	BEVERIDGE, J.	LVMPD P#6707
10	BOOZE, R.	LVMPD P#6394
11	BUTLER, R.	LVMPD P#15719
12	CUSTODIAN OF RECORDS	CCDC
13	CUSTODIAN OF RECORDS	LVMPD/COMMUNICATIONS
14	CUSTODIAN OF RECORDS	LVMPD/RECORDS
15	DARRAGH, D.	LVMPD P#5731
16	EICKMEYER, B.	LVMPD P#5595
17	ESCOBAR, NORMA	TEXAS LIQUOR
18		5020 BROADBENT BLVD
19		LV NV 89122
20	FARIS, C.	LVMPD P#12814
21	GRAHAM, THOMAS	ADDRESS UNKNOWN
22	HERALD, C.	LVMPD P#6019
23	HUBBARD, W.	LVMPD P#5439
24	HUYSENTRUYT, K.	LVMPD P#6034
25	JOHNSON, G.	LVMPD P#10208
26	KELLY, J.	LVMPD P#13737
27	KHACHATRYAN, E.	LVMPD P#15898
28	KIM, PAUL	ADDRESS UNKNOWN
	LEMIRE, K.	LVMPD P#6949
	MACIAS, A.	LVMPD P#9833

1	MCCONNELL, K.	LVMPD P#13336
2	MENDOZA, MOSES	ADDRESS UNKNOWN
3	MILLER, D.	LVMPD P#6627
4	MULLINS, T.	LVMPD P#6414
5	NARASINGHE, SUJAN	AS SMOKE SHOP 4566 E TROPICANA AVE LV NV 89121
6		
7	PIYADASA, ANGULUGAHA	USA SMOKE SHOP 9575 E TROPICANA AVE #6 LV NV 89148
8		
9	ROCK, B.	LVMPD P#6950
10	RODRIGUEZ, LUIS	TEXAS LIQUOR 5020 BROADBENT BLVD LV NV 89122
11		
12	SANTO, J.	LVMPD P#15668
13	SHAMIRZA, ALFRED or designee	CCDA/INVESTIGATOR
14	SHANNON, J.	LVMPD P#13482
15	SINGH, HARBHEJ	USA SMOKE SHOP 9575 W TROPICANA AVE #6 LV NV 89148
16		
17	SMITH, J.	LVMPD P#8177
18	THENNAKoon, CHINTHANA	99 CENT PLAUS SMOKE SHOP 6895 E LAKE MEAD BLVD LV NV 89115
19		
20	TOOMER, K.	LVMPD P#5780
21	TORRES, J.	LVMPD P#15237
22	WANYONYI, J.	LVMPD P#15718
23	ZINGELMAN, M.	LVMPD P#14791
24		
25		
26	17F03197X/pm/L-2	
27	LVMPD EV#1702181773;	
28	170222003903; 170222002480;	
	170222001374; 170218003873	
	(TK8)	

Steven D. Grierson

1 ORDER
2 PHILIP J. KOHN, PUBLIC DEFENDER
3 NEVADA BAR NO. 0556
4 GEORDAN G. LOGAN, DEPUTY PUBLIC DEFENDER
5 NEVADA BAR NO. 13910
6 PUBLIC DEFENDERS OFFICE
7 309 South Third Street, Suite 226
8 Las Vegas, Nevada 89155
9 Telephone: (702) 455-4685
10 Facsimile: (702) 455-5112
11 Attorneys for Defendant

ORIGINAL

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

DAVIN M. TONEY,

Defendant,

CASE NO. C-17-323151-1

DEPT. NO. I

ORDER FOR WRIT OF HABEAS CORPUS

The Petition of DAVIN M. TONEY submitted by GEORDAN G. LOGAN, Deputy Public Defender, as attorney for the above-captioned individual, having been filed in the above-entitled matter,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that you, STEVEN GRIERSON, Clerk of the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, issue a Writ of Habeas Corpus.

DATED AND DONE at Las Vegas, Nevada, this 19th of June, 2017.

Kenneth D. Boy
DISTRICT COURT JUDGE

Submitted By:
PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: /s/ Geordan G. Logan
GEORDAN G. LOGAN, #13910
Deputy Public Defender

AA 007

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 23 2017

BY MICHELE THICKER, DEPUTY

1 AINF
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL R. DICKERSON
6 Deputy District Attorney
7 Nevada Bar #013476
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO. C-17-323151-1

DEPT NO. I

AMENDED
INFORMATION

15 STATE OF NEVADA)
16 COUNTY OF CLARK) ss:

17 STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State
18 of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That DAVIN M. TONEY, aka, Davin Marvell Toney, the Defendant(s) above named,
20 having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON**
21 **(Category B Felony - NRS 200.380, 193.165 - NOC 50138)** and **BURGLARY WHILE IN**
22 **POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC**
23 **50426)**, on or between February 18, 2017 and February 22, 2017, within the County of Clark,
24 State of Nevada, contrary to the form, force and effect of statutes in such cases made and
25 provided, and against the peace and dignity of the State of Nevada,

26 COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON

27 did on or about February 18, 2017 willfully, unlawfully, and feloniously take personal
28 property, to wit: U.S. Currency, from the person of CHINTHANA THENNAKOON and/or

1 U.S. Currency, from the person of SALMAN AKRAM, or in their presence, by means of force
2 or violence, or fear of injury to, and without the consent and against the will of CHINTHANA
3 THENNAKON and/or SALMAN AKRAM, with use of a deadly weapon, to wit: a handgun
4 and/or pneumatic gun.

5 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

6 did on or about February 18, 2017 then and there willfully, unlawfully, and feloniously
7 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by
8 SMOKE SHOP PLUS 99 CENT STORE, located at 6895 East Lake Mead Boulevard, Las
9 Vegas, Clark County, Nevada and/or that certain business occupied by MR K SMOKE SHOP,
10 located at 5130 South Fort Apache Road, Las Vegas, Clark County, Nevada, said Defendant
11 did possess and/or gain possession of a firearm and/or pneumatic gun, a deadly weapon, during
12 the commission of the crime and/or before leaving the structure.

13 COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

14 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
15 property, to wit: U.S. Currency, from the person of SUJAN NARASINGHE and/or U.S.
16 Currency, from the person of HARBHEJ SINGH and/or U.S. Currency, from the person of
17 ANGULUGAHA PIYADASA and/or U.S. Currency, from the person of NORMA
18 ESCOBAR, or in their presence, by means of force or violence, or fear of injury to, and without
19 the consent and against the will of SUJAN NARASINGHE and/or HARBHEJ SINGH and/or
20 ANGULUGAHA PIYADASA and/or NORMA ESCOBAR, with use of a deadly weapon, to
21 wit: a handgun and/or pneumatic gun.

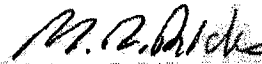
22 COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

23 did on or about February 22, 2017 then and there willfully, unlawfully, and feloniously
24 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by A.S.
25 SMOKE SHOP, located at 4566 East Tropicana Avenue, Las Vegas, Clark County, Nevada
26 and/or that certain business occupied by USA SMOKE SHOP & MINI MART, located at
27 9575 West Tropicana Avenue, Las Vegas, Suite No. 6, thereof, Las Vegas, Clark County,
28 Nevada and/or that certain business occupied by TEXAS LIQUOR, located at 5020 Broadbent

1 Boulevard, Las Vegas, Clark County, Nevada, said Defendant did possess and/or gain
2 possession of a firearm and/or pneumatic gun, a deadly weapon, during the commission of the
3 crime and/or before leaving the structure.

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

7 BY


8 MICHAEL R. DICKERSON
9 Deputy District Attorney
10 Nevada Bar #013476
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 DA#17F03197X/pm/L-2
27 LVMPD EV#1702181773;
170222003903; 170222002480;
28 170222001374; 170218003873
(TK8)

ORIGINAL

pg 12

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

AUG 23 2017

BY Michelle Tucker
MICHELLE TUCKER, DEPUTY

1 **GPA**
2 **STEVEN B. WOLFSON**
3 **Clark County District Attorney**
4 **Nevada Bar #001565**
5 **MICHAEL R. DICKERSON**
6 **Deputy District Attorney**
7 **Nevada Bar #013476**
8 **200 Lewis Avenue**
9 **Las Vegas, NV 89155-2212**
10 **(702) 671-2500**
11 **Attorney for Plaintiff**

DISTRICT COURT
CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO: C-17-323151-1

DEPT NO: I

15 **GUILTY PLEA AGREEMENT**

16 I hereby agree to plead guilty to: **COUNT 1 - ROBBERY WITH USE OF A**
17 **DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138); COUNT**
18 **2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B**
19 **Felony - NRS 205.060 - NOC 50426); COUNT 3 - ROBBERY WITH USE OF A**
20 **DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138) and**
21 **COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON**
22 **(Category B Felony - NRS 205.060 - NOC 50426), as more fully alleged in the charging**
23 **document attached hereto as Exhibit "1".**

24 My decision to plead guilty is based upon the plea agreement in this case which is as
25 follows:

26 The Parties stipulate to an aggregate term of imprisonment of eight (8) years to thirty-
27 five (35) years (96 to 420 months) in the Nevada Department of Corrections structured as
28 follows:

C-17-323151-1
GPA
Guilty Plea Agreement
4677261



W:\2017\2017F03197\17F03197-GPA-(TONEY_DAVIN)-001.DOCX

AA 011

1 Count 1 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a
2 consecutive 12 to 66 months on the deadly weapon enhancement.

3 Count 2 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months,
4 to run concurrent with Count 1.

5 Count 3 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a
6 consecutive 12 to 66 months on the deadly weapon enhancement, to run consecutive to Counts
7 1 and 2.

8 Count 4 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months,
9 to run consecutive to Counts 1 and 2, but concurrent with Count 3.

10 I agree to the forfeiture of any and all weapons or any interest in any weapons seized
11 and/or impounded in connection with the instant case and/or any other case negotiated in
12 whole or in part in conjunction with this plea agreement.

13 I understand and agree that, if I fail to interview with the Department of Parole and
14 Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate,
15 by affidavit review, confirms probable cause against me for new criminal charges including
16 reckless driving or DUI, but excluding minor traffic violations, the State will have the
17 unqualified right to argue for any legal sentence and term of confinement allowable for the
18 crime(s) to which I am pleading guilty, including the use of any prior convictions I may have
19 to increase my sentence as an habitual criminal to five (5) to twenty (20) years, life without
20 the possibility of parole, life with the possibility of parole after ten (10) years, or a definite
21 twenty-five (25) year term with the possibility of parole after ten (10) years.

22 Otherwise I am entitled to receive the benefits of these negotiations as stated in this
23 plea agreement.

24 CONSEQUENCES OF THE PLEA

25 I understand that by pleading guilty I admit the facts which support all the elements of
26 the offense(s) to which I now plead as set forth in Exhibit "1".

27 **AS TO COUNT 1**, I understand that as a consequence of my plea of guilty the Court
28 must sentence me to imprisonment in the Nevada Department of Corrections for a minimum

1 term of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15)
2 years for Robbery plus a consecutive minimum term of not less than ONE (1) year and a
3 maximum term of not more than FIFTEEN (15) years for the Deadly Weapon Enhancement.
4 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
5 term of imprisonment.

6 AS TO COUNT 2, I understand that as a consequence of my plea of guilty the Court
7 must sentence me to imprisonment in the Nevada Department of Corrections for a minimum
8 term of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15)
9 years. The minimum term of imprisonment may not exceed forty percent (40%) of the
10 maximum term of imprisonment. I understand that I may also be fined up to \$10,000.00.

11 AS TO COUNT 3, I understand that as a consequence of my plea of guilty the Court
12 must sentence me to imprisonment in the Nevada Department of Corrections for a minimum
13 term of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15)
14 years for Robbery plus a consecutive minimum term of not less than ONE (1) year and a
15 maximum term of not more than FIFTEEN (15) years for the Deadly Weapon Enhancement.
16 The minimum term of imprisonment may not exceed forty percent (40%) of the maximum
17 term of imprisonment.

18 AS TO COUNT 4, I understand that as a consequence of my plea of guilty the Court
19 must sentence me to imprisonment in the Nevada Department of Corrections for a minimum
20 term of not less than TWO (2) years and a maximum term of not more than FIFTEEN (15)
21 years. The minimum term of imprisonment may not exceed forty percent (40%) of the
22 maximum term of imprisonment. I understand that I may also be fined up to \$10,000.00.

23 I understand that the law requires me to pay an Administrative Assessment Fee.

24 I understand that, if appropriate, I will be ordered to make restitution to the victim of
25 the offense(s) to which I am pleading guilty and to the victim of any related offense which is
26 being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to
27 reimburse the State of Nevada for any expenses related to my extradition, if any.

28 ///

1 AS TO COUNTS 1 AND 3, I understand that I am not eligible for probation for the
2 offense to which I am pleading guilty.

3 AS TO COUNTS 2 AND 4, I understand that I am eligible for probation for the offense
4 to which I am pleading guilty. I understand that, except as otherwise provided by statute, the
5 question of whether I receive probation is in the discretion of the sentencing judge.

6 I understand that I must submit to blood and/or saliva tests under the Direction of the
7 Division of Parole and Probation to determine genetic markers and/or secretor status.

8 I understand that if I am pleading guilty to charges of Burglary, Invasion of the Home,
9 Possession of a Controlled Substance with Intent to Sell, Sale of a Controlled Substance, or
10 Gaming Crimes, for which I have prior felony conviction(s), I will not be eligible for probation
11 and may receive a higher sentencing range.

12 I understand that if more than one sentence of imprisonment is imposed and I am
13 eligible to serve the sentences concurrently, the sentencing judge has the discretion to order
14 the sentences served concurrently or consecutively.

15 I understand that information regarding charges not filed, dismissed charges, or charges
16 to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

17 I have not been promised or guaranteed any particular sentence by anyone. I know that
18 my sentence is to be determined by the Court within the limits prescribed by statute.

19 I understand that if my attorney or the State of Nevada or both recommend any specific
20 punishment to the Court, the Court is not obligated to accept the recommendation.

21 I understand that if the offense(s) to which I am pleading guilty was committed while I
22 was incarcerated on another charge or while I was on probation or parole that I am not eligible
23 for credit for time served toward the instant offense(s).

24 I understand that if I am not a United States citizen, any criminal conviction will likely
25 result in serious negative immigration consequences including but not limited to:

- 26 1. The removal from the United States through deportation;
- 27 2. An inability to reenter the United States;
- 28 3. The inability to gain United States citizenship or legal residency;

4. An inability to renew and/or retain any legal residency status; and/or
5. An indeterminate term of confinement, with the United States Federal Government based on my conviction and immigration status.

Regardless of what I have been told by any attorney, no one can promise me that this conviction will not result in negative immigration consequences and/or impact my ability to become a United States citizen and/or a legal resident.

I understand that the Division of Parole and Probation will prepare a report for the sentencing judge prior to sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. This report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing. Unless the District Attorney has specifically agreed otherwise, the District Attorney may also comment on this report.

WAIVER OF RIGHTS

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

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.
2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.
3. The constitutional right to confront and cross-examine any witnesses who would testify against me.
4. The constitutional right to subpoena witnesses to testify on my behalf.
5. The constitutional right to testify in my own defense.
6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the

proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

VOLUNTARINESS OF PLEA

I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.

I understand that the State would have to prove each element of the charge(s) against me at trial.

I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.

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

I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

///

///

///

///

///

///

///

///


///

1 My attorney has answered all my questions regarding this guilty plea agreement and its
2 consequences to my satisfaction and I am satisfied with the services provided by my attorney.

3 DATED this 23 day of August, 2017.

4
5 
6 DAVIN M. TONEY, aka,
7 Davin Marvell Toney
8 Defendant

9 AGREED TO BY:

10 
11 MICHAEL R. DICKERSON
12 Deputy District Attorney
13 Nevada Bar #013476
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 CERTIFICATE OF COUNSEL:

2 I, the undersigned, as the attorney for the Defendant named herein and as an officer of the court
3 hereby certify that:

- 4 1. I have fully explained to the Defendant the allegations contained in the
5 charge(s) to which guilty pleas are being entered.
6 2. I have advised the Defendant of the penalties for each charge and the restitution
7 that the Defendant may be ordered to pay.
8 3. I have inquired of Defendant facts concerning Defendant's immigration status
9 and explained to Defendant that if Defendant is not a United States citizen any
10 criminal conviction will most likely result in serious negative immigration
11 consequences including but not limited to:
12 a. The removal from the United States through deportation;
13 b. An inability to reenter the United States;
14 c. The inability to gain United States citizenship or legal residency;
15 d. An inability to renew and/or retain any legal residency status; and/or
16 e. An indeterminate term of confinement, by with United States Federal
17 Government based on the conviction and immigration status.

18 Moreover, I have explained that regardless of what Defendant may have been
19 told by any attorney, no one can promise Defendant that this conviction will not
20 result in negative immigration consequences and/or impact Defendant's ability
21 to become a United States citizen and/or legal resident.

- 22 4. All pleas of guilty offered by the Defendant pursuant to this agreement are
23 consistent with the facts known to me and are made with my advice to the
24 Defendant.
25 5. To the best of my knowledge and belief, the Defendant:
26 a. Is competent and understands the charges and the consequences of
27 pleading guilty as provided in this agreement,
28 b. Executed this agreement and will enter all guilty pleas pursuant hereto
voluntarily, and
c. Was not under the influence of intoxicating liquor, a controlled
substance or other drug at the time I consulted with the Defendant as
certified in paragraphs 1 and 2 above.

29 Dated: This 23 day of August, 2017.

30 
ATTORNEY FOR DEFENDANT

31 pm/L-2

1 AINF
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 MICHAEL R. DICKERSON
6 Deputy District Attorney
7 Nevada Bar #013476
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Plaintiff

7 DISTRICT COURT
8 CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 -vs-

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

14 Defendant.

CASE NO. C-17-323151-1

DEPT NO. I

AMENDED

INFORMATION

15 STATE OF NEVADA }
16 COUNTY OF CLARK } ss:

17 STEVEN B. WOLFSON, District Attorney within and for the County of Clark, State
18 of Nevada, in the name and by the authority of the State of Nevada, informs the Court:

19 That DAVIN M. TONEY, aka, Davin Marvell Toney, the Defendant(s) above named,
20 having committed the crimes of **ROBBERY WITH USE OF A DEADLY WEAPON**
21 **(Category B Felony - NRS 200.380, 193.165 - NOC 50138)** and **BURGLARY WHILE IN**
22 **POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC**
23 **50426)**, on or between February 18, 2017 and February 22, 2017, within the County of Clark,
24 State of Nevada, contrary to the form, force and effect of statutes in such cases made and
25 provided, and against the peace and dignity of the State of Nevada,

26 COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON

27 did on or about February 18, 2017 willfully, unlawfully, and feloniously take personal
28 property, to wit: U.S. Currency, from the person of CHINTHANA THENNAKON and/or

1 U.S. Currency, from the person of SALMAN AKRAM, or in their presence, by means of force
2 or violence, or fear of injury to, and without the consent and against the will of CHINTHANA
3 THENNAKOON and/or SALMAN AKRAM, with use of a deadly weapon, to wit: a handgun
4 and/or pneumatic gun.

5 COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

6 did on or about February 18, 2017 then and there willfully, unlawfully, and feloniously
7 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by
8 SMOKE SHOP PLUS 99 CENT STORE, located at 6895 East Lake Mead Boulevard, Las
9 Vegas, Clark County, Nevada and/or that certain business occupied by MR K SMOKE SHOP,
10 located at 5130 South Fort Apache Road, Las Vegas, Clark County, Nevada, said Defendant
11 did possess and/or gain possession of a firearm and/or pneumatic gun, a deadly weapon, during
12 the commission of the crime and/or before leaving the structure.

13 COUNT 3 - ROBBERY WITH USE OF A DEADLY WEAPON

14 did on or about February 22, 2017 willfully, unlawfully, and feloniously take personal
15 property, to wit: U.S. Currency, from the person of SUJAN NARASINGHE and/or U.S.
16 Currency, from the person of HARBHEJ SINGH and/or U.S. Currency, from the person of
17 ANGULUGAHA PIYADASA and/or U.S. Currency, from the person of NORMA
18 ESCOBAR, or in their presence, by means of force or violence, or fear of injury to, and without
19 the consent and against the will of SUJAN NARASINGHE and/or HARBHEJ SINGH and/or
20 ANGULUGAHA PIYADASA and/or NORMA ESCOBAR, with use of a deadly weapon, to
21 wit: a handgun and/or pneumatic gun.

22 COUNT 4 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

23 did on or about February 22, 2017 then and there willfully, unlawfully, and feloniously
24 enter, with intent to commit a felony, to wit: robbery, that certain business occupied by A.S.
25 SMOKE SHOP, located at 4566 East Tropicana Avenue, Las Vegas, Clark County, Nevada
26 and/or that certain business occupied by USA SMOKE SHOP & MINI MART, located at
27 9575 West Tropicana Avenue, Las Vegas, Suite No. 6, thereof, Las Vegas, Clark County,
28 Nevada and/or that certain business occupied by TEXAS LIQUOR, located at 5020 Broadbent

1 Boulevard, Las Vegas, Clark County, Nevada, said Defendant did possess and/or gain
2 possession of a firearm and/or pneumatic gun, a deadly weapon, during the commission of the
3 crime and/or before leaving the structure.

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

7 BY M. R. Dickerson
8 MICHAEL R. DICKERSON
9 Deputy District Attorney
10 Nevada Bar #013476
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 DA#17F03197X/pm/L-2
27 LVMPD EV#1702181773;
170222003903; 170222002480;
28 170222001374; 170218003873
(TK8)

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor

COURT MINUTES

October 18, 2017

C-17-323151-1 State of Nevada
vs
Davin Toney

October 18, 2017 09:00 AM Sentencing

HEARD BY: Cory, Kenneth COURTROOM: RJC Courtroom 16A

COURT CLERK: Tucker, Michele

RECORDER: Lizotte, Lisa

REPORTER:

PARTIES PRESENT:

Public Defender	Attorney for Defendant
Geordan G. Logan	Attorney for Defendant
Ekaterina Derjavina	Attorney for Plaintiff
Davin M Toney	Defendant
State of Nevada	Plaintiff

JOURNAL ENTRIES

Defendant Toney PRESENT, IN CUSTODY.

DEFT TONEY ADJUDGED GUILTY of COUNT 1 - ROBBERY WITH USE OF A DEADLY WEAPON (F), COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON, COUNT 3 - ROBBERY WITH USE OF DEADLY WEAPON (F), and COUNT 4 - BURGLARY WHILE IN POSSESSION OF DEADLY WEAPON (F).

Ms. Derjavina submitted on the record. Statements by the Defendant. Statements by Mr. Logan regarding the defendant's heroin addiction.

COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, a \$150.00 DNA Analysis fee including testing to determine genetic markers - WAIVED, and \$3.00 DNA Collection fee,

Deft. SENTENCED to 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, to run 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, to run 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, to run CONSECUTIVE TO COUNTS 1 and 2 and CONCURRENT with COUNT 3 in the Nevada Department of Corrections (NDC);

for a TOTAL AGGREGATE SENTENCE of a MINIMUM of NINETY SIX (96) MONTHS and a MAXIMUM of FOUR HUNDRED TWENTY (420) MONTHS in the Nevada Department of Corrections (NDC), with

Printed Date: 10/20/2017

Page 1 of 2

Minutes Date:

October 18, 2017

Prepared by: Michele Tucker

AA 022

TWO HUNDRED THIRTY EIGHT (238) DAYS credit for time served.

BOND, if any, EXONERATED.

NDC

Steven D. Grierson

1 JOCP

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 THE STATE OF NEVADA,

8 Plaintiff,

CASE NO. C-17-323151-1

10 -vs-

DEPT. NO. I

11 DAVIN M. TONEY
12 aka DAVIN MARVELL TONEY
13 #2508918

14 Defendant.

15 JUDGMENT OF CONVICTION
16 (PLEA OF GUILTY)

17
18 The Defendant previously appeared before the Court with counsel and entered a
19 plea of guilty to the crimes of COUNTS 1 and 3 – ROBBERY WITH USE OF A
20 DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165;
21 COUNTS 2 and 4 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON
22 (Category B Felony) in violation of NRS 205.060; thereafter, on the 18th day of October,
23 2017, the Defendant was present in court for sentencing with counsel Geordan Logan,
24 Deputy Public Defender, and good cause appearing,
25

26 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in
27 addition to the \$25.00 Administrative Assessment and \$3.00 DNA Collection Fee, the
28

<input type="checkbox"/> Note Proposed (before trial)	<input type="checkbox"/> Bench (Non-Jury) Trial
<input type="checkbox"/> Dismissed (after disposition)	<input type="checkbox"/> Dismissed (during trial)
<input type="checkbox"/> Dismissed (before trial)	<input type="checkbox"/> Acquittal
<input checked="" type="checkbox"/> Guilty Plea with Sent. (before trial)	<input type="checkbox"/> Guilty Plea with Sent. (during trial)
<input type="checkbox"/> Transferred (before/during trial)	<input type="checkbox"/> Correction
<input type="checkbox"/> Other Manner of Disposition	

1 Defendant is sentenced to the Nevada Department of Corrections (NDC) as follows:

2 **COUNT 1 - a MAXIMUM of ONE HUNDRED AND FORTY-FOUR (144) MONTHS**

3 with a MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, plus a

4 CONSECUTIVE term of SIXTY-SIX (66) MONTHS with a MINIMUM parole eligibility

5 of TWELVE (12) MONTHS for the Use of a Deadly Weapon; **COUNT 2 - a MAXIMUM**

6 of ONE HUNDRED AND NINETY-FIVE (195) MONTHS with a MINIMUM parole

7 eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with COUNT 1; **COUNT 3**

8 - a MAXIMUM of ONE HUNDRED AND FORTY-FOUR (144) MONTHS with a

9 MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, plus a CONSECUTIVE

10 term of SIXTY-SIX (66) MONTHS with a MINIMUM parole eligibility of TWELVE (12)

11 MONTHS for the Use of a Deadly Weapon, CONSECUTIVE to COUNTS 1 AND 2,;

12 and **COUNT 4 - a MAXIMUM of ONE HUNDRED AND NINETY-FIVE (195) MONTHS**

13 with a MINIMUM parole eligibility of FORTY-EIGHT (48) MONTHS, to run

14 CONSECUTIVE to COUNTS 1 and 2 and CONCURRENT with COUNT 3; with TWO

15 HUNDRED AND THIRTY-EIGHT (238) DAYS credit for time served. As the \$150.00


16 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and

17 Testing in the current case are WAIVED.

18 The AGGREGATE TOTAL sentence is FOUR HUNDRED AND TWENTY (420)

19 MONTHS MAXIMUM with a MINIMUM of NINETY-SIX (96) MONTHS

20 DATED this 24 day of October, 2017

21
22
23
24
25
26
27
28

KENNETH C. CORY
DISTRICT COURT JUDGE

Davin M. Toney, #1187296
Petitioner/In Propria Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070

FILED

SEP 14 2020

Allen L. Blum
CLERK OF COURT

IN THE Eighth JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF Clark

A-20-821088-W
Dept. 28

Davin Marvell Toney;

Petitioner,

vs.

William Hutchings
(warden)

Respondent(s).

Case No. C-17-323151-1

Dept. No. 1

Docket _____

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department within its custody, name the director of the department of corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction and sentence.

RECEIVED

AUG 24 2020

CLERK OF THE COURT

AA 026

1 Failure to raise all grounds in this petition may preclude you from filing future petitions
2 challenging your conviction and sentence.

3 (6) You must allege specific facts supporting the claims in the petition you file seeking relief
4 from any conviction or sentence. Failure to allege specific facts rather than just conclusions may
5 cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of
6 counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which
7 you claim your counsel was ineffective.

8 (7) If your petition challenges the validity of your conviction or sentence, the original and one
9 copy must be filed with the clerk of the district court for the county in which the conviction
10 occurred. Petitions raising any other claim must be filed with the clerk of the district court for the
11 county in which you are incarcerated. One copy must be mailed to the respondent, one copy to the
12 attorney general's office, and one copy to the district attorney of the county in which you were
13 convicted or to the original prosecutor if you are challenging your original conviction or sentence.
14 Copies must conform in all particulars to the original submitted for filing.

10 PETITION

11 1. Name of institution and county in which you are presently imprisoned or where and who you
12 are presently restrained of your liberty: Southern Desert Correctional Center (Clark County)

13 2. Name the location of court which entered the judgment of conviction under attack: 200 Lewis Ave.
14 Las Vegas, NV 89155; Eighth Judicial District Court of the State of Nevada, Clark County

15 3. Date of judgment of conviction: October 24th, 2017

16 4. Case number: C-17-323151-1

17 5. (a) Length of sentence: Aggregate total Sentence (420) months maximum (96) months minimum.

18 (b) If sentence is death, state any date upon which execution is scheduled: _____

19 6. Are you presently serving a sentence for a conviction other than the conviction under attack in
20 this motion:

21 Yes _____ No X If "Yes", list crime, case number and sentence being served at this time: _____

22
23 7. Nature of offense involved in conviction being challenged: Deadly weapon enhancement
24 sentence.

1 8. What was your plea? (Check one)

2 (a) Not guilty

3 (b) Guilty X

4 (c) Nolo contendere

5 9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea
6 to another count of an indictment or information, or if a guilty plea was negotiated, give details:

7 N/A am a not guilty plea, but pled guilty to four counts and was sentenced to
8 a aggregated 8 to 35 years.

9 10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

10 (a) Jury N/A

11 (b) Judge without a jury N/A

12 11. Did you testify at trial? Yes No X

13 12. Did you appeal from the judgment of conviction?

14 Yes No X

15 13. If you did appeal, answer the following:

16 (a) Name of court:

17 (b) Case number or citation:

18 (c) Result:

19 (d) Date of appeal:

20 (Attach copy of order or decision, if available).

21 14.) If you did not appeal, explain briefly why you did not: I was guilty of my crimes, and
22 with newly discovered evidence I have grounds.

23
24 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously
25 filed any petitions, applications or motions with respect to this judgment in any court, state or
26 federal? Yes No X

- 1 16. If your answer to No 15 was "Yes", give the following information:
- 2 (a) (1) Name of court: N/A
- 3 (2) Nature of proceedings: _____
- 4 _____
- 5 (3) Grounds raised : _____
- 6 _____
- 7 _____
- 8 (4) Did you receive an evidentiary hearing on your petition, application or motion?
- 9 Yes ____ No ____
- 10 (5) Result: _____
- 11 (6) Date of result: _____
- 12 (7) If known, citations of any written opinion or date of orders entered pursuant to each
- 13 result: _____
- 14 (b) As to any second petition, application or motion, give the same information:
- 15 (1) Name of Court: N/A
- 16 (2) Nature of proceeding: _____
- 17 (3) Grounds raised: _____
- 18 (4) Did you receive an evidentiary hearing on your petition, application or motion?
- 19 Yes ____ No ____
- 20 (5) Result: _____
- 21 (6) Date of result: _____
- 22 (7) If known, citations or any written opinion or date of orders entered pursuant to each
- 23 result: _____
- 24 (c) As to any third or subsequent additional application or motions, give the same
- 25 information as above, list them on a separate sheet and attach.
- 26
- 27
- 28

1 (d) Did you appeal to the highest state or federal court having jurisdiction, the result or action
2 taken on any petition, application or motion?

3 (1) First petition, application or motion?

4 Yes ___ No ___

5 Citation or date of decision: _____

6 (2) Second petition, application or motion?

7 Yes ___ No ___

8 Citation or date of decision: _____

9 (e) If you did not appeal from the adverse action on any petition, application or motion,
10 explain briefly why you did not. (You may relate specific facts in response to this question. Your
11 response may be included on paper which is 8 ½ x 11 inches attached to the petition. Your response
12 may not exceed five handwritten or typewritten pages in length). _____

13 _____
14 _____
15 17. Has any ground being raised in this petition been previously presented to this or any other
16 court by way of petition for habeas corpus, motion or application or any other post-conviction
17 proceeding? If so, identify:

18 (a) Which of the grounds is the same: N/A

19 _____
20 (b) The proceedings in which these grounds were raised: _____

21 _____
22 (c) Briefly explain why you are again raising these grounds. (You must relate specific facts
23 in response to this question. Your response may be included on paper which is 8 ½ x 11 inches
24 attached to the petition. Your response may not exceed five handwritten or typewritten pages in
25 length). _____

1 18. If any of the grounds listed in Nos. 23(a), (b), (c), and (d), or listed on any additional pages
2 you have attached, were not previously presented in any other court, state or federal, list briefly what
3 grounds were not so presented, and give your reasons for not presenting them. (You must relate
4 specific facts in response to this question. Your response may be included on paper which is 8 1/2 x
5 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten
6 pages in length). _____
7 _____

8 19. Are you filing this petition more than one (1) year following the filing of the judgment of
9 conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay.
10 (You must relate specific facts in response to this question. Your response may be included on
11 paper which is 8 1/2 x 11 inches attached to the petition. Your response may not exceed five
12 handwritten or typewritten pages in length). A ruling by the U.S. Supreme court on June 24th 2016
13 highly affects my case. Newly discovered evidence, also pursuant to 18 U.S.C. 34726
14 _____

15 20. Do you have any petition or appeal now pending in any court, either state or federal, as to the
16 judgment under attack?

17 Yes _____ No X

18 If "Yes", state what court and the case number: _____
19 _____

20 21. Give the name of each attorney who represented you in the proceeding resulting in your
21 conviction and on direct appeal: Geordan Logan
22 _____
23 _____

24 22. Do you have any future sentences to serve after you complete the sentence imposed by the
25 judgment under attack?

26 Yes _____ No X If "Yes", specify where and when it is to be served, if you know: _____
27 _____
28 _____

Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

23. (a) GROUND ONE: Moves this honorable court to vacate the deadly weapon enhancement sentence given to the petitioner which the United States Supreme Court held section 924(c)(3)(B) unconstitutional (U.S. vs Davis case no. 18-431), which violates Petitioner's Constitutional Rights to be free from ex post facto law under Article I, Sec 10 U.S. Const.

23. (a) SUPPORTING FACTS (Tell your story briefly without citing cases or law): Petitioner was sentenced to an enhanced sentence of (12) to (66) months for counts 1 and 3 for a total of 2 to 11 years in the Nevada Department of Corrections, April 17, 2019. It was argued to U.S. Supreme Court vs. Davis and decided on June 24, 2019 that under 18 U.S.C. Section 924(c) that anyone who was charged with a heightened criminal penalty for using, carrying, or possessing a firearm in connection with any "crime of violence or drug trafficking crime" be deemed unconstitutionally vague. In our constitutional order, a vague law is no law at all. Our doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers. See Dimaya, 584 U.S. Vague laws contravene the "first essential of due process of law" that statutes must give people "of common intelligence" fair notice of what the demands of them. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); see Collins v. Kentucky 234 U.S. 634, 635 (1914). Vague laws also undermine the constitution's separation of powers and the democratic self governance it aims to protect. Petitioner is entitled to the issuance of this writ of habeas corpus to compel the respondents to perform an act which the law especially enjoins as a duty. Any other remedy is insufficient or unable to address this issue. The respondents ex post facto application of (U.S. vs. Davis case no. 18-431) and failure to vacate this sentence as outlined in (U.S. vs. Davis case no. 18-431) violates the petitioner's Constitutional Rights to be free from ex post facto law under Article I, Sec 10 U.S. Const. and his 14th Amendment rights to due process. As such in order to protect the petitioner from further deprivation, the deadly weapon enhancements should be vacated.

23. (b) GROUND TWO: Petitioners 14th Amendment rights are being violated.
(Article IV, Sec. 2 privilege and Immunities) (Article XV Sec. 1 Equal protection of the laws)
Violation of 9th Amendment XI, Violation of (Article VI of the U.S. Constitution).

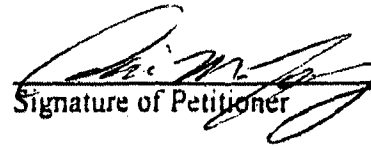
23. (b) SUPPORTING FACTS (Tell your story briefly without citing cases or law):
According to Blacks Law Dictionary it defines (Privilege-A special legal right exemption, or
immunity granted to a person or class of person) an exception to a duty.
According to (U.S. Constitution Article IV, Sec. 2, cl. 1 states that "the citizens of each
state shall be entitled to all privileges and immunities of citizens in the several states.")
(The 14th Amendment Sec. 1 states that "no state shall make or enforce any law which shall abridge
the privileges or immunities of citizens of the United States; nor shall any state deprive any
person of life, liberty, or property, without due process of law; nor deny to any person
within its jurisdiction the equal protection of the laws") (The 9th Amendment states that "the
enumeration in the constitution of certain rights shall not be construed to deny or disparage
others retained by the people.) (The ruling in (U.S. vs Davis case no. 18-431) for it not to apply
to me are violations of my constitutional rights. The supremacy clause says, the clause
in Article VI of the U.S. Constitution declaring that "all laws made in furtherance of the
constitution and all treaties made under the authority of the United States are the
"Supreme Law of the Land" and enjoy legal superiority over any conflicting provision
of a state constitution or law." (see Carter v. Carter Coal Co. (1936) 298 US 238, 80
L ed 1160, 56 Sct 855, motion gr sub nom Helvering v. Carter (1936 US) 17 AF TR
1344. Supremacy of Constitution as law is declared without qualification and is
absolute) also see (Federal Constitution is "supreme law of land" and upon state court.
Equally with court of union, rest obligation to guard and enforce every right secured by constitution
Olson v. State (1946) 224 Ind 327, 67 NE 2d 138) see (Federal law are as much law of land
in any state as state laws are, Claflin v. Houseman (1876) 93 US 130, 3 Otto 130, 23
L Ed 833.)

23. (c) GROUND THREE: Petitioners 5th Amendment rights have been violated
and Petitioners Right to have enhancements vacated under U.S.C. sec. 2244(b)(2)
Rule 28, cause of ruling in (U.S. vs. Davis No. 18-431)

23. (c) SUPPORTING FACTS (Tell your story briefly without citing cases or law):
(The 5th Amendment states "no person be subject for the same offence to be twice put in
jeopardy of life or limb without due process of law." Petitioner was charged and sentenced
to Robbery with the use of a deadly weapon and was additionally sentenced to
additional time for a deadly weapon. Petitioner committed a violent felony in a non-
violent way, see Taylor v. United States, 495 U.S. 575 (1990), and Nijhawan v. Holder, 537
U.S. 29 (2009). Under Rule 28 of FRAP U.S.C. Sec. 2244(b)(2) states that (A) the claim relies
on a new rule of constitutional law, made retroactive to cases on collateral review by
the supreme court, that was previously unavailable; or (B)(i) the factual predicate for the
claim could not have been discovered previously through the exercise of due diligence; and
(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be
sufficient to establish by clear and convincing evidence that, but for constitutional error, no
reasonable fact finder would have found the applicant guilty of the underlying offense. This
ruling (U.S. vs. Davis no. 18-431) has not been applied to Mr. Toney, this violation of the
petitioners rights must cease immediately. Petitioner is being deprived of receiving a vacated
ruling on the Deadly weapon enhancement which will substantially lessen the time spent on
the prison sentence, this deprivation is preventing the petitioner from the opportunity for a
early parole possibility, and programs that would further lessen time spent; Petitioner has been
subjected unlawfully to the ex post facto application of (U.S. vs. Davis no. 18-431) by
the court; and due to the constitutional deprivations, petitioner is entitled to
fair and just compensation. Petitioner orders that appropriate compensation is to be paid
for the Constitutional deprivations suffered in accordance with NRS. 34.270

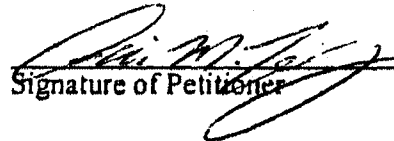
1 WHEREFORE, Davin M. Toney, prays that the court grant writ of Habeas Corpus
2 relief to which he may be entitled in this proceeding.

3 EXECUTED at Southern Desert Correctional Center
4 on the 13th day of August, 2020.

5
6 
7 Signature of Petitioner

8 **VERIFICATION**

9 Under penalty of perjury, pursuant to N.R.S. 208.165 et seq., the undersigned declares that he is
10 the Petitioner named in the foregoing petition and knows the contents thereof, that the pleading is
11 true and correct of his own personal knowledge, except as to those matters based on information and
12 belief, and to those matters, he believes them to be true.

13
14 
15 Signature of Petitioner

16
17 _____
18 Attorney for Petitioner
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE BY MAILING

I, Davin M. Toney, hereby certify, pursuant to NRCP 5(b), that on this 13th
day of August, 2020, I mailed a true and correct copy of the foregoing, "Writ of
Habeas Corpus"

by placing document in a sealed pre-postage paid envelope and deposited said envelope in the
United State Mail addressed to the following:

Nevada office of the
Attorney General
555 Washington Ave. #3900
Las Vegas, Nevada 89101

Steven D. Grierson
clerk of the court
200 Lewis Avenue 3rd floor
Las Vegas, Nevada 89155-1160

CC:FILE

DATED: this 13th day of August, 2020.

Davin M. Toney #1187296
/In/Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Writ of Habeas Corpus (Post conviction)
(Title of Document)

filed in District Court Case number C-17-323151-1

☒ Does not contain the social security number of any person.

-OR-

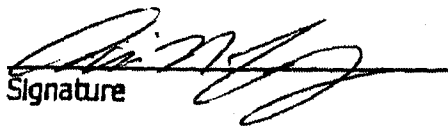
☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

-or-

B. For the administration of a public program or for an application
for a federal or state grant.


Signature

8/3/20
Date

David M. Toney
Print Name

Title

1	Index of Exhibits	Exhibit Page #
2	<u>Exhibit</u>	
3	#1 Inmate Search/Booking Information.....	1
4	#2 Amended Information.....	—
5	#3 Judgement of Conviction.....	2-3
6	#4 offender Legal Orders.....	4
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		

Exhibit 1

Inmate Search

Search By Offender ID

Offender ID: 1187296

-or-

Search By Demographics

First Name: Wildcard %

Last Name: Wildcard %

Submit**NOTICE:**

The information provided here represents raw data. As such, the Nevada Department of Corrections makes no warranty or guarantee that the data is error free. The information should not be used as an official record by any law enforcement agency or any other entity.

Any questions regarding an inmate, please call Family Services at (775) 887-3367. Victims looking for inmate information please contact Victim Services at (775) 887-3393. Any questions regarding the web portal for law enforcement access to inmate information should be referred to PIO Brooke Santana, email: bsantina@doc.nv.gov or (775) 887-3309

Currently the following web browsers are supported for the Inmate Search: Internet Explorer 11, Chrome, Firefox and Opera. If you are unable to view inmate photos, please use a supported browser.

Download Offender DataDemographic, Alias, Booking, Parole, Release

Up to date as of 2018-06-20

Identification and Demographics

Name	Offender ID	Gender	Race	Age	Height	Weight	Build	Complexion	Hair	Eyes	Institution	Custody Level	Aliases	Prior Felonies
DAVIN M TONEY	1187296	Male	BLACK	32	5'1"	190lb		DARK	BLACK	BROWN	SOUTHERN DESERT CORRECTIONAL CENTER	MEDIUM	DAVIN TONEY, BRANDON DAVIS	NO

Booking Information

Offense Code	Offense Description	Status	Gen	Min	Max	Start Date	End Date	Facility	Case No.	Case Type	Next Start Date	
301	BURGLARY WITH A FIREARM / DW	Active	0 yr.	48 mo.	0 days	0 yr.	195 mo.	0 days	02-21	CLARK COUNTY COURTHOUSE	2025-07-14	2017-02-22
A007	Aggregate	Active	8 yr.	0 mo.	0 days	35 yr.	0 mo.	0 days	02-21	2034-06-22	AGGREGATE SENTENCING	2017-02-22

Inmate Photo Unavailable

Parole Hearing Details Unavailable

"no amended information"

Exhibit 2

Amended Information

Exhibit 3

Judgment of Conviction

Steven D. Grierson

1 JOCP

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,

9 Plaintiff,

10 -vs-

CASE NO. C-17-323151-1

DEPT. NO. 1

11 DAVIN M. TONEY
12 aka DAVIN MARVELL TONEY
13 #2508918

14 Defendant.

15 JUDGMENT OF CONVICTION
16 (PLEA OF GUILTY)

17
18 The Defendant previously appeared before the Court with counsel and entered a
19 plea of guilty to the crimes of COUNTS 1 and 3 – ROBBERY WITH USE OF A
20 DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165;
21 COUNTS 2 and 4 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON
22 (Category B Felony) in violation of NRS 205.060; thereafter, on the 18th day of October,
23 2017, the Defendant was present in court for sentencing with counsel Geordan Logan,
24 Deputy Public Defender, and good cause appearing,

25 THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in
26 addition to the \$25.00 Administrative Assessment and \$3.00 DNA Collection Fee, the
27
28

mlt

<input type="checkbox"/> Nolle Prosequi (before trial)	<input type="checkbox"/> Bench (Non-Jury) Trial
<input type="checkbox"/> Dismissed (after diversion)	<input type="checkbox"/> Dismissed (during trial)
<input type="checkbox"/> Dismissed (before trial)	<input type="checkbox"/> Acquittal
<input checked="" type="checkbox"/> Guilty Plea with Sent. (before trial)	<input type="checkbox"/> Guilty Plea with Sent. (during trial)
<input type="checkbox"/> Transferred (before/during trial)	<input type="checkbox"/> Conviction
<input type="checkbox"/> Other Manner of Disposition	

1 Defendant is sentenced to the Nevada Department of Corrections (NDC) as follows:

2 **COUNT 1** - a MAXIMUM of ONE HUNDRED AND FORTY-FOUR (144) MONTHS
3 with a MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, plus a
4 CONSECUTIVE term of SIXTY-SIX (66) MONTHS with a MINIMUM parole eligibility
5 of TWELVE (12) MONTHS for the Use of a Deadly Weapon; **COUNT 2** - a MAXIMUM
6 of ONE HUNDRED AND NINETY-FIVE (195) MONTHS with a MINIMUM parole
7 eligibility of FORTY-EIGHT (48) MONTHS, CONCURRENT with COUNT 1; **COUNT 3**
8 - a MAXIMUM of ONE HUNDRED AND FORTY-FOUR (144) MONTHS with a
9 MINIMUM Parole Eligibility of THIRTY-SIX (36) MONTHS, plus a CONSECUTIVE
10 term of SIXTY-SIX (66) MONTHS with a MINIMUM parole eligibility of TWELVE (12)
11 MONTHS for the Use of a Deadly Weapon, CONSECUTIVE to COUNTS 1 AND 2;;
12 and **COUNT 4** - a MAXIMUM of ONE HUNDRED AND NINETY-FIVE (195) MONTHS
13 with a MINIMUM parole eligibility of FORTY-EIGHT (48) MONTHS, to run
14 CONSECUTIVE to COUNTS 1 and 2 and CONCURRENT with COUNT 3; with TWO
15 HUNDRED AND THIRTY-EIGHT (238) DAYS credit for time served. As the \$150.00
16 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and
17 Testing in the current case are WAIVED.
18

19 The AGGREGATE TOTAL sentence is FOUR HUNDRED AND TWENTY (420)
20 MONTHS MAXIMUM with a MINIMUM of NINETY-SIX (96) MONTHS
21

22 DATED this 24 day of October, 2017
23

24
25
26
27
28

KENNETH C. CORY
DISTRICT COURT JUDGE

Exhibit 4

Offender Legal Orders



State of Nevada
Department of Corrections
OFFENDER LEGAL ORDERS

TONEY, DAVIN M 1187296

Next Parole Expiration Date(NPD):

RECOMMENDED RELEASE DATE:

SENTENCE DATE	RETRO DATE	OFFENSE DESCRIPTION	COUNT	SENTENCE SEQ	SENTENCE CONSECUTIVE TO	MINIMUM	MAXIMUM	LIFE	STATUS	STATUS DATE	PEX	PEXD	MPD
02/22/2017	02/22/2017	Aggravate	1	7		0Y 0M 0D	35Y 0M 0D		A				
02/22/2017	02/22/2017	BURGLARY WITH A FIREARM / DW	2	3		0Y 48M 0D	0Y 195M 0D		A		02/21/2025	12/24/2024	06/22/2024
02/18/2012	02/18/2012	USE OF DEADLY WEAPON	3	5		0Y 12M 0D	0Y 66M 0D		AG		02/21/2021	07/14/2025	
04/28/2023	04/28/2023	USE OF DEADLY WEAPON	1	2		0Y 12M 0D	0Y 66M 0D		AG				
02/02/2006	02/02/2006	ENHANCEMENT	4	8	1	0Y 48M 0D	0Y 195M 0D		AG				
02/02/2006	02/02/2006	BURGLARY WITH A FIREARM / DW	3	4	2	0Y 48M 0D	0Y 195M 0D		AG				
02/22/2017	02/22/2017	ROBBERY	1	4	2	0Y 36M 0D	0Y 144M 0D		AG				
02/22/2017	02/22/2017	ROBBERY	1	1		0Y 36M 0D	0Y 144M 0D		AG				

Sentence Status	
A	Active
D	Deceased
DCS	Discharge to Community
DP	Paroled
I	Inmate
OT	Outstanding
P	Pending
P287	Pending
PTC	Parole to Community
REACT	Reacted
SUSP	Suspended

Report Name: NWROLO

Reference Name: NOTIS-RPT-OR-0068.11

Run Date: JUN-20-18 05:40 PM

4

046

Devlin M. Toney #1187296
SAC
P.O. Box #208
Indian Springs, NV 89070

Steven A. Grierson
Clerk of the Court
200 Lewis Avenue 3rd flr
Las Vegas, Nevada 89155-



MacIver
08/18/2020
USPS

047



1 SPA
2 TERRENCE M. JACKSON, ESQ.
3 Nevada Bar No. 00854
4 Law Office of Terrence M. Jackson
5 624 South Ninth Street
6 Las Vegas, NV 89101
7 T: 702-386-0001 / F: 702-386-0085
8 terry.jackson.esq@gmail.com

9 *Counsel for Davin M. Toney*

10 IN THE EIGHTH JUDICIAL DISTRICT COURT
11 CLARK COUNTY, NEVADA
12

13 THE STATE OF NEVADA,
14 Plaintiff/ Respondent,
15 v.
16 DAVIN M. TONEY,
17 ID # 1187296,
18 Defendant/ Petitioner.

Case No.: A-20-821088-W

Case No.: C-17-323151-1

Dept. XXVIII

19 **SUPPLEMENTAL POINTS AND AUTHORITIES IN SUPPORT OF PETITION**
20 **FOR WRIT OF HABEAS CORPUS FOR POST CONVICTION RELIEF**
21

22 COMES NOW the Defendant/Petitioner, DAVIN M. TONEY, by and through his attorney,
23 TERRENCE M. JACKSON, ESQ., and moves this court to enter an Order granting his Petition and
24 Supplemental Points and Authorities in support of Defendant's Petition for Writ of Habeas Corpus
25 for Post Conviction Relief on the grounds that his defense counsel was ineffective and Defendant
26 was prejudiced thereby.

27 Defendant/Petitioner alleges as grounds for this Petition that the imprisonment and restraint
28 of above named Petitioner Davin M. Toney is unlawful because counsel was ineffective in the
following respects:

- (1.) Defense counsel was ineffective preplea by failing to adequately investigate and prepare preplea;

AA 049

1 (2.) Defense counsel failed to file a meritorious Motion to Dismiss the "weapon's" enhancement
2 prior to the plea and Defendant was prejudiced thereby.

3 Defendant further submits this Petition should not be procedurally barred under NRS 34.726
4 or the doctrine of latches.
5

6 Wherefore, Defendant/Petitioner prays this Honorable Court enter an Order directing the
7 Clerk of the Court issue a Writ of Habeas Corpus directed to William Hutchings, Warden of
8 Southern Desert Correctional Center, commanding Warden Hutchings to bring the above named
9 Defendant/Petitioner before your Honor, and return cause of his imprisonment.
10

11 ...

12
13 DATED this 26th day of January, 2021.
14

15 Respectfully submitted,

16 /s/ Terrence M. Jackson

17 TERRENCE M. JACKSON, ESQUIRE

18 Nevada State Bar 000854

19 624 South 9th Street

20 Las Vegas, Nevada 89101

21 T: (702) 386-0001 / F: (702) 386-0085

22 Terry.jackson.esq@gmail.com

23 Counsel for Defendant/Petitioner *Davin M. Toney*
24
25
26 ...
27
28 ...

1 **INTRODUCTION**
2 **Procedural History**

3 Defendant was charged by criminal complaint on February 27, 2017, which alleged multiple
4 charges of burglary in possession of a firearm and robbery with use of a deadly weapon. Defendant
5 was bound over on April 27, 2017. Information was filed on April 28, 2017, charging Defendant
6 with thirteen (13) counts.

7 Defendant pled guilty on August 23, 2017, to an Amended Information with four (4) Counts:
8 Count 1- Robbery with a Deadly Weapon; Count 2 - Burglary with Use of a Weapon; Count 3 -
9 Robbery with Use of a Weapon; Count 4 - Burglary with Use of a Weapon.

10 A PSI was submitted on September 29, 2017. On October 18, 2017, Defendant was sentenced
11 to an aggregate sentence of 156 to 420 months. On October 30, 2017, the Judgment of Conviction
12 (Plea of Guilty) was filed in District Court.

13 On September 14, 2020, the Defendant filed a *Pro Per* Petition for Writ of Habeas Corpus,
14 A-20-821088-W, with four (4) exhibits. On September 14, 2020, the District Court entered an Order
15 for Petition for Writ of Habeas Corpus. On October 14, 2020, defense counsel, Terrence M. Jackson,
16 was appointed to represent Defendant Davin M. Toney in the instant case, A-20-821088-W.

17 **ARGUMENT**
18

19 **I. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL**
20 **BY NOT ADEQUATELY INVESTIGATING AND PREPARING PREPLEA.**
21 **DEFENDANT'S PLEA OF GUILTY WAS THEREFORE MANIFESTLY UNJUST.**

22 Defense counsel for Defendant failed to adequately investigate or prepare preplea. He
23 erroneously counseled the Defendant to accept a guilty plea without a full discussion of the facts or
24 law, which led to a lack of the full knowledge necessary for an intelligent waiver by the Defendant.
25 In this case it is respectfully submitted the District Court therefore erred when it accepted the
26 Defendant's guilty plea. Counsel clearly was ineffective under *Strickland* for failing to adequately
27 investigate and prepare preplea or to zealously represent Davin M. Toney as his counsel.
28

1 Defendant directs this court to the American Bar Association (ABA) Standards on the
2 Prosecution and Defense function, ABA Standard 4.1 *Duty to Investigate*, which emphasizes the
3 crucial importance of investigation by criminal defense attorneys for their clients.

4 **ABA Standard 4.1: Duty to Investigate:**

5 It is the duty of the lawyer to conduct a prompt investigation of the
6 circumstances of the case and explore all avenues leading to facts
7 relevant to guilt and degree of guilt or penalty. The investigation
8 should always include effort to secure information in the possession
9 of the prosecution and law enforcement authorities. The duty to
10 investigate exists regardless of the accused's admissions or
11 statements to the lawyer of facts constituting guilt or his stated desire
12 to plead guilty. (Emphasis added)

13 ...
14 The importance of this Standard has been recognized and cited by the Nevada Supreme Court
15 for over forty (40) years. *Jackson v. Warden*, 91 Nev. 430, 537 P.2d 473 (1975). Counsel ignored
16 this standard and did not fulfill this elementary command to investigate and develop possible
17 information that might have assisted his client.

18 Assisting the client in investigation is one of the most important tasks of defense counsel.
19 Failure of counsel to do this task effectively undercut the validity of a defendant's plea and therefore
20 requires reversal of the conviction.

21 In *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the United
22 States Supreme Court established a two pronged test for reversal based upon ineffective assistance
23 of counsel. First, the defendant must show counsel's *performance was deficient*. This requires a
24 showing that counsel made errors so serious that counsel was not functioning as the
25 "counsel" guaranteed by the Sixth Amendment. Second, counsel must show that the deficient
26 performance *prejudiced* the defense. This requires showing that counsel errors were so serious as
27 to have deprived defendant of a fair trial, that is a trial where the result is reliable. Unless a defendant
28 makes both showings, it cannot be said that the conviction or death sentence resulted in a breakdown
of the adversary process that renders the result unreliable. *Strickland* at 687. The District Court
wrongly concluded Defendant was not prejudiced by the lack of effective investigation, discounting

1 the Defendant's allegations.

2 *Strickland* noted that:

3 ...[j]udicial scrutiny of counsel's performance must be highly
4 deferential however, counsel must at a minimum conduct a
5 reasonable investigation enabling him to make informed decisions
6 about how best to represent his client. *Strickland, Id.* 691, 104 S.Ct.
at 2066. (Emphasis added).

7 ...

8 Reversing a conviction for ineffective assistance of counsel, the Nevada Supreme Court in
9 *Sanborn v. State*, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

10 To state a claim of ineffective assistance of counsel that is
11 sufficient to invalidate a judgment of conviction, Sanborn must
12 demonstrate that trial counsel's performance fell below an objective
13 standard or reasonableness and that counsel's deficiencies were so
14 severe that they rendered the jury's verdict unreliable. *See Strickland*
15 *v. Washington*, 46 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);
16 *Warden v. Lyons*, 100 Nev. 430, 683 F.2d 504 (1984) *cert. denied*,
17 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985). Focusing on
18 counsel's performance as a whole, and with due regard for the strong
presumption of effective assistance accorded counsel by this court
and *Strickland*, we hold that Sanborn's representation indeed fell
below an objective standard of reasonableness.

19 Trial counsel did not adequately perform pretrial investigation and
20 failed to pursue evidence supportive of innocence or evidence which
21 would establish a reasonable doubt. He failed to establish a claim of
22 self-defense, and failed to explore allegations of the victim's
23 propensity towards violence. Thus, he "was not functioning as the
'counsel' guaranteed the defendant by the Sixth Amendment.
Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. (Emphasis added)

24 ...

25 Counsel's performance in this case was objectively unreasonable. In this case competent
26 counsel did not adequately evaluate the possible defenses available to Defendant. The evidentiary
27 hearing will establish that Defendant Toney had inadequate contact with his counsel and that his
28 counsel did not effectively and competently prepare Defendant's case.

1 Such a hearing will also show that counsel never effectively or competently explained all the
2 consequences of the plea to the Defendant. This failure was a major deficiency in counsel's
3 representation which mandates reversal. A plea must be a knowing, voluntary and intelligent waiver
4 of rights. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Because counsel did not give a complete
5 and thorough explanation of the substance of the plea negotiations to the Defendant, including all
6 his constitutional rights and all the legal consequences of the plea, counsel was clearly ineffective
7 under *Strickland v. Washington*, 466 U.S. 668 (1984).

8 Defendant was greatly prejudiced by his counsel's failures and justice therefore requires his
9 guilty plea be set aside. There are many reasons for courts to set aside guilty pleas. The mere fact the
10 court may have gone through the standard plea canvas is sufficient to establish a plea was voluntary.
11 There is substantial case law that courts must consider the 'totality of circumstances' to determine
12 the validity of a plea and found that a plea is invalid despite a technically valid plea canvas. *See*,
13 *State v. Freese*, 116 Nev. 1097, 13 P.3d 442 (2000); *McConnell v. State*, 125 Nev. 243, 212 P.3d 307
14 (2009).

15 In this case, it is respectfully submitted under the totality of circumstances, counsel was
16 ineffective under *Strickland v. Washington, supra*. Defendant also directs the Court to such cases as
17 *Bustos v. White*, 521 F.3d 321 (4th Cir.2018); *Premo v. Moore*, 562 U.S. 115 (2011); *Raysor v.*
18 *United States*, 647 F.3d 491 (2d Cir.2011); *Smith v. Mahoney*, 611 F.3d 978 (9th Cir.2010); *United*
19 *States v. Mooney*, 497 F.3d 397 (4th Cir.2007); *Dando v. Yukins*, 461 F.3d 791 (6th Cir.2006);
20 *United States v. Keller*, 902 F.2d 1391 (9th Cir.1990); *Iaea v. Sunn*, 800 F.2d 861 (9th Cir.1986);
21 and *Fields v. Gibson*, 277 F.3d 1203 (10th Cir.2002), in which guilty pleas were overturned because
22 of the ineffectiveness of counsel. Defendant submits the facts in this case are equally compelling for
23 setting aside the Defendant's guilty plea, as the above cases cited. The Defendant therefore
24 respectfully urges this Court to grant his *Writ of Habeas Corpus*.

25 Defendant Davin Toney never received an adequate, intelligent explanation of all the rights
26 of a defendant including receiving informed advice on the strength of both the prosecution's case
27 and any possible defenses which the Defendant may have had. *See, Von Moltke v. Gillies*, 332 U.S.
28 708 (1948); *Libretti v. United States*, 516 U.S. 29 (1995). Because of counsel's failure to adequately

1 assist Defendant preplea, the plea in this case must be considered to have been both unknowing and
2 unintelligent and therefore invalid. The evidence will show that in this case counsel did not explain
3 to the Defendant his constitutional and statutory rights. Defendant submits these omissions by
4 counsel amounted to grossly ineffective assistance of counsel and rendered his plea invalid which
5 requires reversal of the conviction.

6 **II. COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO DISMISS OR**
7 **EFFECTIVELY CHALLENGING THE USE OF A TOY GUN AS A DEADLY**
8 **WEAPON UNDER NRS 193.165.**

9 It was ineffective assistance of counsel under *Strickland* for defense counsel to allow
10 Defendant to plead guilty to the weapon(s) enhancement in the Information. Defense counsel was
11 ineffective for not recognizing that a toy gun is not a deadly weapon under NRS 193.165 and
12 therefore because there was insufficient evidence for a deadly weapon enhancement in Counts 1, 2,
13 3, and 4, the plea was invalid.

14 Defense counsel should have moved to dismiss the weapon enhancement. In a classic case
15 of prosecutorial error, the Clark County District Attorney wrongfully pled all counts of the original
16 Complaint with a deadly weapon enhancement. The Defendant eventually wrongly pled guilty to four
17 (4) counts involving use or possession of a deadly weapon, a toy gun. An evidentiary hearing will
18 clearly show that Defendant's alleged 'weapon' in the Amended Information was actually a toy gun,
19 not an actual firearm. NRS 202.253 defines a " 'firearm' as . . . a weapon with a caliber of .177
20 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air
21 or other such force." The toy gun that was used in these offenses was not a firearm under Nevada
22 law.

23 The Nevada Supreme Court has clearly decided the issue of whether a toy gun is a deadly
24 weapon. The Court has previously reversed cases holding that the weapons in criminal enhancement,
25 NRS 193.165, for using a firearm or other deadly weapon in the commission of a crime does not
26 apply to a toy gun.

27 In the case of *McIntyre v. State*, 104 Nev. 622, 764 P.2d 482 (1988), the Supreme Court
28 reversing a sentencing enhancement for the use of a weapon in that case stated: . . .

1 “NRS 193.165 requires that a criminal’s sentence be enhanced
2 when he or she “uses a firearm or other deadly weapon . . . in the
3 commission of a crime.” We have previously determined that in
4 statutorily distinguishing firearms from “other deadly weapons,” the
5 legislature, for purposes of sentence enhancement, attributed to
6 firearms a *per se* deadly status; proof of a firearm’s deadly
7 capabilities is not required. *Stalley v. State*, 91 Nev. 671, 541 P.2d
8 658 (1975). We have applied this rationale in cases involving blank
9 guns, *Anderson v. State*, 96 Nev. 633, 614 P.2d 540 (1980), and
10 firearms which are, in fact, inoperable. *Allen v. State*, 96 Nev. 334,
11 609 P.2d 321 (1980).

12 However, because *McIntyre*’s toy gun is not a firearm, it does
13 not partake of a firearm’s *per se* deadly status. Proof of a toy gun’s
14 actual deadly capabilities is necessary before NRS 193.165 can apply.
15 In this case, no evidence suggests that *McIntyre* could have used his
16 toy gun as a bludgeon or in some other way to inflict death or great
17 bodily harm, prospects that the enhancement provision was designed
18 to deter. Absent such evidence, the enhanced sentences for use of a
19 deadly weapon cannot stand.” See, *People v. Skelton*, 414 N.E.2d 455,
20 458 (Ill. 1980); *State v. Allen*, 343 S.E.2d 893 (N.C. 1986); *Pena*
21 *Cortex v. State*, 732 S.W.2d 713 (Texas 1987). *Id.* 623, 624
22 (Emphasis added)

23 The Court again reaffirmed the decision that a toy gun is not a deadly weapon in the case of
24 *Bias v. State*, 105 Nev. 869, 784 P.2d 963 (1989), stating:

25 “In *McIntyre*, we held that absent proof of deadly capabilities,
26 the use of a toy gun cannot support an enhanced sentence for the
27 commission of a crime “with the use of a deadly weapon.” *Id.* at 623,
28 764 P.2d at 483. Here, as in *McIntyre*, the toy gun did not warrant *per se*
deadly status because it was not a firearm. Moreover, there was no
evidence that appellant used or could have used the toy gun in a
deadly manner. Even the trial judge noted at sentencing that she did
not think the gun could be used as a blunt instrument because it was
very light and “just a little plastic thing.” (Emphasis added)

1 We decline the State's invitation to overrule our decision in
2 McIntyre. Accordingly, we vacate the sentences imposed against
3 appellant for use of a deadly weapon." Id. 871 (Emphasis added)

4 ...
5 The Court apparently thought it ridiculous that a "little plastic thing" could be construed as a deadly
6 weapon. Other cases show that the Court has been very strict in enforcing the meaning of what is an
7 inherently dangerous weapon to qualify as the type of weapon which enhances punishment under
8 NRS 193.165.

9 In *Smith v. State*, 110 Nev. 1094, 881 P.2d 649 (1994), the Nevada Supreme Court ruled the
10 district court erred in failing to dismiss the deadly weapon enhancement holding in that case that a
11 hammer was not a deadly weapon. In *Smith*, even though the victim actually died, because a hammer
12 is not inherently a deadly weapon, the court did not in that case enhance the penalty for the murder.

13 Consider also the case of *Milton v. State*, 111 Nev. 1487, 908 P.2d 684 (1998), where the
14 court applying the "inherently dangerous weapon" test held that scissors could not be considered a
15 deadly weapon. If a hammer or scissors are not inherently deadly weapons under Nevada law,
16 Defendant submits it is ludicrous to consider under any circumstances that a toy gun can be
17 considered a deadly weapon. A toy gun does not meet the statutory or functional definition of an
18 inherently dangerous weapon. Whether counsel actually moved to dismiss the weapon enhancement,
19 he was clearly ineffective in this case in allowing Defendant to plead guilty to four (4) counts of the
20 Amended Information, each enhanced under NRS 193.165, with a double punishment.

21 It is respectfully submitted there can be no doubt that the failure of counsel to even recognize
22 a toy gun was not a deadly weapon was ineffectiveness under *Strickland, supra*. This ineffectiveness
23 moreover was clearly prejudicial as it greatly increased the Defendant's actual sentence in this case
24 when Defendant pled guilty to a nonexistent crime. Therefore, reversal is required under *Strickland*.

25 **III. PETITIONER'S CLAIM FOR RELIEF IS NOT PROCEDURALLY BARRED BY**
26 **THE STATUTE ON TIME DELAY, NRS 34.726 OR LATCHES.**

27 Defendant filed his *Pro Per* Petition for post-conviction relief on September 14, 2020. This
28 was technically outside the statute NRS 34.726, which states that a post-conviction Writ should be

1 filed within one (1) year after entry of the Judgment of Conviction . . . “unless there is good cause
2 shown for delay.” Good cause for delay exists if Petitioner demonstrates to the satisfaction of the
3 court that:

4 (a.) That the delay is not the fault of the petitioner; and

5 (b.) That dismissal of the petition as untimely will unduly prejudice the petitioner.

6 2. The execution of a sentence must not be stayed for the period provided in subsection
7 1 solely because a petition may be filed within that period. A stay of sentence must
8 not be granted unless:

9 (a.) A petition is actually filed; and

10 (b.) The petitioner establishes a compelling basis for the stay.

11 (Added to NRS by 1991.75; A 2013.1736) (Emphasis added)

12 . . .

13 Defendant submits his Petition however should not be procedurally barred for several important
14 reasons:

15 (1) He had ineffective assistance of counsel. Counsel did not appropriately advise him of the
16 law before his plea but instead totally misled him on what was the actual law. He actually pled guilty
17 to a charge that was factually impossible, as a toy gun is not a deadly weapon;

18 (2) The State’s misconduct or error in improperly pleading Defendant’s case provides good
19 cause for Defendant’s delay;

20 (3) Defendant filed his *Pro Per* Petition as soon as he became aware of the United States
21 Supreme Court case of *United States v. Davis*, 588 U.S. v ____ (2019), which Defendant believed
22 was relevant to his due process rights which had been violated by his guilty plea in this case; and

23 (4) Finally, a principle reason for not barring this Petition is that the State is not in anyway
24 prejudiced. If however, the Court bars the Petition, the State will then benefit by its wrongdoing by
25 its wrongful pleading of the enhancement.

26 Furthermore, there exists no question of latches in this case. There was no uncertainty of the
27 law at the time of Defendant’s plea. The State was represented by experienced prosecutors who knew
28 the law, or at the very least, they had constructive knowledge of the case law of deadly weapons

1 enhancement when they plead the charges and when the Defendant entered his plea. The Defendant's
2 plea, which included the deadly weapon enhancement, was not legal because the enhancement was
3 not legally correct. The State of Nevada should be as anxious as the Defendant is to correct the grave
4 injustice to the Defendant resulting from their error which occurred because of the State's mistake
5 in wrongly pleading the deadly weapon enhancement for a toy gun in the four (4) counts of the
6 Amended Information.

7 The Court therefore should not bar this Petition on any procedural grounds so that this unfair
8 pleading error can be corrected and justice can be done. The purpose of procedural rules such as
9 NRS 34.786 and the related doctrine of laches is to protect the State from any unfairness that might
10 result from a lengthy delay in filing a Post Conviction Petition. The procedural default statute was
11 not designed to protect an injustice to a Defendant such as wrongly doubling the sentence of a
12 Defendant contrary to established law.

13 This Petition should not be barred by laches and the Defendant has good cause which
14 prevented him from filing the Petition earlier.

15 The Defendant did not file the Petition earlier because he is indigent and unschooled in the
16 law and also he had ineffective assistance of counsel. His counsel wrongly persuaded him to plead
17 guilty to a crime of which he was factually innocent.

18 When Defendant, a layman, learned of the facts and law supporting his Petition, he
19 immediately filed a *Pro Per* Writ of Habeas Corpus. The State is not prejudiced by this late filing.
20 In fact the State benefits because the wrongful enhancement of the Defendant's conviction can now
21 be corrected. The law is clear that when factual innocence is at issue, as in this case, the Court should
22 not impose any procedural bar to prohibit necessary post conviction relief.

23 **IV. DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW GROSS**
24 **INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND OTHER**
25 **FACTS WHICH WILL PROVE HIS PETITION SHOULD NOT BE**
26 **PROCEDURALLY BARRED.**

27 An evidentiary hearing will establish defense counsel was ineffective under *Strickland* in
28 numerous ways. An evidentiary hearing will establish that Defendant pled guilty on the advice of

1 counsel to the deadly weapon enhancement even though the alleged 'deadly weapon' was merely a
2 toy gun.

3 An evidentiary hearing is necessary to show that counsel did not adequately research the law
4 or facts before urging the Defendant to plead guilty with a deadly weapon enhancement under NRS
5 193.165.5, even though there was no legal evidence of use or possession of a deadly weapon.

6 In *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court
7 reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction.

8 The Court there stated:

9 "When a petition for post-conviction relief raises claims
10 supported by specific factual allegations which, if true, would entitle
11 the petitioner to relief, the petitioner is entitled to an evidentiary
12 hearing unless those claims are repelled by the record." *Hargrove v.*
State, 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331

13 ...
14 Although the court rejected many of *Marshall's* claims as meritless, it found the issue of
15 insufficiency of the evidence presented to the grand jury supporting the possession or controlled
16 substance charge to have merit and reversed those counts stating:

17 "At most, the state presented evidence that appellant
18 frequented an apartment that was rented to his brother and that
19 appellant stored some of his personal belongings in the apartment.
20 This evidence is not sufficient to establish that appellant, rather than
21 one of the numerous other persons who frequented the apartment,
22 possessed the cocaine and the marijuana the police found. Appellate
counsel was ineffective for failing to raise this issue on appeal and
counsel's failure prejudiced appellant. *Warden v. Lyons*, 100 Nev.
23 430, 683 P.2d 504 (1984), *cert. den.*, 471 U.S. 1004 (1985). The
district court erred in refusing to provide appellant an evidentiary
hearing on this issue and in denying appellant relief."

24 "Because the record on appeal establishes that appellant was
25 improperly convicted of the possession charges, we reverse
26 appellant's judgment of conviction on these charges and we vacate
27 the sentences imposed with respect to those convictions." *Id.* 1333
28 (Emphasis added)

1 Similarly, in *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court
2 reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his
3 petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing
4 will also show conclusively there are sufficient other facts to show Defendant had good cause for
5 any delay in filing this Petition. The hearing will also show that the Defendant will suffer substantial
6 prejudice if this Petition is barred which will substantially outweigh any prejudice to the State.

7 CONCLUSION

8 Defendant was not guilty of the deadly weapon enhancement. The Defendant's attorney
9 however wrongly urged him to plead guilty to crimes of which he was factually innocent. This was
10 grievously ineffective assistance of counsel that seriously prejudiced the Defendant.

11 Mr. Toney could not have been found guilty of the weapons enhancement on any of the
12 counts in this case because the facts are clear that he only possessed a toy gun. Any competent
13 attorney who did a minimal review of the law and the facts would have not advised the Defendant
14 to plead guilty to any charges entailing a weapons enhancement under NRS 193.165.

15 It is therefore respectfully submitted the Petitioner in this case did not receive his
16 constitutional Sixth Amendment right to effective assistance of counsel under *Strickland v.*
17 *Washington* because Mr. Toney's counsel totally failed to protect his rights. The ineffectiveness of
18 defense counsel prejudiced Toney so much that his conviction must be reversed. The case should
19 therefore be remanded for further proceedings with such other remedies as this Honorable Court
20 deems just.

21
22 **DATED** this 26th day of January, 2021.

23
24
25 Respectfully submitted,
26 /s/ Terrence M. Jackson
27 TERRENCE M. JACKSON, ESQ.
28 Nevada State Bar # 00854
Terry.jackson.esq@gmail.com
Counsel for Petitioner/Defendant *Davin M. Toney*

1 CERTIFICATE OF SERVICE

2
3 I hereby certify that I am an assistant to Terrence M. Jackson, Esq., I am a person competent
4 to serve papers and not a party to the above-entitled action and on the 26th day of January, 2021, I
5 served copy of the foregoing: Petitioner/Defendant's, Davin Toney's, SUPPLEMENTAL POINTS
6 AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS FOR POST CONVICTION
7 RELIEF as follows:

8
9 [X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States
10 first class mail to the Nevada Attorney General and Petitioner/Defendant as follows:

11
12 STEVEN B. WOLFSON
13 Clark County District Attorney
14 steven.wolfson@clarkcountyda.com

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

15 DAVIN M. TONEY
16 S. D. C. C. - P. O. BOX 208
17 ID# 1187296
18 Indian Springs, NV 89070-0208

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

19
20 By: /s/ Ila C. Wills
21 Assistant to T. M. Jackson, Esq.
22
23
24
25
26
27
28

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 01:45 PM Appointment of Counsel (Terry Jackson)

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

COURT CLERK: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

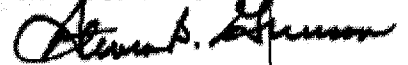
PARTIES PRESENT:

Bernard B. Zadrowski Attorney for Defendant
Terrence Michael Jackson Attorney for Defendant, Plaintiff

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



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 THE STATE OF NEVADA,

9 Plaintiff,

CASE#: C-17-323151-1

DEPT. I

10 vs.

11 DAVIN M. TONEY,

12 Defendant.

13
14 BEFORE THE HONORABLE KENNETH C. CORY, DISTRICT COURT JUDGE
15 WEDNESDAY, AUGUST 23, 2017

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **ENTRY OF PLEA**

18
19 APPEARANCES:

20 For the State:

MICHAEL DICKERSON, ESQ.
Deputy District Attorney

21
22 For the Defendant:

GEORDAN G. LOGAN, ESQ.
Deputy Public Defender

23
24 RECORDED BY: LISA LIZOTTE, COURT RECORDER
25 TRANSCRIBED BY: JUDY CHAPPELL, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, August 23, 2017

2

3 [Case called at 9:03 a.m.]

4 THE CLERK: The State of Nevada versus Davin Toney, Case
5 Number C323151.

6 THE COURT: Good morning.

7 MR. LOGAN: Geordan Logan, we have Davin Toney. If we
8 could just trail this, we're just going over the GPA.

9 THE COURT: All right. Sure.

10 [Hearing trailed at 9:03 a.m.]

11 [Hearing recalled at 9:11 a.m.]

12 THE CLERK: Recalling page 12, the State of Nevada versus
13 Davin Toney, Case Number C323151.

14 MR. LOGAN: Geordan Logan on behalf of Mr. Toney, who is
15 present, in custody.

16 THE COURT: That was page 12, was it?

17 MR. DICKERSON: May I approach your clerk, Your Honor. I
18 have an amended information.

19 THE COURT: Yes, uh-huh.

20 Mr. Logan, what's the essence of the plea here?

21 MR. LOGAN: So the matter is resolved today. Today
22 Mr. Toney will be pleading guilty to Robbery with Use of a Deadly
23 Weapon, a Category B felony. Burglary while Possession of a Deadly
24 Weapon, two counts of each. We'll be looking at an aggregate sentence
25 of 8 to 35 years in NDOC.

1 THE COURT: Okay.

2 MR. DICKERSON: Correct, Your Honor. The GPA lays out
3 the structure for that sentencing.

4 THE COURT: Okay. I see. So specifically Count 1, Robbery
5 With Use would be a 36 to 144, plus consecutive 12 to 66. Count 2
6 would be, is Burglary with a Deadly 48 to 195, to run concurrent with
7 Count 1. Count 3, Robbery With Use would be 36 to 144, plus
8 consecutive 12 to 66, consecutive to Counts 1 and 2. Count 4 would be
9 Burglary While in Possession, a sentence of 48 to 195 months, to run
10 consecutive to Counts 1 and 2, but concurrent with Count 3.

11 MR. DICKERSON: Correct.

12 THE COURT: Mr. Toney, have you had an opportunity to go
13 over this entirely with your attorney?

14 THE DEFENDANT: Yes, I have.

15 THE COURT: Do you have any questions about how the
16 sentence itself would run?

17 THE DEFENDANT: No.

18 THE COURT: Okay.

19 MR. LOGAN: Your Honor, he does have one question that
20 I've answered the best of my ability. I just want to make it clear --

21 THE COURT: Okay.

22 MR. LOGAN: -- that he's to be focused on the aggregate
23 sentence of 8 to 35 years. And he's just a little concerned about the
24 consecutive sentences whether he has to expire Counts 1 and 2 before
25 he begins Counts 3 and 4. I explained to him that the important thing is

1 that the aggregate sentence is listed and that he's eligible for parole at 8
2 years.

3 MR. DICKERSON: That's --

4 THE COURT: I believe that's --

5 MR. DICKERSON: -- correct.

6 THE COURT: -- correct.

7 MR. DICKERSON: That is correct.

8 THE COURT: Yeah. And we can make a record of that at the
9 sentencing.

10 MR. LOGAN: Okay. Thank you, Your Honor.

11 THE COURT: Does that answer your question, sir?

12 THE DEFENDANT: Yes, it does.

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

18 THE DEFENDANT: Yes.

19 THE COURT: Have you had an opportunity to read that
20 amended information and to discuss it fully with your attorney --

21 THE DEFENDANT: Yes.

22 THE COURT: -- so that he could answer any questions that
23 you may have?

24 THE DEFENDANT: Yes.

25 THE COURT: You have any -- do you understand what's in

1 the amended information? What it's charging you with?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you have any questions about the meaning
4 of any of the charges that are in the amended information?

5 THE DEFENDANT: No.

6 THE COURT: How do you plead? Guilty or not guilty?

7 THE DEFENDANT: Guilty.

8 THE COURT: Guilty. All right. Before I can accept your plea,
9 I must be satisfied it's freely and voluntarily given. We've just talked
10 about a Guilty Plea Agreement and I have a written Guilty Plea
11 Agreement here that appears to have been signed by you on today's
12 date. Did you sign this Guilty Plea Agreement?

13 THE DEFENDANT: Yes, I did.

14 THE COURT: And before you signed it, did you have an
15 opportunity to discuss everything that's in it with your attorney?

16 THE DEFENDANT: Yes, I did.

17 THE COURT: Do you have any other questions? We talked
18 about the aggregate sentence and what the sentence is you'd be facing.
19 Do you have any other questions about the meaning of anything else
20 that's in this Guilty Plea Agreement?

21 THE DEFENDANT: No.

22 THE COURT: Okay. That's, you know, that's what, 6, 7
23 pages long. It talks about various things, consequences of the plea. It
24 talks about if you were in the country illegally or if you were an immigrant,
25 what potential it could have. Talks about the rights that you're waiving.

1 You understand you're waiving your constitutional right against self-
2 incrimination? I'm going to ask you what you did that causes you enter a
3 guilty plea in just a minute here. You'd be waiving the constitutional right
4 to a speedy trial, to confront cross-examine any witnesses who would
5 testify against you, as well as some other things. You read that part?

6 THE DEFENDANT: Yes.

7 THE COURT: And the voluntariness part. Is there anything, I
8 mean, let me put it this way, other than what's in this Guilty Plea
9 Agreement and what we've discussed in court, has anyone made you
10 any threats or any promises in order to get you to enter a Guilty Plea
11 here?

12 THE DEFENDANT: No.

13 THE COURT: Okay. The amended information says that you
14 did some things between February 18th and February 22nd of this year in
15 Clark County, Nevada. Count 1 says that on February 18th you did
16 something in relation to a person named Chinthana Thennakoon and
17 Salman Akram. What did you do in relation to those -- in relation to those
18 two people that causes you to enter a plea of guilty to the charge of
19 Robbery With a Use of a Deadly Weapon?

20 THE DEFENDANT: Presented a weapon and demanded
21 money.

22 THE COURT: Okay. You had the weapon on you? Did you
23 show it to them?

24 THE DEFENDANT: Yes.

25 THE COURT: And you demanded their money?

1 THE DEFENDANT: Yes.

2 THE COURT: They gave it to you?

3 THE DEFENDANT: Yes.

4 THE COURT: Okay. And you pretty well knew that was
5 wrong --

6 THE DEFENDANT: Yes.

7 THE COURT: -- to do? That's a silly question, but I get some
8 people that don't get it.

9 Count 2 says that on February 18th while you were in Clark
10 County, Nevada, you did something in relation to a place called the
11 Smoke Shop Plus 99 Cent Store on East Lake Mead Boulevard. Were
12 you on East Lake Mead Boulevard that day?

13 THE DEFENDANT: Yes.

14 THE COURT: Did you go in the Smoke Shop Plus?

15 THE DEFENDANT: Yes.

16 THE COURT: Is that where you brandished a weapon and
17 got the money?

18 THE DEFENDANT: Yes, a BB gun.

19 THE COURT: I'm sorry.

20 THE DEFENDANT: Yes, a pellet gun.

21 THE COURT: Okay. So -- and I assume this is statutory
22 burglary count for entering the building with that intent?

23 MR. DICKERSON: That's correct, Your Honor, acting with the
24 intent to commit robbery --

25 THE COURT: Yeah.

1 MR. DICKERSON: -- as well as entering Mr. K's Smoke Shop
2 that same day at 5130 South Fort Apache Road.

3 THE COURT: Yeah. On -- okay, I'm going to do these count
4 by count just to make sure our record is clear.

5 Count 3 says that Robbery With Use of a Deadly Weapon,
6 February 22nd, and it lists off some people's names that says that you did
7 as in Coun1. It says that you used a deadly weapon, a hand gun or
8 pneumatic gun. Is that the same type of situation? Did you take some
9 money from somebody named Harbhej Singh and I can't pronounce it
10 Piyadasa, in U.S. currency? Were they inside the USA Smoke Shop?

11 THE DEFENDANT: Yes.

12 THE COURT: Okay. So did you take money from them?

13 THE DEFENDANT: Yes.

14 THE COURT: All right. And did you show them the gun?

15 THE DEFENDANT: Yes.

16 THE COURT: Okay. Count 4 says Burglary While in
17 Possession of Deadly Weapon. Did you go into that smoke shop with the
18 intention of committing that robbery?

19 THE DEFENDANT: Yes.

20 THE COURT: Okay. And that was at 4566 East Tropicana
21 Avenue?

22 THE DEFENDANT: Yes.

23 THE COURT: In Las Vegas. All right.

24 State satisfied as to the canvass?

25 MR. DICKERSON: I am. If we could just inquiry as to a

1 couple other of the victims and places here?

2 THE COURT: Yep.

3 MR. DICKERSON: The first one being on Count 2, Mr. K's
4 Smoke Shop at 5130 South Fort Apache Road.

5 THE COURT: Okay. So that was the partic -- that wasn't the
6 Smoke Shop Plus 99 Cent Store.

7 MR. DICKERSON: No, that was an additional one.

8 THE COURT: All right. Count 2 does not include an address.
9 Was that -- I'm sorry, I'm reading the wrong place. Count 2, you're
10 speaking of.

11 MR. DICKERSON: Yes, that's correct, Your Honor.

12 THE COURT: All right. So there was also a Mr. K's. I see it.

13 On back on Count 2, we talked about you going in the Smoke
14 Shop Plus 99 Cent Store to commit a robbery. Did you do the same
15 thing at Mr. K's Smoke Shop --

16 THE DEFENDANT: Yes.

17 THE COURT: -- on 5130 South Fort Apache Road?

18 THE DEFENDANT: Yes.

19 THE COURT: And do the same thing?

20 THE DEFENDANT: Yes.

21 THE COURT: Okay. Use a gun?

22 THE DEFENDANT: Yeah, that pellet gun was.

23 THE COURT: All right. You showed it to them?

24 THE DEFENDANT: Yes.

25 THE COURT: And got their money.

1 THE DEFENDANT: Yes.

2 THE COURT: Okay.

3 State satisfied with the canvass?

4 MR. DICKERSON: And as to Counts 3 and 4, victim
5 Sujan Narasinghe, being a victim at the A.S. Smoke Shop at 4566 East
6 Tropicana. And the fourth victim of that same count, Count 3, Norma
7 Escobar, being a victim at Texas Liquor at 5020 Broadbend Boulevard.

8 THE COURT: Okay. Do you have Count 4 in front of you
9 there?

10 THE DEFENDANT: Yes.

11 THE COURT: Take a look at it, if you would. Count 4 is
12 Burglary While in Possession. That's a one where you -- if you go into
13 the building with the intention to commit the robbery, then you've
14 committed a burglary as well. It lists off two stores. And so what he's
15 saying is that the people in the stores corresponds to what's in Count 3.,
16 the actual people that you took the money from. Are these people with
17 names that I can't pronounce, Sujan Narasinghe and Harbhej Singh, who
18 would have been in the first one, A.S. Smoke Shop on Tropicana?
19 And --

20 MR. DICKERSON: And Sujan was in the A.S. Smoke Shop
21 and then Harbhej Singh and Angulugaha Piyadasa was in the USA
22 Smoke Shop.

23 THE COURT: USA. All right.

24 So I don't imagine you -- I don't imagine you stopped to ask
25 these people their names, but were there these people in these various

1 stores that we just talked about that you took the money from?

2 THE DEFENDANT: Yes.

3 THE COURT: All right.

4 MR. DICKERSON: And the final one, Your Honor, being
5 Norma Escobar.

6 THE COURT: Norma Escobar in Texas Liquor. Is that
7 correspond to Texas Liquor?

8 MR. DICKERSON: Correct, Your Honor.

9 THE COURT: So when you went into Texas Liquor, which is
10 listed in Count 4 on a burglary count, was it -- did you take money from a
11 lady? I don't imagine you know her name, but her name apparently was
12 Norma Escobar. But you took money from a lady by showing her the
13 gun?

14 THE DEFENDANT: Yes.

15 THE COURT: Okay. Do you have any reason to think this is
16 inaccurate? That that was in Texas Liquor store at 5020 Broadbend
17 Boulevard in Las Vegas?

18 THE DEFENDANT: No.

19 THE COURT: Okay.

20 MR. DICKERSON: And defendant said he's committed these
21 crimes with a pellet gun. Just that that is in fact a pneumatic gun.

22 THE COURT: Okay. All right. That's -- I don't think that's
23 something that would, that the defendant would be admitting to, would it?
24 You're stating for the record that a pellet gun is a pneumatic gun --

25 MR. DICKERSON: And --

1 THE COURT: -- which qualifies under the statute.

2 MR. DICKERSON: Yeah, and then the defendant is agreeing
3 with that.

4 THE COURT: All right.

5 Mr. Logan, have you had any discussion with your client any
6 reason to contest whether the law regarding pneumatic guns applies to
7 pellet guns?

8 MR. LOGAN: No, that is our understanding.

9 THE COURT: That is my understanding as well.

10 All right.

11 MR. DICKERSON: State's satisfied, Your Honor.

12 THE COURT: All right.

13 Mr. Toney, you're obviously looking at some substantial time
14 here considering the number of crimes involved and the number of
15 people involved, but that's probably a good -- a good negotiation. But I
16 always just have to wonder what drives a guy to the point of thinking
17 that's the way out? Maybe you'll write --

18 THE DEFENDANT: No excuse.

19 THE COURT: -- maybe you'll write a book about it.

20 THE DEFENDANT: There's no excuse.

21 THE COURT: What's that?

22 THE DEFENDANT: There's no excuse.

23 THE COURT: Okay. All right.

24 All right. Court's satisfied that the plea is freely and voluntarily
25 given and we'll set it down for -- accepts the plea and we'll set it down for

1 sentencing.

2 THE CLERK: October 18th at 9 a.m. Trial date is vacated.

3 THE COURT: Yes.

4 MR. DICKERSON: Thank you.

5

6

[Hearing concluded at 9:24 a.m.]

7

8

9

10

11

12

13

14

15

16

17

18

19

20 ATTEST: I do hereby certify that I have truly and correctly transcribed the
21 audio/video proceedings in the above-entitled case to the best of my ability.

22

23

24

25

Judy Chappell
Judy Chappell
Court Recorder/Transcriber



RSPN
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,

CASE NO: A-20-821088-W

-vs-

THE STATE OF NEVADA,

DEPT NO: XXVIII

Respondent.

**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**

DATE OF HEARING: MAY 24, 2021

TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in 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.

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

///

\\CLARKCOUNTYDA.NET\CRM\CASE2\2017\086\34\201708634C-RSPN-(DAVIN MARVELL TONEY)-001.DOCX

AA 076

1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

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

11 On April 28, 2017, the State filed an Information charging Petitioner with the above
12 charges as well as two (2) counts of Conspiracy to Commit Robbery. On August 23, 2017, a
13 Guilty Plea Agreement (hereinafter "GPA") was filed and Petitioner pled guilty to: Count 1 –
14 Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count
15 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060);
16 Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380,
17 193.165); and Count 4 – Burglary While in Possession of a Deadly Weapon (Category B
18 Felony – NRS 205.060). The terms of the GPA were as follows:

19
20 The Parties stipulate to an aggregate term of imprisonment of eight (8) years
21 to thirty-five (35) years (96 to 420 months) in the Nevada Department of
22 Corrections structured as follows: Count 1 - Robbery With Use of a Deadly
23 Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months
24 on the deadly weapon enhancement. Count 2 - Burglary While in Possession
25 of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with
26 Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of
27 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon
28 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.

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

15 On September 14, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus
16 (Post-Conviction) (hereinafter "Pro Per Petition"). On October 14, 2020, counsel Terrence
17 Jackson, Esq. was appointed. On January 26, 2021, counsel filed a Supplemental Points and
18 Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief
19 (hereinafter "Supplemental Petition"). The State's Response now follows.

20 **STATEMENT OF FACTS**

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

25 On February 18, 2017, Chinthana Thennakoon was robbed while he was working at the
26 99 Center Plus Smoke Shop. Id. at 5. He described the person that robbed him as a six (6) foot
27 eight (8), a little overweight, African American male who was wearing a white baseball hat,
28 black sunglasses, and a brown jacket. Id. at 6.

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

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

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

26 Akram stepped back from the register as Petitioner took about \$400 from inside of the
27 register. Id. at 27. After Petitioner grabbed the cash, he began to walk towards the door, pointed
28 the gun at Akram, and told him that he better not pull anything from the counter or he would

1 shoot him. Id. at 28. Petitioner then unlocked the front door, which Akram never locked, and
2 both individuals exited the store. Id. at 28. At the preliminary hearing, Akram testified that the
3 gun Petitioner pointed at him that day appeared to be a real gun. Id. at 31.

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

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

24 Narasingehe testified at that preliminary hearing that he was not sure if the gun
25 Petitioner pointed at him that day was a toy or real gun, but he recalled that he was scared
26 because he thought he was going to die that day. Id. at 49. He was however able to describe
27 the firearm as black in color and was the type of gun one would load from the top as the top
28

1 would slide back. Id. at 50. Most importantly, he testified that at the time Petitioner pulled out
2 the gun, he did not think it was a toy gun and thought he was going to get shot. Id.

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

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

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

25 At the preliminary hearing, Singh recalled the license plate number to be: 79E092. Id.
26 at 60. Singh also testified that while Petitioner was in the store, he touched some Oreo Cookies
27 packages and Swishers. Id. at 60. Singh also recalled that the firearm Petitioner pointed at him
28 that day was a black Glock semiautomatic firearm. Id. at 55. Singh later testified that while he

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

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

19 In addition to this eyewitness testimony, there was also physical evidence presented
20 that linked Petitioner to the five (5) robberies. Id. at 93-114. LVMPD Detective David Miller,
21 who was assigned to investigate the robbery series, retrieved surveillance camera footage from
22 the stores. Id. at 98-100. Detective Miller took note of certain similarities among the robberies,
23 including that the robberies occurred at the same type of business, the description of the
24 suspect was similar, the suspect was wearing the same unique jacket, and had the same method
25 of operation. Id. Based on these similarities, Detective Miller believed it was the same suspect
26 that conducted all five (5) of the robberies. Id. at 100. Indeed, in all five (5) of the robberies,
27 the suspect wore blue jeans and wore what appeared to be a unique, leather jacket with white
28 along the collar and the sleeve cuffs as well as a type of leather material on the shoulder. Id.

1 at 102. The suspect also wore a white ball cap, with a sticker on the brim and a black line along
2 a black symbol on the left upper part of the cap. Id. at 102-03. The suspect was also seen
3 wearing a gray beanie in some of the robberies as well as sunglasses. Id. at 104. Detective
4 Miller also reviewed a map showing the locations of the robberies which further confirmed
5 that the five (5) robberies amounted to a series. Id. at 105.

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

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

23 When Detective Miller eventually took Petitioner into custody, he was wearing what
24 appeared to be the same leather jacket from the robberies. Id. at 108. Petitioner told Detective
25 Miller that he could find toy guns in his bedroom. Id. at 114. When Detective Miller spoke
26 with Petitioner, Detective Miller pointed to the surveillance picture from one (1) of the
27 robberies in which the suspect wore a gray beanie and asked Petitioner where they could find
28

1 that gray beanie. Id. Petitioner told him that the beanie would probably be inside of a drawer
2 in his bedroom. Id. Petitioner also stated he had toy guns in his bedroom. Id.

3 ARGUMENT

4 **I. PETITIONER'S PETITION IS PROCEDURALLY BARRED**

5 **A. Petitioner's Petition is Time-barred**

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

13 The one-year time limit for preparing petitions for post-conviction relief under NRS
14 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
15 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
16 evidence presented by the defendant that he purchased postage through the prison and mailed
17 the Notice within the one-year time limit.

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

23
24 Habeas corpus petitions that are filed many years after conviction are an
25 unreasonable burden on the criminal justice system. The necessity for a
26 workable system dictates that there must exist a time when a criminal
conviction is final.

27 Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)).

28 Additionally, the Court noted that procedural bars "cannot be ignored [by the district court]

1 when properly raised by the State.” Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court
2 has granted no discretion to the district courts regarding whether to apply the statutory
3 procedural bars; the rules *must* be applied.

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

9 **B. Application of the Procedural Bars is Mandatory**

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

15
16 Habeas corpus petitions that are filed many years after conviction are an
17 unreasonable burden on the criminal justice system. The necessity for a
18 workable system dictates that there must exist a time when a criminal
conviction is final.

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

23 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
24 There the Court ruled that the defendant’s petition was “untimely, successive, and an abuse of
25 the writ” and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
26 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant’s
27 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
28

085

1 procedural bars are so fundamental to the post-conviction process that they must be applied
2 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

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

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

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

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

28 ///

1 To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading
2 and proving specific facts that demonstrate good cause for his failure to present his claim in
3 earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be
4 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan
5 v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of
6 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas
7 petition if it presents claims that either were or could have been presented in an earlier
8 proceeding, unless the court finds both cause for failing to present the claims earlier or for
9 raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646–
10 47, 29 P.3d 498, 523 (2001) (emphasis added).

11 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
12 following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner will
13 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet the
14 first requirement, “a petitioner *must* show that an impediment external to the defense prevented
15 him or her from complying with the state procedural default rules.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). “A qualifying impediment might
17 be shown where the factual or legal basis for a claim was not reasonably available *at the time*
18 *of default*.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The
19 Court continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d
20 at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.”
21 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105
22 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by
23 State officials and the previous unavailability of a legal or factual basis. See State v. Huebler,
24 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition
25 must not be the fault of the petitioner. NRS 34.726(1)(a).

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

1 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
2 available to the petitioner during the statutory time period did not constitute good cause to
3 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
4 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
5 453 120 S. Ct. 1587, 1592 (2000).

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

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

17 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
18 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
19 Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865
20 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
21 representation fell below an objective standard of reasonableness, and second, that but for
22 counsel's errors, there is a reasonable probability that the result of the proceedings would have
23 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
24 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
25 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
26 inquiry in the same order or even to address both components of the inquiry if the defendant
27 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

28 ///

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

7 Counsel cannot be ineffective for failing to make futile objections or arguments. See
8 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
9 "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
10 any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
11 (2002).

12 Based on the above law, the role of a court in considering allegations of ineffective
13 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
14 whether, under the particular facts and circumstances of the case, trial counsel failed to render
15 reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
16 (1978). This analysis does not mean that the court should "second guess reasoned choices
17 between trial tactics nor does it mean that defense counsel, to protect himself against
18 allegations of inadequacy, must make every conceivable motion no matter how remote the
19 possibilities are of success." Id. To be effective, the constitution "does not require that counsel
20 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
21 cannot create one and may disserve the interests of his client by attempting a useless charade."
22 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

23 "There are countless ways to provide effective assistance in any given case. Even the
24 best criminal defense attorneys would not defend a particular client in the same way."
25 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after
26 thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,
27 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
28 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's

1 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
2 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

20 When a conviction is the result of a guilty plea, a defendant must show that there is a
21 “reasonable probability that, but for counsel's errors, he would not have pleaded guilty and
22 would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370
23 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107
24 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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

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

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

3 As an initial matter, Petitioner's pro per claim, that his deadly weapon enhancement
4 sentences are unconstitutional, is waived in two (2) ways. First, his claim is substantively
5 waived because he failed to raise the claim on direct appeal. NRS 34.810(1) reads:

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

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

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

11 [. . .]

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

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

24 Second, Petitioner cannot raise constitutional claims that occurred prior to his guilty
25 plea. A defendant cannot enter a guilty plea then later raise independent claims alleging a
26 deprivation of his rights before entry of the plea. State v. Eighth Judicial District Court, 121
27 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).
28 Generally, the entry of a guilty plea waives any right to appeal from events occurring prior to

1 the entry of the plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). “[A] guilty plea
2 represents a break in the chain of events which has preceded it in the criminal process. . . . [A
3 defendant] may not thereafter raise independent claims relating to the deprivation of
4 constitutional rights that occurred prior to the entry of the guilty plea.” Id. (quoting Tollett,
5 411 U.S. at 267).

6 Notwithstanding Petitioner’s claim being waived, it is also meritless because Davis is
7 inapplicable. In Davis, 139 S. Ct. at 2323–24, the U.S. Supreme Court reviewed whether 18
8 U.S.C. § 924(c), i.e. a federal statute which required longer prison sentences for those
9 individuals that used, carried, or possessed a firearm in the commission of a federal “crime of
10 violence or drug trafficking crime,” was void for vagueness. The Court explained that “crime
11 of violence” was defined in two (2) of the statute’s subparts: the elements clause, 18 U.S.C. §
12 924(c)(3)(A), and the residual clause, 18 U.S.C. § 924(c)(3)(B). The Court concluded that the
13 residual clause of such federal statute, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague
14 because there was “no reliable way to determine which offenses qualify as crimes of violence”
15 for application of the increased penalty. Id. at 2324. Notably, despite this conclusion, the Court
16 did not conclude that vacating the defendant’s sentences was the appropriate remedy, but
17 instead remanded the case to the Fifth Circuit Court for further proceedings:

18
19 We agree with the court of appeals’ conclusion that § 924(c)(3)(B) is
20 unconstitutionally vague. At the same time, exactly what that holding means
21 for Mr. Davis and Mr. Glover remains to be determined. After the Fifth
22 Circuit vacated their convictions and sentences on one of the two § 924(c)
23 counts at issue, both men sought rehearing and argued that the court should
24 have vacated their sentences on all counts. In response, the government
25 conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are
26 entitled to a full resentencing, not just the more limited remedy the court had
27 granted them. The Fifth Circuit has deferred ruling on the rehearing petitions
28 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.

27 Id. at 2336.

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

6 Regardless, even if the Court decided to apply Davis to this case, which would not be
7 appropriate, Petitioner would still not be able to demonstrate good cause because he failed to
8 file his Petition within one (1) year of the decision. Indeed, a petitioner raising good cause to
9 excuse procedural bars must do so within a reasonable time after the alleged good cause arises.
10 See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726
11 applies to successive petitions). Additionally, Petitioner cannot demonstrate prejudice as he
12 stipulated to sentences for his use of a deadly weapon when he entered his plea, which was
13 knowingly, intelligently, and voluntarily entered as discussed *infra*. Strickland, 466 U.S. at
14 687–88, 694, 104 S. Ct. at 2065, 2068; GPA, filed Aug. 23, 2017, at 1-2. Therefore,
15 Petitioner's claim should be denied.

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

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

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

1 “[D]efense counsel has a duty ‘to make reasonable investigations or to make a
2 reasonable decision that makes particular investigations unnecessary.’ State v. Love, 109 Nev.
3 at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision
4 “not to investigate must be directly assessed for reasonableness in all the circumstances,
5 applying a heavy measure of deference to counsel’s judgment.” Id. Moreover, “[a] decision
6 not to call a witness will not generally constitute ineffective assistance of counsel” Id. at 1145,
7 865 P.2d at 328.

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

12 Indeed, to establish a claim of ineffective assistance of counsel for advice regarding a
13 guilty plea, a defendant must show “gross error on the part of counsel.” Turner v. Calderon,
14 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where
15 it is entered into on the advice of counsel, and the burden is on a defendant to show that the
16 plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (citing Wingfield
17 v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jeziarski v. State, 107 Nev. 395, 397,
18 812 P.2d 355, 356 (1991). Ultimately, while it is counsel’s duty to candidly advise a defendant
19 regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant’s.
20 Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

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

26 Petitioner’s claim that Petitioner did not knowingly and intelligently enter his guilty
27 plea equally fails because it is belied by the record. Id. Pursuant to NRS 176.165, after
28 sentencing, a defendant’s guilty plea can only be withdrawn to correct “manifest injustice.”

1 See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The law in Nevada
2 establishes that a plea of guilty is presumptively valid, and the burden is on a defendant to
3 show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d
4 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)).
5 Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev.
6 at 72, 787 P.2d at 394.

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

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

16 Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev.
17 774, 476 P.2d 950 (1970)). The presence and advice of counsel is a significant factor in
18 determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d
19 107, 107 (1975).

20 This standard requires the court accepting the plea to personally address the defendant
21 at the time he enters his plea in order to determine whether he understands the nature of the
22 charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 367. A court may not
23 rely simply on a written plea agreement without some verbal interaction with a defendant. Id.
24 Thus, a "colloquy" is constitutionally mandated and a "colloquy" is but a conversation in a
25 formal setting, such as that occurring between an official sitting in judgment of an accused at
26 plea. Id. However, the court need not conduct a ritualistic oral canvass. State v. Freese, 116
27 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas "do not require
28 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,

1 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct.
2 1463, 1470 (1970).

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

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

11
12 MR. LOGAN: So the matter is resolved today. Today Mr. Toney will be
13 pleading guilty to Robbery with Use of a Deadly Weapon, a Category B
14 felony. Burglary while Possession of a Deadly Weapon, two counts of each.
15 We'll be looking at an aggregate sentence of 8 to 35 years in NDOC.

16 THE COURT: Okay.

17 MR. DICKERSON: Correct, Your Honor. The GPA lays out the structure
18 for that sentencing.

19 THE COURT: Okay. I see. So specifically Count 1, Robbery With Use
20 would be a 36 to 144, plus consecutive 12 to 66. Count 2 would be, is
21 Burglary with a Deadly 48 to 195, to run concurrent with Count 1. Count 3,
22 Robbery With Use would be 36 to 144, plus consecutive 12 to 66,
23 consecutive to Counts 1 and 2. Count 4 would be Burglary While in
24 Possession, a sentence of 48 to 195 months, to run consecutive to Counts 1
25 and 2, but concurrent with Count 3.

26 MR. DICKERSON: Correct.

27 THE COURT: Mr. Toney, have you had an opportunity to go over this
28 entirely with your attorney?

THE DEFENDANT: Yes, I have.

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

25
26 THE COURT: All right. Mr. Toney, have you been given a copy of an
27 amended information charging you with Count 1, Robbery With Use of a
28 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?

1 THE DEFENDANT: Yes.

2 THE COURT: Have you had an opportunity to read that amended
3 information and to discuss it fully with your attorney --

4 THE DEFENDANT: Yes.

5 THE COURT: -- so that he could answer any questions that you may have?

6 THE DEFENDANT: Yes.

7 THE COURT: You have any -- do you understand what's in the amended
8 information? What it's charging you with?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you have any questions about the meaning of any of the
11 charges that are in the amended information?

12 THE DEFENDANT: No.

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

15 THE COURT: Okay. That's, you know, that's what, 6, 7 pages long. It talks
16 about various things, consequences of the plea. It talks about if you were in
17 the country illegally or if you were an immigrant, what potential it could
18 have. Talks about the rights that you're waiving. You understand you're
19 waiving your constitutional right against self-incrimination? I'm going to ask
20 you what you did that causes you enter a guilty plea in just a minute here.
21 You'd be waiving the constitutional right to a speedy trial, to confront cross-
22 examine any witnesses who would testify against you, as well as some other
23 things. You read that part?

24 THE DEFENDANT: Yes.

25 THE COURT: And the voluntariness part. Is there anything, I mean, let me
26 put it this way, other than what's in this Guilty Plea Agreement and what
27 we've discussed in court, has anyone made you any threats or any promises
28 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 should be 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

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

3 NRS 193.165 provides in relevant part:

4 1. Except as otherwise provided in NRS 193.169, any person who uses a
5 firearm or other deadly weapon or a weapon containing or capable of
6 emitting tear gas, whether or not its possession is permitted by NRS 202.375,
7 in the commission of a crime shall, in addition to the term of imprisonment
8 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.

9 [...]

6. As used in this section, "deadly weapon" means:

10 (a) Any instrument which, if used in the ordinary manner contemplated
11 by its design and construction, will or is likely to cause substantial bodily
harm or death;

12 (b) Any weapon, device, instrument, material or substance which, under
13 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

14 (c) A dangerous or deadly weapon specifically described in NRS
202.255, 202.265, 202.290, 202.320 or 202.350.

15
16 Additionally, NRS 202.253 defines a "firearm" as "any device designed to be used as
17 a weapon from which a projectile may be expelled through the barrel by the force of any
18 explosion or other form of combustion."

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

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

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

10 Thus, Petitioner's citation to Nevada Supreme Court precedent, where the Court found
11 that toy guns and other items did not necessarily constitute firearms for purposes of the
12 statutory deadly weapon enhancement, does not advance his argument. McIntyre v. State, 104
13 Nev. 622, 764 P.2d 482 (1988); Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989); Smith v.
14 State, 110 Nev. 1094, 881 P.2d 649 (1994); Milton v. State, 111 Nev. 1487, 908 P.2d 684
15 (1998). In each of these cases the Nevada Supreme Court concluded that various items,
16 including toy guns, hammers, and scissors might not be deadly weapons, which is
17 distinguishable from the instant case in which a .177 Daisy Powerline BB gun was found.
18 Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Like the BB gun in
19 Manning, 107 Nev. at 339, 810 P.2d at 1216, Petitioner's firearm fits the current statutory
20 definition of firearm as it is a "device designed to be used as a weapon from which a projectile
21 may be expelled through the barrel by the force of any explosion or other form of combustion."
22 NRS 202.253.

23 Accordingly, any effort by counsel to move to dismiss the case on this basis would have
24 been futile and, thus, he did not fall below an objective standard of reasonableness. See Ennis,
25 122 Nev. at 706, 137 P.3d at 1103; Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065,
26 2068. For the foregoing reasons, Petitioner also has not and cannot demonstrate that even if
27 there was error, he would have not pled guilty and proceeded to trial. Hill, 474 U.S. at 59, 106
28 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina v. State, 120 Nev.

1 at 190-91, 87 P.3d at 537. Therefore, this claim should be denied.

2 **D. Petitioner's Additional Claims for Good Cause Fail**

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

10 **1. Petitioner was not factually innocent**

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

17 Regardless, actual innocence means factual innocence not mere legal insufficiency.
18 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley,
19 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a
20 crime, a petitioner "must show that it is more likely than not that no reasonable juror would
21 have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538,
22 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298,
23 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be
24 applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

25 "Without any new evidence of innocence, even the existence of a concededly
26 meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice
27 that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at
28 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims

1 of actual innocence as a basis for habeas review stating, “[c]laims of actual innocence based
2 on newly discovered evidence have never been held to state a ground for federal habeas relief
3 absent an independent constitutional violation occurring in the underlying state criminal
4 proceeding.” Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins,
5 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence
6 suggesting the defendant’s innocence must be “so strong that a court cannot have confidence
7 in the outcome of the trial.” Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has
8 made a showing of actual innocence, he may then use the claim as a “gateway” to present his
9 constitutional challenges to the court and require the court to decide them on the merits. Id.

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

12 **2. The State did not commit misconduct or prosecutorial error**

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

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

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

24 **4. Laches does not apply**

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

1 Certain limitations exist on how long a defendant may wait to assert a post-conviction
2 request for relief. Consideration of the equitable doctrine of laches is necessary in determining
3 whether a defendant has shown 'manifest injustice' that would permit a modification of a
4 sentence. Hart, 116 Nev. at 563-64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:
5 "Application of the doctrine to an individual case may require consideration of several factors,
6 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied
7 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)
8 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.
9 631, 633, 584 P.2d 672, 673-74 (1978)." Id.

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

19 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 21 1. The judge or justice, upon review of the return, answer and all
22 supporting documents which are filed, shall determine whether
23 an evidentiary hearing is required. A petitioner must not be
24 discharged or committed to the custody of a person other than the
25 respondent *unless an evidentiary hearing is held*.
- 26 2. If the judge or justice determines that the petitioner is not
27 entitled to relief and an evidentiary hearing is not required, he
28 shall dismiss the petition without a hearing.
- 29 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.

///

///

1 The Nevada Supreme Court has held that if a petition can be resolved without
2 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
3 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
4 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
5 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
6 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
7 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
8 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
9 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
10 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

11 It is improper to hold an evidentiary hearing simply to make a complete record. See
12 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
13 district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
14 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
15 hearing.”). Further, the United States Supreme Court has held that an evidentiary hearing is
16 not required simply because counsel’s actions are challenged as being unreasonable strategic
17 decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge
18 post hoc rationalization for counsel’s decision making that contradicts the available evidence
19 of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis
20 for his or her actions. Id. There is a “strong presumption” that counsel’s attention to certain
21 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Id. (citing
22 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
23 *objective* reasonableness of counsel’s performance, not counsel’s *subjective* state of mind. 466
24 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

25 Petitioner’s Petition does not require an evidentiary hearing. An expansion of the record
26 is unnecessary because Petitioner has failed to assert any meritorious claims, his claims are
27 legal not factual, counsel’s testimony would not aid Petitioner, and the Petition can be disposed
28

1 of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Mann, 118 Nev. at
2 356, 46 P.3d at 1231.

3 **CONCLUSION**

4 Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ
5 of Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of
6 Petition for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary
7 Hearing be DENIED.

8 DATED this 19th day of April, 2021.

9 Respectfully submitted,

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

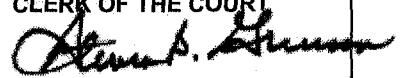
13 BY /s/ TALEEN PANDUKHT
14 TALEEN PANDUKHT
15 Chief Deputy District Attorney
16 Nevada Bar #005734

17 **CERTIFICATE OF ELECTRONIC FILING**

18 I hereby certify that service of State's Response to Petitioner's Petition for Writ of
19 Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of Petition
20 for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary Hearing,
21 was made this 19th day of April, 2021, by Electronic Filing to:

22
23 TERRENCE JACKSON, ESQ.
24 terry.jackson.esq@gmail.com

25 
26 Secretary for the District Attorney's Office
27
28



RPLY
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

DAVIN M. TONEY,
1187296
Petitioner,
v.
STATE OF NEVADA,
Respondent.

CASE NO.: A-20-821088-W
DEPT. NO.: XXVIII
Date of Hearing: May 24, 2021
Time of Hearing: 11:00 AM

REPLY TO STATE'S RESPONSE

Comes now the Defendant, Davin M. Toney, by and through Terrence M. Jackson, counsel for Defendant, and respectfully submits the attached Points and Authorities in Reply to the State's Response in Opposition to his Petition and request for an Evidentiary Hearing. This Reply is based upon all prior pleadings on file, the attached Points and Authorities and all further Authorities at Oral Argument at the request of the Court.

DATED this 13th day of May, 2021.

Respectfully submitted,
/s/ Terrence M. Jackson
TERRENCE M. JACKSON, ESQ.
Law Office of Terrence M. Jackson
Terry.jackson.esq@gmail.com
Counsel for Defendant, *Davin M. Toney*

1 **POINTS AND AUTHORITIES**

2
3 **I. PROCEDURAL TIME BARS IN THIS CASE ARE INAPPLICABLE BECAUSE**
4 **DEFENDANT CAN EASILY DEMONSTRATE GOOD CAUSE AND PREJUDICE.**

5 It is respectfully submitted the State's Response seeks to assert time bars in this case because
6 the State has no defense on the merits of Defendant's Petition. Defendant's Writ of Habeas Corpus
7 has not been needlessly delayed. In fact the Defendant filed his *Pro Per* Petition as soon as he was
8 able to raise the fundamental constitutional issue which was dispositive of his case. He did not file
9 multiple, or duplicative post-conviction petitions in this case.

10 This Petition is the only post-conviction Habeas Petition and it raises fundamental due
11 process issues. The Petition requested a necessary evidentiary hearing. There were clearly strong
12 legal basis for an evidentiary hearing of the Petition.

13 The reason the Defendant has not filed this Petition earlier is because the United States
14 Supreme Court had not yet clarified the law regarding the constitutionality of multiple
15 enhancements. *See, United States v. Davis*, 139 S.Ct. 2319 (2019). Although the State in its
16 Response briefly acknowledges the *Davis* decision, it chose to overlook *Davis*' holding and how it
17 would have affected Defendant Toney's sentence.

18 The State's argument that Defendant cannot demonstrate good cause and prejudice for any
19 delay must therefore fail. The Defendant submits the *Davis* decision makes clear that his sentence
20 was unconstitutionally enhanced and he will be greatly prejudiced if his claim is procedurally barred.

21 **II. DEFENDANT DID NOT WAIVE HIS STATUTORY RIGHT TO FILE POST**
22 **CONVICTION RELIEF CHALLENGING THE VALIDITY OF THE WEAPON**
23 **ENHANCEMENT.**

24 Defendant did not waive his statutory right to file for post conviction relief in this case to
25 challenge the validity of the weapon enhancement in his case. The State wrongly argues that
26 Defendant's guilty plea waived any claims of ineffective assistance before the entry of his plea citing
27 *State v. Eighth Judicial District Court (Riker)*, 121 Nev. 225, 112 P.3d 1070 (2005). (See
28 Respondent's Brief, p. 9) That case cited by the State is easily distinguishable. The procedural bar

1 upheld in that case occurred because the defendant filed his Petition almost 8 ½ years after the Court
2 decided the direct appeal. The Court in that case found that the defendant did not establish good
3 cause for such a lengthy delay and found that the denying the Petition would not unduly prejudice
4 him. The Court concluded:

5 “[T]o show good cause, Riker must demonstrate that an impediment
6 external to the defense prevented him from complying with
7 procedural rules. Actual prejudice requires him to show “not merely
8 that the errors at his trial created a possibility of prejudice, but that
9 they worked to his actual and substantial disadvantage, infecting his
10 entire trial with error of constitutional dimensions.” Absent a showing
11 of good cause to excuse procedural default, the court will consider a
12 claim only if the petitioner demonstrates that failure to consider it will
13 result in a fundamental miscarriage of justice.” (Emphasis added)
14 (*Id.* 232)

15 ...
16 It is respectfully submitted that in this case Defendant was clearly prejudiced by the
17 unconstitutional enhancement to his sentence. The delay in filing his Writ was excusable and to deny
18 him the right to challenge his counsel’s ineffectiveness by Writ of Habeas Corpus because of any
19 alleged “waiver” would result in a fundamental miscarriage of justice.

20 **III. AN EVIDENTIARY HEARING IS NECESSARY TO DEVELOP FULLY ALL**
21 **VIALE CLAIMS IN DEFENDANT’S PETITION.**

22 Unfortunately, the State of Nevada has chosen to argue that an evidentiary hearing in this
23 case is/was not necessary, even though an evidentiary hearing would clearly establish viable claim(s)
24 in Defendant’s Petition. (See Respondent’s Brief, p. 27-29)

25 In *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984), the Nevada Supreme Court reversed
26 the denial of a post conviction Petition because the district court refused an evidentiary hearing on
27 matters that could not be resolved on the basis of the available record. Defendant submits that in this
28 case, as in *Hatley, supra*, the available record was inadequate to resolve the questions the Defendant
had raised in his Petition therefore it was error not to grant him an evidentiary hearing.

1 **CONCLUSION**

2 For all the reasons stated in the Defendant's Petition for Habeas Corpus Relief and
3 Supplemental Points and Authorities previously filed and for all the reasons cited in this Reply Brief,
4 Defendant/Petitioner respectfully submits his Petition should be granted because he was denied
5 effective assistance of counsel under *Strickland*.

6 This Honorable Court should hold the ineffectiveness was so prejudicial that the case should
7 be reversed and remanded for further proceedings with such further action as this Court finds just.

8 **DATED** this 13th day of May, 2021.

9 Respectfully submitted,

10 /s/ Terrence M. Jackson

11 TERRENCE M. JACKSON, ESQ.

12 Terry.jackson.esq@gmail.com

13 Counsel for Defendant, *Davin M. Toney*

14 **CERTIFICATE OF SERVICE**

15 I hereby certify that I am an assistant to Terrence M. Jackson, Esq., I am a person competent
16 to serve papers and not a party to the above-entitled action and on the 13th day of May, 2021, I
17 served copy of the foregoing: Defendant, Davin M. Toney's, Reply to State's Response to
18 Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Supplemental Points and
19 Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief and Request
20 for an Evidentiary Hearing as follows:

21 [X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States
22 first class mail to the Nevada Attorney General and Petitioner/Appellant as follows:

23 STEVEN B. WOLFSON
24 Clark County District Attorney
steven.wolfson@clarkcountynyda.com

25 Davin M. Toney
26 ID# 1187296
27 S. D. C. C. - PO Box 208
28 Indian Springs, NV 89070-0208

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

TALEEN PANDUKHT
Chief Deputy D.A. - Criminal
taleen.pandukht@clarkcountynyda.com

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

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: Thomas, Kathy

RECORDER: Chappell, Judy

REPORTER:

PARTIES PRESENT:

Bernard B. Zadrowski Attorney for Defendant

Davin Toney Plaintiff

Terrence Michael Jackson Attorney for Defendant, Plaintiff

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

1 **FCL**
2 STEVEN B. WOLFSON
3 Clark County District Attorney
4 Nevada Bar #001565
5 TALEEN PANDUKHT
6 Chief Deputy District Attorney
7 Nevada Bar #005734
8 200 Lewis Avenue
9 Las Vegas, Nevada 89155-2212
10 (702) 671-2500
11 Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Petitioner,

CASE NO: A-20-821088-W

-vs-

12 THE STATE OF NEVADA,

DEPT NO: XXVIII

Respondent.

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

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

18 THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL,
19 District Judge, on the 21st day of June, 2021, the Petitioner present, represented by
20 TERRENCE MICHAEL JACKSON, ESQ., the Respondent being represented by STEVEN
21 B. WOLFSON, Clark County District Attorney, by and through BERNARD B.
22 ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter,
23 including briefs, transcripts, arguments of counsel, and documents on file herein, now
24 therefore, the Court makes the following findings of fact and conclusions of law:

25 ///

26 ///

27 ///

28 ///

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

2 **PROCEDURAL HISTORY**

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

11 On April 28, 2017, the State filed an Information charging Petitioner with the above
12 charges as well as two (2) counts of Conspiracy to Commit Robbery. On August 23, 2017, a
13 Guilty Plea Agreement (hereinafter "GPA") was filed and Petitioner pled guilty to: Count 1 –
14 Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count
15 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060);
16 Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380,
17 193.165); and Count 4 – Burglary While in Possession of a Deadly Weapon (Category B
18 Felony – NRS 205.060). The terms of the GPA were as follows:

19
20 The Parties stipulate to an aggregate term of imprisonment of eight (8) years
21 to thirty-five (35) years (96 to 420 months) in the Nevada Department of
22 Corrections structured as follows: Count 1 - Robbery With Use of a Deadly
23 Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months
24 on the deadly weapon enhancement. Count 2 - Burglary While in Possession
25 of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with
26 Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of
27 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon
28 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.

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

15 On September 14, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus
16 (Post-Conviction) (hereinafter "Pro Per Petition"). On October 14, 2020, counsel Terrence
17 Jackson, Esq. was appointed. On January 26, 2021, counsel filed a Supplemental Points and
18 Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief
19 (hereinafter "Supplemental Petition"). The State filed its Response on April 19, 2021. On May
20 13, 2021, Petitioner filed a Reply. On May 24, 2021, the Court denied Petitioner's Pro Per
21 Petition, Supplemental Petition, and Request for an Evidentiary Hearing and found as follows.

22 FACTS

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

27 On February 18, 2017, Chinthana Thennakoon was robbed while he was working at the
28 99 Center Plus Smoke Shop. Id. at 5. He described the person that robbed him as a six (6) foot

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

3 Right before Thennakoon was robbed, the robber entered the front door of the store and
4 asked about purchasing a blunt wrap as well as a cigar. Id. at 7. Thennakoon turned around to
5 retrieve those items from behind and when he turned back around the robber pointed a gun at
6 him. Id. While pointing the gun at Thennakoon, the robber aggressively asked him to open the
7 register and give him the money. Id. at 8. Thennakoon opened the register, the robber grabbed
8 about \$350 to \$400 from the register, and placed the money inside of a brown paper bag. Id.
9 8-10, 13. Thennakoon then opened the second register and the robber took money out of that
10 register as well. Id. Subsequently, one (1) or two (2) customers entered the store. Id. at 10. The
11 robber told the customers that the smoke shop was closed, but the customers did not pay
12 attention. Id. at 10-12. Petitioner then put his gun back inside of his jacket and, while carrying
13 the paper bag filled with cash from the register, slowly exited the through the front door of the
14 store. Id. at 10-12. When asked at the preliminary hearing about the firearm that the robber
15 pointed at him, Thennakoon testified that he was not sure whether the gun was a toy gun or a
16 real gun. Id. at 19.

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

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

28 ///

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 ANALYSIS

5 **I. PETITIONER'S PETITION IS PROCEDURALLY BARRED**

6 **A. Petitioner's Petition is Time-barred**

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

14 The one-year time limit for preparing petitions for post-conviction relief under NRS
15 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
16 the Nevada Supreme Court rejected a habeas petition that was filed two days late despite
17 evidence presented by the defendant that he purchased postage through the prison and mailed
18 the Notice within the one-year time limit.

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

24
25 Habeas corpus petitions that are filed many years after conviction are an
26 unreasonable burden on the criminal justice system. The necessity for a
27 workable system dictates that there must exist a time when a criminal
28 conviction is final.

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

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

11 **B. Application of the Procedural Bars is Mandatory**

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

17
18 Habeas corpus petitions that are filed many years after conviction are an
19 unreasonable burden on the criminal justice system. The necessity for a
20 workable system dictates that there must exist a time when a criminal
conviction is final.

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

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

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

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

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

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

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

1 To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading
2 and proving specific facts that demonstrate good cause for his failure to present his claim in
3 earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be
4 unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan
5 v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep’t of
6 Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a habeas
7 petition if it presents claims that either were or could have been presented in an earlier
8 proceeding, unless the court finds both cause for failing to present the claims earlier or for
9 raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-
10 47, 29 P.3d 498, 523 (2001) (emphasis added).

11 To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the
12 following: (1) “[t]hat the delay is not the fault of the petitioner” and (2) that the petitioner will
13 be “unduly prejudice[d]” if the petition is dismissed as untimely. NRS 34.726. To meet the
14 first requirement, “a petitioner *must* show that an impediment external to the defense prevented
15 him or her from complying with the state procedural default rules.” Hathaway v. State, 119
16 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). “A qualifying impediment might
17 be shown where the factual or legal basis for a claim was not reasonably available *at the time*
18 *of default*.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The
19 Court continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d
20 at 526. To find good cause there must be a “substantial reason; one that affords a legal excuse.”
21 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105
22 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by
23 State officials and the previous unavailability of a legal or factual basis. See State v. Huebler,
24 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition
25 must not be the fault of the petitioner. NRS 34.726(1)(a).

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

1 generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably
2 available to the petitioner during the statutory time period did not constitute good cause to
3 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good
4 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446,
5 453 120 S. Ct. 1587, 1592 (2000).

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

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

17 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
18 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
19 Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865
20 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
21 representation fell below an objective standard of reasonableness, and second, that but for
22 counsel's errors, there is a reasonable probability that the result of the proceedings would have
23 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
24 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
25 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
26 inquiry in the same order or even to address both components of the inquiry if the defendant
27 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

28 ///

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

7 Counsel cannot be ineffective for failing to make futile objections or arguments. See
8 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
9 "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
10 any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
11 (2002).

12 Based on the above law, the role of a court in considering allegations of ineffective
13 assistance of counsel is "not to pass upon the merits of the action not taken but to determine
14 whether, under the particular facts and circumstances of the case, trial counsel failed to render
15 reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
16 (1978). This analysis does not mean that the court should "second guess reasoned choices
17 between trial tactics nor does it mean that defense counsel, to protect himself against
18 allegations of inadequacy, must make every conceivable motion no matter how remote the
19 possibilities are of success." Id. To be effective, the constitution "does not require that counsel
20 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
21 cannot create one and may disserve the interests of his client by attempting a useless charade."
22 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

23 "There are countless ways to provide effective assistance in any given case. Even the
24 best criminal defense attorneys would not defend a particular client in the same way."
25 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after
26 thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,
27 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
28 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's

1 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
2 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

20 When a conviction is the result of a guilty plea, a defendant must show that there is a
21 “reasonable probability that, but for counsel's errors, he would not have pleaded guilty and
22 would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370
23 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107
24 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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

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

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

3 As an initial matter, Petitioner's pro per claim, that his deadly weapon enhancement
4 sentences are unconstitutional, is waived in two (2) ways. First, his claim is substantively
5 waived because he failed to raise the claim on direct appeal. NRS 34.810(1) reads:

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

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

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

11 [. . .]

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

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

24 Second, Petitioner cannot raise constitutional claims that occurred prior to his guilty
25 plea. A defendant cannot enter a guilty plea then later raise independent claims alleging a
26 deprivation of his rights before entry of the plea. State v. Eighth Judicial District Court, 121
27 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973)).
28 Generally, the entry of a guilty plea waives any right to appeal from events occurring prior to

1 the entry of the plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). “[A] guilty plea
2 represents a break in the chain of events which has preceded it in the criminal process. . . . [A
3 defendant] may not thereafter raise independent claims relating to the deprivation of
4 constitutional rights that occurred prior to the entry of the guilty plea.” Id. (quoting Tollett,
5 411 U.S. at 267).

6 Notwithstanding Petitioner’s claim being waived, it is also meritless because Davis is
7 inapplicable. In Davis, 139 S. Ct. at 2323–24, the U.S. Supreme Court reviewed whether 18
8 U.S.C. § 924(c), i.e. a federal statute which required longer prison sentences for those
9 individuals that used, carried, or possessed a firearm in the commission of a federal “crime of
10 violence or drug trafficking crime,” was void for vagueness. The Court explained that “crime
11 of violence” was defined in two (2) of the statute’s subparts: the elements clause, 18 U.S.C. §
12 924(c)(3)(A), and the residual clause, 18 U.S.C. § 924(c)(3)(B). The Court concluded that the
13 residual clause of such federal statute, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague
14 because there was “no reliable way to determine which offenses qualify as crimes of violence”
15 for application of the increased penalty. Id. at 2324. Notably, despite this conclusion, the Court
16 did not conclude that vacating the defendant’s sentences was the appropriate remedy, but
17 instead remanded the case to the Fifth Circuit Court for further proceedings:

18
19 We agree with the court of appeals’ conclusion that § 924(c)(3)(B) is
20 unconstitutionally vague. At the same time, exactly what that holding means
21 for Mr. Davis and Mr. Glover remains to be determined. After the Fifth
22 Circuit vacated their convictions and sentences on one of the two § 924(c)
23 counts at issue, both men sought rehearing and argued that the court should
24 have vacated their sentences on all counts. In response, the government
25 conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are
26 entitled to a full resentencing, not just the more limited remedy the court had
27 granted them. The Fifth Circuit has deferred ruling on the rehearing petitions
28 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.

27 Id. at 2336.

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

6 Regardless, even if the Court decided to apply Davis to this case, which would not be
7 appropriate, Petitioner would still not be able to demonstrate good cause because he failed to
8 file his Petition within one (1) year of the decision. Indeed, a petitioner raising good cause to
9 excuse procedural bars must do so within a reasonable time after the alleged good cause arises.
10 See Pellegrini, 117 Nev. at 869-70, 34 P.3d at 525-26 (holding that the time bar in NRS 34.726
11 applies to successive petitions). Additionally, Petitioner cannot demonstrate prejudice as he
12 stipulated to sentences for his use of a deadly weapon when he entered his plea, which was
13 knowingly, intelligently, and voluntarily entered as discussed *infra*. Strickland, 466 U.S. at
14 687-88, 694, 104 S. Ct. at 2065, 2068; GPA, filed Aug. 23, 2017, at 1-2. Therefore,
15 Petitioner's claim is denied.

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

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

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

1 “[D]efense counsel has a duty ‘to make reasonable investigations or to make a
2 reasonable decision that makes particular investigations unnecessary.’ State v. Love, 109 Nev.
3 at 1138, 865 P.2d at 323 (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision
4 “not to investigate must be directly assessed for reasonableness in all the circumstances,
5 applying a heavy measure of deference to counsel’s judgment.” Id. Moreover, “[a] decision
6 not to call a witness will not generally constitute ineffective assistance of counsel” Id. at 1145,
7 865 P.2d at 328.

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

12 Indeed, to establish a claim of ineffective assistance of counsel for advice regarding a
13 guilty plea, a defendant must show “gross error on the part of counsel.” Turner v. Calderon,
14 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where
15 it is entered into on the advice of counsel, and the burden is on a defendant to show that the
16 plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (citing Wingfield
17 v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397,
18 812 P.2d 355, 356 (1991). Ultimately, while it is counsel’s duty to candidly advise a defendant
19 regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant’s.
20 Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

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

26 Petitioner’s claim that Petitioner did not knowingly and intelligently enter his guilty
27 plea equally fails because it is belied by the record. Id. Pursuant to NRS 176.165, after
28 sentencing, a defendant’s guilty plea can only be withdrawn to correct “manifest injustice.”

1 See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The law in Nevada
2 establishes that a plea of guilty is presumptively valid, and the burden is on a defendant to
3 show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d
4 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)).
5 Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev.
6 at 72, 787 P.2d at 394.

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

10
11 [T]he defendant knowingly waived his privilege against self-incrimination, the
12 right to trial by jury, and the right to confront his accusers; (2) the plea was
13 voluntary, was not coerced, and was not the result of a promise of leniency; (3)
14 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.

15 Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev.
16 774, 476 P.2d 950 (1970)). The presence and advice of counsel is a significant factor in
17 determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d
18 107, 107 (1975).

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

1 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S. Ct.
2 1463, 1470 (1970).

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

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

11 MR. LOGAN: So the matter is resolved today. Today Mr. Toney will be
12 pleading guilty to Robbery with Use of a Deadly Weapon, a Category B
13 felony. Burglary while Possession of a Deadly Weapon, two counts of each.
14 We'll be looking at an aggregate sentence of 8 to 35 years in NDOC.

15 THE COURT: Okay.

16 MR. DICKERSON: Correct, Your Honor. The GPA lays out the structure
17 for that sentencing.

18 THE COURT: Okay. I see. So specifically Count 1, Robbery With Use
19 would be a 36 to 144, plus consecutive 12 to 66. Count 2 would be, is
20 Burglary with a Deadly 48 to 195, to run concurrent with Count 1. Count 3,
21 Robbery With Use would be 36 to 144, plus consecutive 12 to 66,
22 consecutive to Counts 1 and 2. Count 4 would be Burglary While in
23 Possession, a sentence of 48 to 195 months, to run consecutive to Counts 1
24 and 2, but concurrent with Count 3.

25 MR. DICKERSON: Correct.

26 THE COURT: Mr. Toney, have you had an opportunity to go over this
27 entirely with your attorney?

28 THE DEFENDANT: Yes, I have.

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

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

1 THE DEFENDANT: Yes.

2 THE COURT: Have you had an opportunity to read that amended
3 information and to discuss it fully with your attorney --

4 THE DEFENDANT: Yes.

5 THE COURT: -- so that he could answer any questions that you may have?

6 THE DEFENDANT: Yes.

7 THE COURT: You have any -- do you understand what's in the amended
8 information? What it's charging you with?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you have any questions about the meaning of any of the
11 charges that are in the amended information?

12 THE DEFENDANT: No.

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

15 THE COURT: Okay. That's, you know, that's what, 6, 7 pages long. It talks
16 about various things, consequences of the plea. It talks about if you were in
17 the country illegally or if you were an immigrant, what potential it could
18 have. Talks about the rights that you're waiving. You understand you're
19 waiving your constitutional right against self-incrimination? I'm going to ask
20 you what you did that causes you enter a guilty plea in just a minute here.
21 You'd be waiving the constitutional right to a speedy trial, to confront cross-
22 examine any witnesses who would testify against you, as well as some other
23 things. You read that part?

24 THE DEFENDANT: Yes.

25 THE COURT: And the voluntariness part. Is there anything, I mean, let me
26 put it this way, other than what's in this Guilty Plea Agreement and what
27 we've discussed in court, has anyone made you any threats or any promises
28 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

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

3 NRS 193.165 provides in relevant part:

4 1. Except as otherwise provided in NRS 193.169, any person who uses a
5 firearm or other deadly weapon or a weapon containing or capable of
6 emitting tear gas, whether or not its possession is permitted by NRS 202.375,
7 in the commission of a crime shall, in addition to the term of imprisonment
8 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.

9 [...]

6. As used in this section, "deadly weapon" means:

10 (a) Any instrument which, if used in the ordinary manner contemplated
11 by its design and construction, will or is likely to cause substantial bodily
harm or death;

12 (b) Any weapon, device, instrument, material or substance which, under
13 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

14 (c) A dangerous or deadly weapon specifically described in NRS
202.255, 202.265, 202.290, 202.320 or 202.350.

15
16 Additionally, NRS 202.253 defines a "firearm" as "any device designed to be used as
17 a weapon from which a projectile may be expelled through the barrel by the force of any
18 explosion or other form of combustion."

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

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

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

10 Thus, Petitioner's citation to Nevada Supreme Court precedent, where the Court found
11 that toy guns and other items did not necessarily constitute firearms for purposes of the
12 statutory deadly weapon enhancement, does not advance his argument. McIntyre v. State, 104
13 Nev. 622, 764 P.2d 482 (1988); Bias v. State, 105 Nev. 869, 784 P.2d 963 (1989); Smith v.
14 State, 110 Nev. 1094, 881 P.2d 649 (1994); Milton v. State, 111 Nev. 1487, 908 P.2d 684
15 (1998). In each of these cases the Nevada Supreme Court concluded that various items,
16 including toy guns, hammers, and scissors might not be deadly weapons, which is
17 distinguishable from the instant case in which a .177 Daisy Powerline BB gun was found.
18 Reporter's Transcript of Preliminary Hearing, Apr. 27, 2017, at 109-110. Like the BB gun in
19 Manning, 107 Nev. at 339, 810 P.2d at 1216, Petitioner's firearm fits the current statutory
20 definition of firearm as it is a "device designed to be used as a weapon from which a projectile
21 may be expelled through the barrel by the force of any explosion or other form of combustion."
22 NRS 202.253.

23 Accordingly, any effort by counsel to move to dismiss the case on this basis would have
24 been futile and, thus, he did not fall below an objective standard of reasonableness. See Ennis,
25 122 Nev. at 706, 137 P.3d at 1103; Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065,
26 2068. For the foregoing reasons, Petitioner also has not and cannot demonstrate that even if
27 there was error, he would have not pled guilty and proceeded to trial. Hill, 474 U.S. at 59, 106
28 S.Ct. at 370; see also Kirksey, 112 Nev. at 988, 923 P.2d at 1107; Molina v. State, 120 Nev.

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

2 **D. Petitioner's Additional Claims for Good Cause Fail**

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

10 **1. Petitioner was not factually innocent**

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

17 Regardless, actual innocence means factual innocence not mere legal insufficiency.
18 Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley,
19 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a
20 crime, a petitioner "must show that it is more likely than not that no reasonable juror would
21 have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538,
22 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298,
23 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be
24 applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

25 "Without any new evidence of innocence, even the existence of a concededly
26 meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice
27 that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at
28 316, 115 S. Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims

1 of actual innocence as a basis for habeas review stating, “[c]laims of actual innocence based
2 on newly discovered evidence have never been held to state a ground for federal habeas relief
3 absent an independent constitutional violation occurring in the underlying state criminal
4 proceeding.” Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins,
5 506 U.S. 390, 400, 113 S. Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence
6 suggesting the defendant’s innocence must be “so strong that a court cannot have confidence
7 in the outcome of the trial.” Schlup, 513 U.S. at 315, 115 S. Ct. at 861. Once a defendant has
8 made a showing of actual innocence, he may then use the claim as a “gateway” to present his
9 constitutional challenges to the court and require the court to decide them on the merits. Id.

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

12 **2. The State did not commit misconduct or prosecutorial error**

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

17 **3. Petitioner cannot establish good cause based on his discovery of the** 18 **Davis case**

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

24 **4. Laches does not apply**

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

1 Certain limitations exist on how long a defendant may wait to assert a post-conviction
2 request for relief. Consideration of the equitable doctrine of laches is necessary in determining
3 whether a defendant has shown 'manifest injustice' that would permit a modification of a
4 sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:
5 "Application of the doctrine to an individual case may require consideration of several factors,
6 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied
7 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)
8 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.
9 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

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

19 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 21
- 22 1. The judge or justice, upon review of the return, answer and all
23 supporting documents which are filed, shall determine whether
24 an evidentiary hearing is required. A petitioner must not be
25 discharged or committed to the custody of a person other than the
26 respondent *unless an evidentiary hearing is held*.
 - 27 2. If the judge or justice determines that the petitioner is not
28 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

1 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
2 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
3 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
4 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
5 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
6 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
7 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
8 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
9 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

10 It is improper to hold an evidentiary hearing simply to make a complete record. *See*
11 State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The
12 district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted
13 ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary
14 hearing.”). Further, the United States Supreme Court has held that an evidentiary hearing is
15 not required simply because counsel’s actions are challenged as being unreasonable strategic
16 decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge
17 post hoc rationalization for counsel’s decision making that contradicts the available evidence
18 of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis
19 for his or her actions. *Id.* There is a “strong presumption” that counsel’s attention to certain
20 issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” *Id.* (*citing*
21 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the
22 *objective* reasonableness of counsel’s performance, not counsel’s *subjective* state of mind. 466
23 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

24 Petitioner’s Petition does not require an evidentiary hearing. An expansion of the record
25 is unnecessary because Petitioner has failed to assert any meritorious claims, his claims are
26 legal not factual, counsel’s testimony would not aid Petitioner, the Petition can be disposed of
27 with the existing record, and counsel has failed to indicate what would be added that could
28

1 change the issues. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Mann, 118 Nev. at 356, 46
2 P.3d at 1231.

3 **ORDER**

4 THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Petition for Writ of
5 Habeas Corpus (Post-Conviction), Supplemental Points and Authorities in Support of Petition
6 for Writ of Habeas Corpus for Post-Conviction Relief, and Request for an Evidentiary Hearing
7 shall be, and are, hereby denied.

8 DATED this ____ day of July, 2021.

Dated this 8th day of July, 2021

Ronald J. Israel

DISTRICT JUDGE A-20-821088-

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

708 CCC A8E2 DE71
Ronald J. Israel
District Court Judge

SC

13 BY

Taleen Pandukht

14 TALEEN PANDUKHT
15 Chief Deputy District Attorney
Nevada Bar #005734

28 jm/L2

1 CSERV

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Davin Toney, Plaintiff(s)

CASE NO: A-20-821088-W

7 vs.

DEPT. NO. Department 28

8 William Hutchings, Warden,
9 Defendant(s)

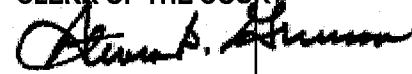
10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 7/8/2021

16 Terrence Jackson

terry.jackson.esq@gmail.com



1 NEFF

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5 DAVIN TONEY,

6 Petitioner,

Case No: A-20-821088-W

Dept No: XXVIII

7 vs.

8 WILLIAM HUTCHINGS, WARDEN,

9 Respondent,

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

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

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

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 15 day of July 2021, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

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

24 ☒ The United States mail addressed as follows:

25 Davin Toney # 1187296
P.O. Box 208
Indian Springs, NV 89070

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

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk



1 NOASC
2 TERRENCE M. JACKSON, ESQ.
3 Nevada Bar No. 00854
4 Law Office of Terrence M. Jackson
5 624 South Ninth Street
6 Las Vegas, NV 89101
7 T: 702-386-0001 / F: 702-386-0085
8 Terry.jackson.esq@gmail.com
9 *Counsel for Defendant, Davin M. Toney*

Electronically Filed
Jul 21 2021 08:37 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

9 THE STATE OF NEVADA,

10 Plaintiff,

11 v.

12 DAVIN M. TONEY,

1187296,

13 Defendant.

District Case No.: A-20-821088-W

Dept.: XXVIII

NOTICE OF APPEAL

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

17 Defendant, Davin M. Toney, further states he is indigent and requests that the filing fees be
18 waived.
19

20 Respectfully submitted this 15th day of July, 2021.

21 /s/ Terrence M. Jackson

22 Terrence M. Jackson, Esquire

23 Nevada Bar No. 00854

24 Law Office of Terrence M. Jackson

25 624 South Ninth Street

26 Las Vegas, NV 89101

27 T: 702-386-0001 / F: 702-386-0085

28 Terry.jackson.esq@gmail.com

Counsel for Defendant, Davin M. Toney

...

1 **CERTIFICATE OF SERVICE**

2 I hereby certify I am an assistant to Terrence M. Jackson, Esq., not a party to this action, and
3 on the 15th day of July, 2021, I served a true, correct and e-filed stamped copy of the foregoing:
4 Defendant, Davin M. Toney's, NOTICE OF APPEAL as follows:
5

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

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

9 [X] and by United States first class mail to the Nevada Attorney General and the Defendant as
10 follows:
11

12 STEVEN B. WOLFSON
13 Clark County District Attorney
14 steven.wolfson@clarkcountynyda.com

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

15
16 DAVIN M. TONEY
17 ID # 1187296
18 Southern Desert Correctional Ctr.
19 P.O. Box 208
Indian Springs, NV 89070-0208

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

20
21 By: /s/ Ila C. Wills
22 Assistant to T. M. Jackson, Esq.
23
24
25
26
27
28



1 RTRAN

2
3
4 DISTRICT COURT
5 CLARK COUNTY, NEVADA

6
7 DAVIN TONEY,

8 Plaintiff,

CASE#: A-20-821088-W

DEPT. XXVIII

9 vs.

10 WILLIAM HUTCHINGS,

11 Defendant.

12 BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE
13 MONDAY, JUNE 21, 2021

14 **RECORDER'S TRANSCRIPT OF HEARING**
15 **PETITION FOR WRIT OF HABEAS CORPUS**
16
17
18

19 APPEARANCES:

20 For the Plaintiff:

TERRENCE M. JACKSON, ESQ.

21
22 For the Defendant:

BERNARD ZADROWSKI, ESQ.
Chief Deputy District Attorney
(via BlueJeans)

23
24
25 RECORDED BY: JUDY CHAPPELL, COURT RECORDER

1 Las Vegas, Nevada, Monday, June 21, 2021

2
3 [Case called at 11:29 a.m.]

4
5 THE COURT: Toney, 821088. This is on for a petition.
6 Counsel, state your appearance.

7 MR. JACKSON: This is Terrence Jackson for Davin Toney.

8 THE COURT: And the defendant is present on Bluejeans on
9 a petition for habeas. Do you have anything to add?

10 MR. JACKSON: Just very briefly, if I can make a few points. I
11 won't take too much time.

12 I think there are two critical issues. One is the State has
13 responded basically arguing this case should be procedurally barred. I
14 urge the Court not to bar this case procedurally. I think there's
15 substantive issues that would be manifestly unjust to bar it. Defendant
16 filed his pro per petition after the United States Supreme Court decision
17 in *Davis* which has substantive changes in the law regarding
18 enhancements in criminal sentencing which defendant raised in his
19 petition. And I think that he waited until that *Davis* decision and he filed
20 his petition. So I think it was proper to raise his petition at time and to bar
21 it would be unfair to him and be a manifest in justice.

22 Second, I raise up supporting points and authorities. I raise
23 the fact that the gun involved was a toy gun and there's substantial case
24 law in Nevada the toy gun shouldn't be considered a deadly weapon. I'd
25 ask the Court to review that case law because it's clear --

1 THE COURT: Well let me ask you. Sorry to interrupt, but you
2 allege it's a toy gun. Apparently it was not a toy gun, it was a BB gun.

3 MR. JACKSON: A BB gun I don't think it is -- it has to be
4 more than .177 centimeters according to NRS that I cited. I don't think a
5 BB gun under the Nevada Revised Statutes qualifies as a firearm.

6 THE COURT: Well that might be the case, but we're not
7 talking, just so the record is clear, it's not --

8 MR. JACKSON: Oh, wait, I think --

9 THE COURT: -- a toy gun.

10 MR. JACKSON: -- a toy gun is analogous to a BB gun. You
11 know, we played with BB guns as a toy when I was a child. Maybe I
12 was -- had a bad upbringing. But I'm simply analogizing a BB gun to a
13 toy gun. I also cited the statute. I think it's NRS 177 point something,
14 where it makes clear that the firearm has to be more -- the projectile has
15 to be more than .177 inches [sic]. And I do not believe the 1.77 [sic]
16 inches requirement was met in this particular alleged firearm. So I think
17 the plea was in that respect. He pled to something that shouldn't have
18 been a crime. I think the counsel was ineffective for allowing him to even
19 plea to that and for that reason the Court should allow him to set aside
20 his plea. At most he should have pled guilty with due to the crime not to
21 the enhancement. We're not arguing that the whole crime should be set
22 aside, just the enhancement.

23 And I'll submit it with that.

24 THE COURT: Thank you. State.

25 MR. ZADROWSKI: Submitted.

1 THE COURT: Okay. Well first of all, and I've had a case
2 somewhat similar, at least on the first issue, the procedural bar. There
3 has to be good cause for the delay or prejudice. And it's not just the fact
4 that he doesn't get to proceed with a habeas. The case came down over
5 a year prior to. In one that I had, they took -- I believe it was two years
6 after the case that was important to file. We have over a year here, I
7 don't know the exact. And therefore if there is no good cause and there's
8 been none shown for the delay, the fact that over a year had passed, it is
9 procedurally barred. There has to be, and the Supreme Court has made
10 it clear, there has to be some importance to the timing -- or to timing. In
11 other words, you can't just let time pass and if there's new cases and
12 bring up years later. And they've been very, I think, strict in that regard.
13 So, first of all, I do think it is procedurally barred.

14 But, and I say but, I am going to address the claims because
15 there is, well basically no reason not to should the Supreme Court
16 disagree. So the first claim is that -- the failure to investigate. But, and
17 really most of these are, in this case, it's a bare and naked allegation
18 that's belied by the record. Looking at my notes from this. And therefore,
19 you can't just say, he failed to investigate. You have to show what a
20 thorough investigation would have done -- or would have shown that
21 would have overturned, if you will, the case. Or overturned his decision
22 to enter the plea.

23 The argument that it was a toy gun has no merit since the gun
24 wasn't found, oh, and I BB gun is not a toy so it's a bare and naked
25 allegation that he didn't use a real gun. They did find a BB gun which I

1 believe the State was arguing is with the 1.77 -- that's exactly what it is.
2 But in any event, the fact that a gun or a BB gun was found isn't
3 substantive, that's probably not the best. It doesn't show what he
4 actually used in this. They didn't, if you will, catch him with the gun and
5 so, again, that's a bare and naked allegation.

6 And for -- I, well I put and I, I put that that was also, let me, oh,
7 here, okay. That that was also a bare and naked allegation. And that's a
8 quote from the Supreme Court, by the way. Probably wouldn't be by --
9 the way I would phrase it. I think that was the -- where they argued that
10 the attorney was ineffective assistance and, again, there's nothing other
11 than the bare and naked allegation that Counsel was ineffective.

12 Trying to look for the -- sorry, in the --

13 THE DEFENDANT: Your Honor, could I speak?

14 THE COURT: -- initial petition.

15 MR. JACKSON: No, I'll speak for you.

16 THE COURT: Did I cover the issues that were raised?

17 MR. JACKSON: The only issue Your Honor hasn't dealt with
18 is my request for an evidentiary hearing because I had some of the
19 issues that you were concerned about. If we had an evidentiary hearing,
20 we could raise these -- or brought more substance or more clarity to
21 these issues with an evidentiary hearing. That was one of my main
22 requests in the supplemental points and authorities that we get an
23 evidentiary hearing.

24 THE COURT: Okay.

25 MR. JACKSON: And --

1 THE COURT: Oh, sorry, are you done?

2 MR. JACKSON: That's it.

3 THE COURT: Well, first of all, as I said, it's procedurally
4 barred which --

5 MR. JACKSON: I understand that.

6 THE COURT: -- takes care of everything. No, I appreciate
7 you going over. I want to cover this in the, as, if you will, an alternative,
8 requesting an evidentiary hearing, but you haven't said, in this case,
9 what, I assume, defense counsel would somehow add to the record that
10 these issues -- that would change the issues. So I'm certainly, I think,
11 obviously denying an evidentiary hearing when, as I said, first of all, this
12 is very much procedurally barred. And there's been no good cause.

13 THE DEFENDANT: My sentence -- and, Judge, excuse me.
14 You can say due to procedurally barred that the ruling on the *United*
15 *States versus Davis* was ruled in June 2019. I received the case law in
16 SDCC in March of 2020 which I filed. Now due to COVID and due to the
17 substantial amount of cases that you guys had, it was submitted
18 September of 2020. But I filed my paperwork within that year of that
19 ruling. So that is good cause and I would be prejudiced if you don't grant
20 me an evidentiary hearing because I filed within the proper time.

21 THE COURT: Well there's, you know, there's always
22 prejudice when, I guess you'd say, when you're denied -- when you fail to
23 do it in a timely manner. And I don't understand what, other than your
24 argument, you got the case at some point long after it was filed, but you
25 haven't showed how the State, and I believe that's a requirement,

1 somehow prejudiced you how, why you didn't get it sooner, that is, you
2 know, there's been no showing. So that's why it is barred.

3 Do you have anything? Sorry, Counsel, anything else?

4 MR. JACKSON: Well, you say we didn't raise issues of fact. I
5 just point out on page 11 and 12 beginning with our request for an
6 evidentiary hearing, we raised the reasons we wanted an evidentiary
7 hearing. Right in the first couple paragraphs state what we wanted to
8 show at the evidentiary hearing. So I think it's not true that we just, you
9 know, just said we just want an evidentiary hearing. You know, talk
10 about, you know, generally we raised specific things we wanted to ask at
11 the evidentiary hearing. And I think there was a factual predicate for an
12 evidentiary hearing and what we needed to call the defense counsel, we
13 needed to call the defendant, we needed to be able to put things on the
14 record. And I think there is sufficient evidence on record that the
15 defendant pled guilty to a charge that really shouldn't have existed, this
16 charge that there was a deadly weapon used in this matter. I think the
17 record would reflect that it wasn't a deadly weapon and that's what an
18 evidentiary hearing would show clearly and conclusively.

19 THE COURT: All right. Thank you. I totally disagree.
20 There's -- an evidentiary hearing wouldn't produce, and the State's
21 argument is it wouldn't produce the weapon that was used. The fact that
22 they didn't find it, that -- anyway, so it's procedurally barred and I think I
23 went through everything else.

24 ...

25 ...

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

So State, you need to prepare the order.

[Hearing concluded at 11:43 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Judy Chappell
Court Recorder/Transcriber