IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 10 2021 08:38 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

GARY LAMAR CHAMBERS,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-831669-W

Docket No: 83247

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
GARY CHAMBERS #76089,
PROPER PERSON
P.O. BOX 1989
ELY, NV 89301

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-21-831669-W **Gary Chambers, Plaintiff(s)**
vs.
State of Nevada, Defendant(s)

I N D E X

VOL	DATE	PLEADING	PAGE NUMBER:
1	07/16/2021	CASE APPEAL STATEMENT	140 - 141
1	08/10/2021	CERTIFICATION OF COPY AND TRANSMITTAL OF RECORD	
1	08/10/2021	DISTRICT COURT MINUTES	142 - 143
1	03/24/2021	EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING	60 - 62
1	06/23/2021	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	88 - 111
1	03/24/2021	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF WRIT OF HABEAS CORPUS (POST-CONVICTION)	16 - 59
1	07/15/2021	NOTICE OF APPEAL	137 - 139
1	07/02/2021	NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	112 - 136
1	03/29/2021	NOTICE OF HEARING	65 - 65
1	03/24/2021	ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS	63 - 64
1	03/24/2021	PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)	1 - 15
1	05/10/2021	STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MEMORANDUM OF POINTS AND AUTHORITIES, AND EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING	66 - 87

Original

Case No. A-21-831669-W
Dept. No Dept. 2

FILED
MAR 24 2021
CLERK OF COURT

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

Gary Chambers
Petitioner,

v.

State of Nevada,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

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're not in a specific institution of the Department but 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 or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

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

(3)

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Nevada Department of Corrections

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court, Clark County Nevada

3. Date of judgment of conviction: June 5, 2017

4. Case number: C292987-1

5. (a) Length of sentence: Life Without the Possibility of Parole

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No XX

If "yes", list crime, case number and sentence being served at this time: ____

7. Nature of offense involved in conviction being challenged: Second Degree Murder W|U|D|W

8. What was your plea? (check one):

(a) Not guilty XX (b) Guilty ____ (c) Nolo contendere ____

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

N/A

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

(a) Jury XX (b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No XX

12. Did you appeal form the judgment of conviction? Yes XX No ____

13. If you did appeal, answer the following:

(a) Name of Court: Nev. Sup. Court (COA)

(b) Case number or citation: 73446

(c) Result: Order of Affirmance

(d) Date of result: July 24, 2019
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

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

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court: ____
(2) Nature of proceeding: N/A
(3) Grounds raised: ____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No XX
(5) Result: N/A
(6) Date of result: ____
(7) If known, citations of any written opinion or date of orders entered pursuant to such result: ____

(b) As to any second petition, application or motion, give the same information:
(1) Name of court: ____
(2) Nature of proceeding: N/A
(3) Grounds raised: ____
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result: N/A
(6) Date of result: ____
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result: N/A

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ____ No ____
Citation or date of decision: N/A
(2) Second petition, application or motion? Yes ____ No ____
Citation or date of decision: ____
(3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision: ____

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

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

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

(b) The proceedings in which these grounds were raised: N/A

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

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) This petition is timely pursuant to NRS 34.726

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No XX

If yes, state what court and case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Mr. Yanez, Public Defender for trial and Sentencing. Jean Schwartzer for direct appeal.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes _____ No XX

If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) **Ground One:** See Memorandum of Points And Authorities In Support of Writ of Habeas Corpus

Supporting FACTS (Tell your story briefly without citing cases or law.):

(b) **Ground Two:** See Points and Authorities

Supporting FACTS (Tell your story briefly without citing cases or law.):

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(c) **Ground Three:**

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Supporting FACTS (Tell your story briefly without citing cases or law.):

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(d) **Ground Four:**

Supporting FACTS (Tell your story briefly without citing cases or law.):

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WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 1ST day of the month of MARCH of the year 2021.

Gary Chambers #76089
Signature of petitioner
Gary Chambers #76089

Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Gary Chambers #76089
Petitioner
Gary Chambers #76089

N/A
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Gary Chambers, hereby certify pursuant to N.R.C.P. 5(b), that on this 1ST day of the month of March, of the year 2021 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

_____
Respondent prison or jail official

_____
_____
Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717

Steve Wolfson
District Attorney of County of Conviction
200 Lewis Ave
LV NV 89155
Address

Gary Chambers # 76089
Signature of Petitioner
Gary Chambers #76089

AFFIRMATION PURSUANT TO NRS 239B.030

I, Gary Chambers, NDOC# 76089,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED Writ of Habeas Corpus (Post-Conviction),

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 1ST DAY OF March, 2021.

SIGNATURE: MR. Gary Chambers #76089

INMATE PRINTED NAME: Gary Chambers

INMATE NDOC # 76089

INMATE ADDRESS:

Original

Affidavit Of Gary Chambers

State of Nevada)
) ss
County of Clark)

I, Gary Chambers, after being duly sworn, depose and states the following:

1. That I am the Defendant in Case No. C292987-1, of the Eighth Judicial District Court, Clark County, Nevada.

2. That I am 18 years of age or over and competent to testify to the contents of this affidavit. However, as I am not educated in the art of law, I had an inmate Legal Assistant, Eric Douglas, assist me in preparing this affidavit and my Writ of Habeas Corpus (Post-Conviction) Petition.

3. That due to the nature of the charges I stand convicted for; the complexities of the law, my inability to comprehend the post-conviction proceedings and my indigency to retain private counsel, I respectfully request

of the district court to appoint me counsel.

4. That on or about July 9, 2013, I was arrested in relation to the instant case (C292987-1) and shortly thereafter, Able Yanez, ESQ, Special Public Defender, was appointed to represent me.

Between 2013 and 2017, I was housed at the High Desert State Prison and between the approximate four (4) year period of awaiting trial, never once did Mr. Yanez visit with me to discuss the facts and defenses of my case, and I had only one visit with my case investigator.

The only time I had the opportunity to speak with Mr. Yanez was during courtroom hearings, and even then, he did not discuss any aspects of the facts of my case; did not discuss my side of the story in relation to the incident, or what defense he was actually presenting although I informed him that my actions were

in self-defense to the victim's unprovoked attack against me.

5. That during several of our courtroom conversations, I constantly requested of Mr. Yanez to contact numerous witnesses in my defense and for him to investigate and secure the victim's background to potentially show the victim had a propensity for violence or was violent in nature to support my claim of acting in self-defense.

Mr. Yanez did not contact or interview the potential witnesses I requested of him to contact and he never conducted his own investigation into the victim's background for potential violence as he told me that "the State must provide him with that information upon his request."

Mr. Yanez claimed he asked of the State to provide him with the victim's background history, but the State did not give it to him.

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6. That during the Preliminary Hearing, Dr. Levy, an expert on toxicology and affects of substance abuse, testified as to the many different type's of drugs found in the victim's body and how these combination of drugs would make the victim aggressive, irrational, paranoid and cause hallucinations.

As this expert witness provided favorable scientific evidence testimony of the victim's use of drugs being the potential cause of his unprovoked aggressive attack upon me, I made numerous request of Mr. Yanez to call Dr. Levy as an expert witness during trial to support my claim of acting in self-defense.

Mr. Yanez refused to call Dr. Levy as an expert witness at my jury trial.

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7. That I do not believe Mr. Yanez investigated and represented my case and defense to its full potential to the district court prior to trial and to the jury during trial.

8. That any facts not specifically mentioned in this affidavit are not deemed waived, as additional facts and information may arise after this affidavit is signed.

9. That the contents of this affidavit are true and accurate to the best of my personal knowledge.

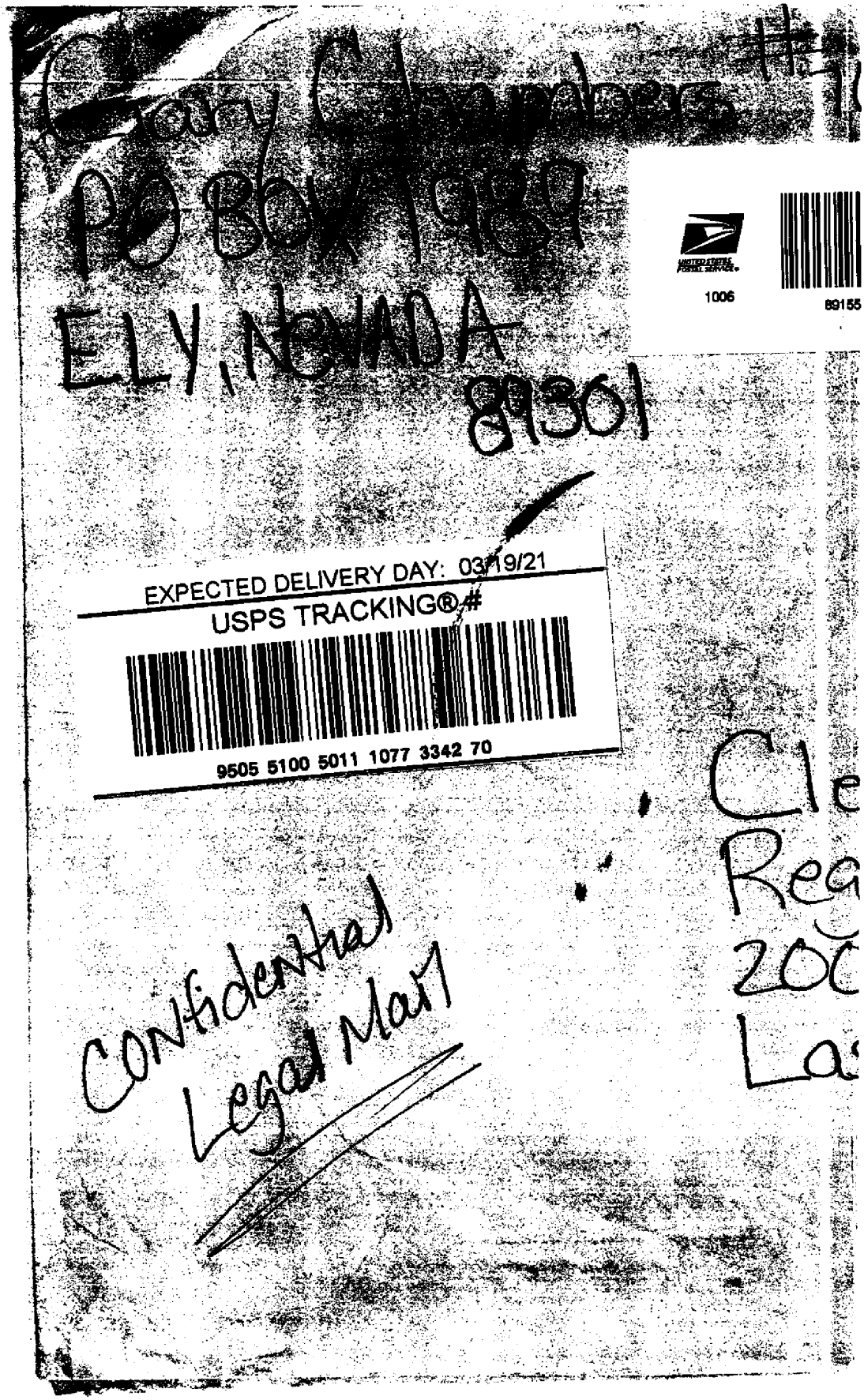
10. That this affidavit is executed under the penalty of perjury pursuant to NRS 208.165.

Dated this 3rd day of September 2019

MR. Gary Chambers #76089

Gary Chambers
#76089

(52)


Gary Chambers #1
PO Box 1989
ELY, NEVADA
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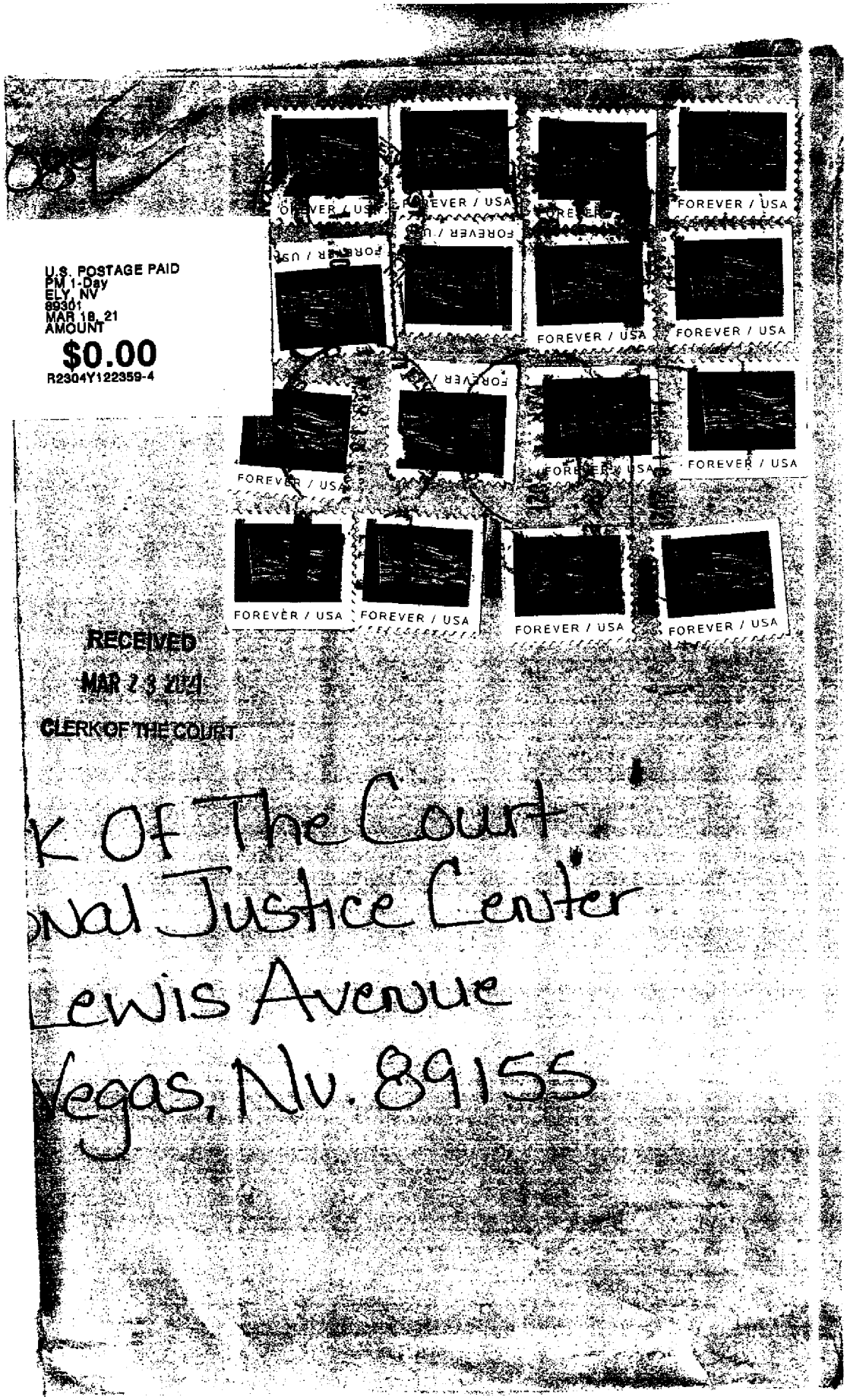
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Original

District Court
Clark County, Nevada

FILED
MAR 24 2021
CLERK OF COURT

Gary Chambers,
Petitioner,

Case No. A-21-831669-W
Dept. 2

Vs.

Dept. No. II

State of Nevada,
Respondent

Memorandum Of Points And Authorities In Support Of Writ Of Habeas Corpus (Post-Conviction)

Comes Now, Gary Chambers, Petitioner, in proper person under Haines v. Kerner, 92 S.Ct. 594, 596 (1972) (Pro Se pleadings are to be held to a less stringent standard than those pleadings drafted by attorneys) and respectfully submits the instant Memorandum.

This Memorandum is submitted in good faith and to assist this Court in reviewing the constitutionality of the enclosed claims.

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RECEIVED
MAR 23 2021
CLERK OF THE COURT

Points And Authorities

Procedural History

On October 10, 2013, Gary Chambers (hereinafter Mr. Chambers), was charged via Information as follows: Count 1- Burglary While in Possession of a Firearm; Count 2 - Murder with Use of a Deadly Weapon; Count 3 - Attempt Robbery With Use of a Deadly Weapon; Count 4 - Attempt Murder with Use of a Deadly Weapon; Count 5 - Battery with Use of a Deadly Weapon, and Count 6 - Possession of a Firearm by Ex-Felon.

On February 21, 2017, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal, a mere three (3) hours and nine (9) minutes prior to the start of trial. Also, on February 21, 2017, Mr. Chambers trial commenced in a bifurcated fashion with Count 6 (Possession of a Firearm by Ex-Felon) not being presented to the jury.

On March 1, 2017, the seventh day of trial, the jury returned a verdict of guilty to: Count 2 - Second Degree Murder With

Use of a Deadly Weapon; Count 4 - Attempt Murder with Use of a Deadly Weapon, and Count 5 - Battery with Use of a Deadly Weapon. A guilty plea was entered pursuant to negotiations as to Count 6 - Possession of a Firearm by Ex-Felon and received no benefit from such negotiations.

On May 23, 2017, Mr. Chambers was sentenced under the violent habitual criminal statute with respect to Counts 2 and 4; and sentenced under the large habitual criminal statute with respect to Counts 5 and 6. As to Counts 2 and 4, Mr. Chambers was sentenced to a term of Life Without the Possibility of Parole with both counts to run concurrent. As to Counts 5 and 6, Mr. Chambers was sentenced to a term of Life Without the Possibility of Parole with both counts to run concurrent, and concurrent to Counts 2 and 4, with zero (0) credit for time served.

The Judgment of Conviction was filed on June 5, 2017.

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On July 2, 2017, Mr. Chambers filed a timely Notice of Appeal.

Mr. Chambers' direct appeal was completely briefed in the Supreme Court of the State of Nevada and on July 24, 2019, the Court issued its decision. (Sup. Ct. No. 73446).

The instant Petition For Writ of Habeas Corpus (Post-Conviction) is before this Court in a timely manner pursuant to NRS 34.726(1) for proper review and consideration as to the constitutionality of the underlying ineffective assistance of counsel claims.

Mr. Chambers, indigent and having filed the instant pro se petition, asserts that due to the complexity of the proceeding; nature of offense's, extensive length of his sentences and ineffective assistance of counsel claim of the failure to investigate, which will require additional discovery to be ascertained, request of the Court to appoint counsel pursuant to NRS 34.750; Renteria-Novoa v. State, 391 P.3d 760, 761-62 (Nev. 2017).

Statement Of The Facts

The alleged victims in this case, Lisa Papoutsis (Papoutsis) and Gary Bly (Bly) were both known drug dealers and drug users according to neighbors and evidence found in their trailer and toxicology reports. Both were living inside a trailer that flagrantly acknowledged that drugs could be purchased there.

The evidence presented at trial showed that in July of 2013, Chambers was abusing methamphetamines. He purchased drugs a Papoutsis' and Bly's trailer on several prior occasions. On July 9, 2013, the day of the shooting, Mr. Chambers drove over to the trailer and walked in the front door. He was there to purchase more meth. He took his wallet out to pay for the drugs, but a heated argument ensued between Mr. Chambers and Papoutsis over the amount to be paid. Bly backed up Lisa and pulled out a gun to challenge Mr. Chambers. A struggle occurred over

the gun and both Papoutsis and Bly were shot.

Unfortunately, Mr. Bly died from his injuries. Scared and shocked by the event, Mr. Chambers fled the scene, leaving his wallet behind inside the trailer. Afterwards, medical testing showed both Papoutsis and Bly had large amounts of amphetamines, opiates, meth, ephedrine, benzodiazepines and other illegal substances in their systems.

At trial, Papoutsis testified that on that morning, she received a call from Mr. Chambers, aka "Money" asking if he could stop by. Papoutsis identified Mr. Chambers in the court room. According to Papoutsis, Mr. Chambers came to her house and asked her if he knew why he was there. She noticed he had car keys, a wallet, and a gun in his hands when he got there. She noticed the gun was in a holster.

Papoutsis testified that Mr. Chambers said something to her that gave her the impression that Mr. Chambers was going to rob her so she called for Bly. When

Bly came into the room, he confronted Mr. Chambers.' Papoutsis claimed she did not see Bly touch Mr. Chambers. Papoutsis further claimed that neither she nor Bly had any weapons. After Bly was shot, she reached for her phone that was on the coffee table and saw Mr. Chambers' gun so she swatted it away, which is when it went off. The bullet went through her hand. Despite her previously given testimony that Bly did not touch Mr. Chambers, she believes the holster came off when Bly and Mr. Chambers confronted each other.

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1. It appears paradoxical that Papoutsis had received a call from Mr. Chambers, whom she claimed not to know, but yet, when he arrives at her trailer with a holstered gun in his hands, she opens the yard gate and kindly welcomes an armed stranger into the trailer home that she lives in without concern.

In a taped statement, Papoutsis told detectives that she believed Mr. Chambers was trying to rob her before and after shooting Bly. She also told detectives that Mr. Chambers removed the gun from a holster when Bly entered the room.

On cross-examination, it was made clear that Papoutsis was not truthful with the police, at the preliminary hearing and at trial because her testimony was not consistent. With regard to her relationship with Mr. Chambers, at first she told detectives that she didn't know why Mr. Chambers came over, but later told them that Chambers came over because he knew Bly and Bly's wife Angel. She then changed her testimony and said she didn't say that. According to Detective Christopher Bunting (Bunting), she never once indicated to him that Chambers had gone over to see Bly.

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Papoutsis claimed she didn't know Chambers very well, but did not ask him why he was coming over when he called. She admits she told detectives that he had been to her trailer before to see a woman named Kristie. Then at trial she said that she did not tell the detective the truth; she does not remember Chambers meeting Kristie at her house. In short, Papoutsis did not want the jury to know that Chambers was in fact going to her house to buy drugs from her and that she is a drug user and dealer but she could not manage to keep her lies straight.

During the interview, the detectives told Papoutsis that he felt like she was leaving something out. When asked what the connection between her and Chambers was, she told the detective that Mr. Chambers was a drug dealer. Papoutsis claimed she was heavily medicated at the time she gave the interview. However, Detective Bunting testified that Papoutsis appeared competent during the interview and did not get the impression that she was unable to answer questions.

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Papoutsis said she never sold meth to Mr. Chambers. She also claimed that she was under the influence of painkillers and stress when she testified at the preliminary hearing. She did not believe her interview with the detective should be given any weight because she was heavily medicated. Papoutsis also admitted to lying under oath at the preliminary hearing, but then said she did not lie, she was "confused and tripped up by the question". She claimed that she never sold drugs to Mr. Chambers because she is not a drug dealer. She stated she did not sell Mr. Chambers drugs, however, Bly did. Papoutsis was the questioned regarding "house rules" posted on a sign regarding drug sales although she denied creating the "house rules" sign or writing the strict rules.

Papoutsis testified at the preliminary hearing that there was no meth or illegal drugs in her house on July 9, 2013. She also claimed that the little plastic baggie on the table did not have meth residue in it.

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After being released from UMC, Papoutsis claimed she went home and found Mr. Chambers' wallet sitting on the coffee table. Rather than calling the police, she called Daniel Plumlee to come pick it up. However, in the pictures taken of the entire crime scene, the alleged wallet is not on the table within a single photograph. Also, when Crime Scene Investigator (CSI), Amy Nemcik (Mencik) conducted a thorough search and processing of the trailer, she did not find a wallet or any identification for Mr. Chambers.

Finally, the officer first on the scene, Brett Brosnahan (Brosnahan) testified that when he questioned Papoutsis, she mentioned nothing about Chambers leaving his wallet.

Mr. Chambers did not take anything from Papoutsis, Bly or from the trailer when he left - not any money or other belongings. Despite Papoutsis' questionable story about how Mr. Chambers came to her trailer and tried to rob her, she testified that Mr. Chambers did

not rob, or attempt to rob her or Bly.

In short, the State's entire case derived from questionable direct evidence which was inconsistent, contradictory and blatant lies from the testimony of Ms. Papoutsis, an undisputed drug addict and drug dealer.

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Standard of Review

Mr. Chambers contends that he was denied his constitutional right to effective assistance of counsel under the Sixth Amendment, as his court appointed counsel failed to conduct adequate investigations in preparation for trial; failed to file the appropriate pretrial motions and various other deficient investigations in violation of the Sixth and Fourteenth Amendment to the U.S. Constitution.

The question of whether a criminal defendant has received effective assistance of counsel presents a mixed question of law and fact, and is subject to independent review. Molina v. State, 87 P.3d 533, 537 (Nev. 2004); Smith v. Ylst, 826 F.2d 872, 875 (9th Cir. 1987), cert denied, 488 U.S. 829, 109 S. ct. 83 (1968).

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."

The Supreme Court has instructed that "the Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984).

The Nevada Supreme Courts review claims of ineffective assistance of counsel under the two-part test set forth in Strickland, 104 S.Ct. 2052 (1984). See Rubio v. State, 194 P.3d 1224 (Nev. 2008). Under Strickland, the defendant must demonstrate that his counsel's performance was deficient, i.e., being "it fell below an objective standard of reasonableness, and that the deficient performance prejudiced the defense. Id. at 466 U.S. at 687; William v. Taylor, 120 S.Ct 1166 (2003).

In United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039 (1984), the Court decided on the same day as Strickland, "the Supreme Court created an exception to the Strickland standard for ineffective.

assistance of counsel and acknowledged that certain circumstances are so egregiously prejudiced that ineffective assistance of counsel will be presumed." Stano v. Dugger, 921 F.2d 741, 744 (11th Cir. 1991)(en Banc)(citing Cronic, 466 U.S. at 658). "Cronic presumes prejudice where there has been an actual breakdown in the adversarial process at trial." Toomey v. Bunnell, 898 F.2d 741, 744 (9th Cir___).

In Powell v. Alabama, 287 U.S. 45, (1932), the Court held that counsel has a duty to perform adequately during pretrial matters to include thorough investigations. Id.___; see also Sanborn v. State, 812 P.2d 1279 (Nev. 1991)(concluding counsel was ineffective in failing to conduct pretrial investigations). The U.S. Supreme Court has concluded that attorneys have a duty to make pretrial motions, particularly motions to suppress evidence, when adequate foundation for the motion exists. Luce v. United States, 469 U.S. 38, 41 (1984).

A claim of ineffective assistance of counsel on appeal is also examined under Strickland, 104 S.Ct. 2052 (1984). To establish prejudice based upon the deficient performance of appellate counsel, the defendant must show that the omitted claim would have a reasonable probability of success on appeal. See Firestone v. State, 83 P.3d 279, 281 (Nev. 2004); Duhamel v. Collins, 955 F.2d 962 (5th Cir. 1992);

With this principle in mind, a district court is obligated to review the merits of the omitted issue. Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

Mr. Chambers asserts the underlying claims of ineffective assistance of counsel violate the Sixth and Fourteenth Amendment to undermine confidence in the verdict and conviction to warrant the reversal and remand for a new trial.

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Legal Arguments

Ground One

Trial Counsel Was Ineffective In Failing To Conduct Adequate And Thorough Investigations In Preparation For Trial, In Violation Of The Sixth And Fourteenth Amendment To The United States Constitution

The Nevada Supreme Court reviews Claims of ineffective assistance of counsel under the "reasonably effective" test set forth in Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052 (1984) adopted in Warden v. Lyons, 683 P.2d 504 (Nev. 1984).

To establish an ineffective assistance of counsel claim under Strickland, two components must be met: (1) deficient performance, and (2) prejudice.

To show deficient performance, a petitioner must demonstrate that counsel's representation "fell below

an objective standard of reasonable-ness" and but for counsel's errors, the results of the proceeding would have been different.

The prejudicial effect is established when a petitioner demonstrates a reasonable probability to undermine the confidence in the outcome of the trial based on counsel's deficient performance. Williams v. Taylor, —U.S —, 120 S.Ct. 1166 (2003).

Deficient Performance

A. Failure To Consult and Communicate

Mr. Chambers asserts that trial counsel (Mr. Yanez) was ineffective in failing to properly consult and communicate with him to discuss the case to learn Mr. Chambers' version of the events and what had caused him to react in a manner of having to act in self-defense from the aggressive attack made upon him

by the victim. (Exhibit A)
Supreme Court Rule 154 (SCR 154) Clearly states:

"A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information. (2) A lawyer shall explain a matter to the extent necessary to permit a client to make informed decisions regarding the representation."

In the instant case, Mr. Chambers' sworn affidavit alleges that from the time in which trial counsel was appointed in 2013 on through to the day his trial commenced in 2017, trial counsel never once made an attorney visit with him while housed at the High Desert State Prison (HDSP) awaiting trial, and only had one (1) visit with his case investigator over the approximate four (4) year period. (Exh. A)

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In Harris By and Through Ramseyer v. Blodgett, 853 F.Supp 1239 (W.D. Wash 1994), the court held that trial counsel had a duty to keep in contact and consult with his client regarding important issues and decisions of his defense. At a minimum, the consultation should be sufficient to determine all legal and relevant information known to the defendant. Id. at 1258; see also United States v. Tucker, 716 F.2d 882 n.12 ( ).

Here, trial counsel's overall lack of communication (i.e., visits, telephone calls and letters) for approximately four (4) years while Mr. Chambers awaited trial coupled with the courtroom visit that were insufficient for Mr. Chambers and trial counsel to discuss relevant aspects of the case had only caused frustration and created an actual breakdown in Mr. Chambers' trust in trial counsel's representation and in the adversarial process.

Without question, the lack of consultation and communication between

(23)

Mr. Chambers and counsel had ultimately deprived Mr. Chambers from providing critical facts and information to assist trial counsel in the preparation of the trial.

"An effective attorney must play the role of an advocate rather than a mere friend of the court." Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988)(quoting Evitts v. Lucey, 469 U.S. 387, 394 (1985))

Here, the circumstances presented in this matter demonstrates the constructive absence of an attorney dedicated to the protection of his client's rights under our adversarial system of justice. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991).

Therefore, trial counsel's failure to consult and communicate with Mr. Chambers for approximately four (4) years is a direct violation of the Sixth Amendment right to effective assistance and Fourteenth Amendment right to equal due process of laws.

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B. Victims Propensity For Violence

In Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002), the Court held;

"[a] lawyer who fails to investigate and introduce into evidence [evidence] that demonstrates his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance."

Id. at 919.

Trial counsel, aware of Mr. Chambers claim of acting in self-defense and the victim having a combination of drugs in his body that makes a person violently aggressive, irrational, paranoid and have hallucinations, refused to conduct an independent investigation into the victims background to secure evidence to demonstrate the victim had a propensity for violence or violent nature to support Mr. Chambers' claim

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of self-defense.

According to Mr. Chambers' sworn affidavit, he made several request for trial counsel to investigate the victims background for evidence of potential violence only to be told by trial counsel that the State (prosecutors) must provide him with the information upon his request. Trial counsel told Mr. Chambers that he requested of the prosecutor to provide him with the victim's background history, but the prosecutor did not give it to him. (Exh. A).

In Sanborn v. State, 812 P.2d 1279 (Nev. 1991), the Court, in reversing and remanding the conviction for a new trial, had concluded that trial counsel was ineffective in failing to conduct an adequate pretrial investigation of the victim to determine if he had the propensity for violence, which would have bolstered the claim of self-defense. Id. at 1281. see also, Tenney v. Dretke, 416 F.3d 404, 408-09 (5th Cir. 2005)(ineffe-

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ctive assistance of counsel for the failure to investigate and call witnesses to elicit critical evidence to show the victim was the aggressor to support self-defense theory.).

In the instant case, as the victim was the aggressor, it was critical for trial counsel to investigate the victim's violent nature and propensity for violence, beyond the prosecutor's failure to provide such information, to demonstrate that Mr. Chambers acted in self-defense.

Accordingly, trial counsel's representation "fell below an objective standard of reasonableness," to amount to the clearest form of deficient performance under Strickland, 104 S.Ct. 2052.

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C. Failure To Interview Witnesses

In Warner v. State, 729 P.2d 1359 (Nev. 1986), the Court, in reversing the conviction based on ineffective assistance of counsel, held:

"... the failure to use the public defender's full time investigator to investigate the background of the victim, ... and contact witnesses, ... constitute inadequate pretrial investigations resulting in the ineffective assistance of counsel."

Id. 1361, citing Strickland, 104 S.Ct. 2052.

In the instant case, Mr. Chambers was represented by the Special Public Defender's Office and despite having a full time investigator, counsel failed to have the case investigator contact and interview the families living in the trailer-park to demonstrate the victim's (both Mr. Bly

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and Ms. Papoutsis) were known drug dealers and drug users who were or could be aggressive and violent in their dealings and drug use, which would have supported Mr. Chambers' claim of acting in self-defense. (Exh. A) See Berry v. Gramley, 74 F.Supp 2d. 808 (N.D. Ill. 1999)(counsel ineffective in failing to visit crime scene or employ an investigator to locate and interview witnesses to corroborate defendant's testimony).

Here, counsel's actions, or lack thereof, "can hardly be said ... [to be] a strategic choice," Sanders v. Ratelle, 21 F.3d 1446, 1175 (9th Cir. 1994), that is consistent with the Sixth Amendment right to effective assistance of counsel to render representation that "fell below an objective standard of reasonableness", demonstrating deficient performance under Strickland, 104 S.Ct. 2052.

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Prejudicial Effect

The prejudicial effect to trial counsel's ineffective assistance in this case is irreparable to ultimately deny Mr. Chambers his Sixth Amendment rights to effective assistance of counsel; the right to a fair trial, and his Fourteenth Amendment right to equal due process of the law to warrant the reversal of the conviction and remand for a new trial.

With this case being a clash between Mr. Chambers and victim's under the influence of numerous types of drugs that cause aggressively violent behavior, it was important for trial counsel to present the jury with every form of viable evidence to demonstrate Mr. Chambers' actual innocence and actions being in self-defense.

Without question, trial counsel's failure to communicate; failure to interview witnesses and failure to

investigate the victim's propensity for violence has ultimately deprived the jury of vital testimony and evidence which caused the jury to reach an unsupported guilty verdict of second degree murder.

When considering the totality of the circumstances, trial counsel's actions, or lack thereof, have created unfair prejudice and there is more than a "reasonable probability" that but for counsel's errors, the results of the trial would have been extremely different. William v. Taylor, 120 S.Ct. 1116 (2003)

The prejudice created has undermined the reliability in the jury's verdict and entire trial process to violate the Sixth Amendment right to effective assistance of counsel and equal due process under the Fourteenth Amendment. With good cause appearing, the conviction must be reversed and remanded for a new trial.

Relief is warranted.

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Ground Two

Trial Counsel Was Ineffective In Failing To Present Expert Witness Testimony By Dr. Levy On The Behavioral Effects Of Drug Addiction, In Violation Of The Sixth And Fourteenth Amendment

In order to assert a claim of ineffective assistance of counsel a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Deficient Performance

Trial counsel was ineffective in failing to call Dr. Levy as an expert witness to provide testimony as to the victim's propensity for extreme violence based upon the combination of drugs found in the victim's body

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at the time of the victims death, which would have supported Mr. Chambers' claim of having to act in self-defense.

During the Preliminary Hearing, Dr. Levy, an expert on toxicology and affects of substance abuse, testified as to the many different type's of drugs found in the victim's body and how these high levels and combination of dangerous drugs would have made the victim aggressive, irrational, paranoid and to hallucinate.

As Dr. Levy provided favorable scientific testimony of the victim's use of drugs being the potential cause of the unprovoked aggressive attack upon Mr. Chambers, it was critical for trial counsel to call Dr. Levy to testify at trial to permit the jury to understand how the average person confronted with a similar situation would be forced to defend themselves from the violent attack of a deranged drug addict.

53

Unfortunately, despite the several request made by Mr. Chambers to have Dr. Levy testify at trial, counsel refused to call Dr. Levy or any other expert witness on the matter. (Exh. A)

NRS 50.275, provides for expert witness testimony or opinion if such expert testimony or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. See Pineda v. State, 88 P.3d 827, 833 (Nev. 2004)

During trial, the State called an expert witness to explain the behavioral effects of drug addiction and instead of trial counsel calling Dr. Levy to refute the State's witness, counsel merely cross-examined the witness without obtaining the disired results.

In Paine v. Massie, 339 F.3d 1194 (10th Cir. 2003), in remanding with instructions, the court concluded trial counsel was ineffective in failing to offer expert testimony on battered

woman syndrome to support a claim of self-defense. The court found that BWS is a "substantial scientifically accepted theory" where expert testimony would assist the trier of fact. Id. 1199.

In Bell v. Miller, 500 F.3d 149 (2nd Cir. 2007), in reversing and remanding, the court concluded counsel was constitutionally ineffective for failing to consult a medical expert regarding reliability of shooting victims identification.

Prior to and during trial, his attorney failed to consider consulting a medical expert or present a medical expert regarding the reliability of the victims memory. Id. at 157.

Here, trial counsel was ineffective in failing to call Dr. Levy as an expert witness, as done during the preliminary hearing, to provide favorable testimony in support of Mr. Chambers' claim of acting in self-defense theory. See Powell v. Hollins, 261 F.3d

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210, 219 (2nd Cir. 2001)(finding ineffectiveness for failure to call witness whose testimony could have bolstered defense theory).

Prejudicial Effect

The prejudicial effect of counsel's failure to call Dr. Levy to trial is irreparable and creates unfair prejudice as Mr. Chambers was denied his right to a fair trial.

Under Strickland, counsel's actions, or lack thereof, demonstrate deficient performance and that but for counsel's errors, the results of the trial would have been different. Wiggins v. Smith, 539 U.S. ___, 123 S.Ct. 2527, 2536 (2003).

Accordingly, Mr. Chambers is entitled to have his conviction reversed and the matter set for a new trial.

Relief is warranted

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Ground Three

Trial Counsel Was Ineffective In Failing To Request A Special Cautionary Instruction Concerning Testimony By A Methamphetamine / Drug Addict, In Violation Of The Sixth And Fourteenth Amendment

Under Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984), two elements must be established by a defendant claiming ineffective assistance of counsel: (1) deficient performance, and (2) prejudice.

Deficient Performance

Trial counsel was ineffective in failing to request a special cautionary instruction concerning the testimony of Ms. Papoutsis, a known Meth and drug addict, in violation of the Sixth Amendment right to effective assistance of counsel; the right to a fair

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trial, and the Fourteenth Amendment right to equal due process of law.

Trial counsel, aware that Ms. Papoutsis was a chronic meth and drug abuser by way of her toxicology report and testimony from the preliminary hearing and trial proceedings, failed to have the district court provide the jury with a "special cautionary instruction," that would caution the jury of the care which must be taken in weighing testimony by a drug addict. See, Crowe v. State, 441 P.2d 90, 94 (Nev. 1968)(holding; "The refusal of the trial court to exercise appropriate procedural safeguards that have many times been ruled essential to a fair trial necessitates a new trial...).

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In Champion v. State, 490 P.2d 1056 (Nev. 1971), the Court held:

"When the State adduces testimony by an addict-informer, the defendant is entitled to careful instructions cautioning the jury 'of the care which must be taken in weighing such testimony.'" (citation omitted).

Id. at 1056

Here, by way of Ms. Papoutsis' toxicology report and her own testimony of being a drug user, coupled with the abundance of inconsistent statements and testimony, she is about as unreliable as most meth addicts as one can find and cannot be trusted to speak the truth.

In Crowe v. State, 441 P.2d 90 (Nev. 1968), the Court held:

"Special cautionary instructions are surely required when the [addicts] testimony is uncorroborated... we would favor careful instructions in form

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and substance to call attention to the character of the testimony of the [addict], leaving to the jury the ultimate question of value and credibility." Id. 95-6

Here, going in, trial counsel was well aware the jury would be hearing and weighing the credibility of testimony offered by a drug addicted witness, and yet, trial counsel was ineffective in failing to request of the district court to provide a "special cautionary instruction" concerning Ms. Papoutsis' testimony which was central to the entire case. Champion, 490 P.2d at 1057.

Had trial counsel requested the special instruction the district court would have granted such request as reflected in Champion, stating:

"... But, whether emanating from the fault of the attorney or from judicial error, plain error occured when [defendant] was not afforded his right." Id. 490 P.2d at 1057.

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Trial counsel's failure to request the above-referenced instruction clearly demonstrates counsel's deficient performance which "fell below an objective standard of reasonableness," under Strickland, 104 S.Ct. 2052, to violate the Sixth Amendment right to the U.S. Constitution.

Prejudicial Effect

The prejudicial effect is irreparable to warrant the reversal of the conviction for a new trial. Counsel's deficient performance in not requesting the appropriate cautionary instruction, eliminated adequate guidance for the jury's consideration of the testimony provided by a drug addicted witness. Crowe, supra; see also, U.S.v. Griffin, 382 F.2d 823 (6th Cir. 1967)(the failure to provide such instructions "sometimes can be fatal to a conviction").

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When considering the totality of the circumstances, Mr. Chambers has demonstrated a "reasonable probability" that but for counsel's errors, the jury would have received adequate guidance for the consideration of testimony given by a drug addicted witness. Thus, the results of the trial would have been extremely different. Strickland, 104 S.Ct. 2052.

Wherefore, counsel's ineffective assistance violates the Sixth and Fourteenth Amendment to warrant the vacating of the conviction.

Relief is warranted

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Request For Evidentiary Hearing

In Berry v. State, 363 P.3d 1148 (Nev. 2015), relying on Mann v. State, 46 P.3d 1228, 1230 (Nev. 2002), the Court held:

> "The court has long recognized a petitioner's right to a post-conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."

Id. at 363 P.3d at 1155; see also Hathaway v. State, 71 P.3d 503, 508 (Nev. 2003) (reversing and remanding district courts denial of a writ of habeas corpus for district court to conduct an evidentiary hearing on petitioner's specific factual allegations contained in the sworn affidavit not belied by the record).

Mr. Chambers' writ of habeas corpus (post-conviction) petition challenges the validity of the jury's verdict and

43

resulting conviction based on claims of ineffective assistance of counsel.

As the ineffective assistance of counsel claims are supported by specific factual allegations, evidence and Mr. Chambers' sworn affidavit (Exhibit A), which are not belied by the record, this Court must conduct an evidentiary hearing to resolve the factual disputes created by such factual allegations and the sworn affidavit. See Vaillancourt v. Warden, 529 P.2d 204 (Nev. 1974)("... it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing.").

Mr. Chambers asserts his trial and appellate counsel were ineffective and in asserting his claims he makes specific factual allegations of events outside the record that warrant an evidentiary hearing. See Downs-Morgan v. United States, 765 F.2d 1534 (11th Cir. 1985)(concluding that the defendant was entitled to an evidentiary hearing to determine whether counsel was

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ineffective based upon the underlying arguments and factual assertions presented in defendants affidavit).

When considering the totality of the circumstances of the factual allegations, evidence and constitutional violations alleged within the petition and supported by Mr. Chambers' sworn affidavit, he is entitled to an evidentiary hearing to resolve the apparent factual disputes within the record and claims of ineffective assistance of counsel.

Good cause appearing, the Court must appoint counsel and conduct an evidentiary hearing.

Relief is warranted.

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Conclusion

Wherefore, Mr. Chambers respectfully request of this Court to grant the petition in its entirety and award the relief so requested of a new trial.

In the alternative, appoint counsel and conduct an evidentiary hearing on the claims of ineffective assistance of counsel and grant the appropriate relief. Grant any other relief deemed appropriate.

Dated this 1ST day of March 2021

MR. Gary Chambers #76089

Gary Chambers
#76089

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CERTIFICATE OF SERVICE

I, Gary Chambers, hereby certify pursuant to NRCP 5(b) that on this 15th day of March, 2021, I did serve a true and correct copy of the foregoing, Memorandum of Points and Authorities,

by giving it to a prison guard at Ely State Prison to deposit in the U.S. Mail, sealed in an envelope, postage pre-paid, addressed to the following:

Steve Wolfson
District Attorney
200 Lewis Ave
Las Vegas, Nv. 89155

Signed,
GARY Chambers # 76089
Gary Chambers # 76089

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Original

Gary Chambers #76089

FILED
MAR 24 2021
CLERK OF COURT

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

Gary Chambers,
Petitioner,

vs.

State of Nevada
Warden; State of Nevada,
Respondents.

CASE NUMBER: A-21-831669-W
Dept. 2
Dept. No.

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, Chambers the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings, or

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(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at NDOC, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 1ST day of MARCH, 2021.

MR. Gary Chambers #76089

In Proper Person

Gary Chambers #76086

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on MARCH 1ST, 2021, he served a copy of the foregoing Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

District Attorney's Office
Address:
200 Lewis Ave
Las Vegas, Nv.
89155

Warden
Address:

Gary Chambers
Petitioner
Gary Chambers #76089

Electronically Filed
03/24/2021 5:40 PM
CLERK OF THE COURT

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Gary Chambers,

Petitioner,

vs.

State of Nevada,

Respondent,

Case No: A-21-831669-W
Department 2

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on March 24, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

June 3, 2021 at 11 am

Calendar on the _____ day of _____, 20____, at the hour of

_____ o'clock for further proceedings.

Dated this 24th day of March, 2021

Carli Kierny

District Court Judge
498 980 96E4 77E7
Carli Kierny
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Gary Chambers, Plaintiff(s)	CASE NO: A-21-831669-W
vs.	DEPT. NO. Department 2
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 3/25/2021

Gary Chambers #76089
ESP
P.O. Box 1989
Ely, NV, 89301

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Gary Chambers, Plaintiff(s) vs. State of Nevada, Defendant(s)	Case No.: A-21-831669-W Department 2

NOTICE OF HEARING

Please be advised that the Plaintiff's Motion for Appointment of Attorney and Request for Evidentiary Hearing in the above-entitled matter is set for hearing as follows:

Date: June 03, 2021

Time: 11:00 AM

Location: RJC Courtroom 16B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

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

STEVEN D. GRIERSON, CEO/Clerk of the Court

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

CERTIFICATE OF SERVICE

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

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

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

GARY LAMAR CHAMBERS,
#877763

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-831669-W

DEPT NO: II

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MEMORANDUM OF POINTS AND AUTHORITIES, AND EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: JUNE 3, 2021
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through KAREN MISHLER, 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), Memorandum of Points and Authorities, and Ex Parte Motion for Appointment of Counsel and Request for 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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On September 9, 2013, GARY CHAMBERS (hereinafter "Petitioner") was charged by way of Criminal Complaint with one (1) count of Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060), one (1) count of Murder with Use of A Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165), one (1) count of Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165), one (1) count of Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 193.330, 200.010, 200.030, 193.165), one (1) count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481.2e), one (1) count of Trafficking in Controlled Substance (Category B Felony – NRS 453.3385.1), and one (1) count of Possession of a Firearm by Ex-Felon (Category B Felony – NRS 202.360). On September 27, 2013, a preliminary hearing was held in Justice Court, Department 5. Bridgett Graham ("Bridgett") was among the witnesses that testified at the preliminary hearing. Subsequently, the Court held Petitioner to answer as to all of the charges alleged in the Criminal Complaint.

On October 10, 2013, the State charged Petitioner by way of Information as follows: Count 1– Burglary While in Possession of a Firearm; Count 2– Murder with Use of a Deadly Weapon; Count 3– Attempt Robbery With Use of a Deadly Weapon; Count 4– Attempt Murder With use of a Deadly Weapon; Count 5– Battery With Use of a Deadly Weapon; and Count 6– Possession of Firearm by Ex-Felon.

After several trial date continuances, on January 26, 2016, Petitioner filed a Motion in Limine to preclude the State from admitting Petitioner's prior convictions. The State filed its opposition on March 2, 2016. Petitioner filed his reply on April 28, 2016. On July 7, 2016, the Court heard argument and denied Petitioner's motion.

On February 21, 2017, Petitioner's jury trial commenced. That same day, and prior to the start of trial, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. On February 22, 2017, the State filed a Motion to Admit Preliminary Hearing Transcript

regarding Bridgett's testimony because she refused to appear at trial despite the State's efforts. On February 24, 2017, the State filed a Motion for Audiovisual Testimony of Cynthia Lacey ("Cynthia").

On March 1, 2017, after seven (7) days of trial, the jury found Petitioner guilty of: Counts 2– Second Degree Murder with Use of a Deadly Weapon, Count 4– Attempt Murder with Use of a Deadly Weapon, and Count 5– Battery With Use of a Deadly Weapon. The jury found Petitioner not guilty on Counts 1 and 3. That same day, Petitioner entered into a Guilty Plea Agreement (hereinafter "GPA") regarding Count 6 – Possession of a Firearm by Ex-Felon (Category B Felony - NRS 202.360).

After the State and Petitioner filed sentencing memoranda, Petitioner was sentenced on May 23, 2017. The Court sentenced Petitioner to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 2– life without the possibility of parole; Count 4– life without the possibility of parole, concurrent with Count 1; Count 5– life without the possibility of parole, concurrent with Count 2; Count 6– life without the possibility of parole, concurrent with Count 2. Petitioner was sentenced under NRS 207.012 for Counts 2 and 4 as well as NRS 207.010 for Counts 5 and 6. Petitioner was awarded zero (0) days credit for time served. The Judgment of Conviction was filed on June 5, 2017.

On July 2, 2017, Petitioner filed a Notice of Appeal. On November 21, 2019, the Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction.

On November 3, 2020, the Court held a Clarification of Sentence Hearing and noted that although Petitioner was adjudicated guilty under the Large Habitual Criminal Statute, his Judgment of Conviction did not include that language. On November 5, 2020, this clerical error was fixed and an Amended Judgment of Conviction was filed.

On March 24, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), Memorandum of Points and Authorities (hereinafter "Memorandum"), a Motion for Appointment of Attorney and a Request for Evidentiary Hearing (hereinafter "Motion"). The State's Response follows.

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STATEMENT OF THE FACTS

On the morning of Tuesday, July 9, 2013, Lisa Papoutsis ("Lisa") was in her trailer at Van's Trailer Oasis, Mobile Home Park ("Van's)". JT Day 3 at 103-04. That morning Lisa decided to run some errands and returned to her trailer around 9:00 a.m. JT Day 3 at 105. Lisa's friend, Gary Bly ("Gary"), had spent the night at Lisa's and planned on running errands with Lisa after she returned that morning. JT Day 3 at 104-05, 109. Once Lisa returned to her trailer she ate breakfast with Gary. JT Day 3 at 106. As Lisa and Gary ate, Lisa received a call from Petitioner. JT Day 3 at 107-08. Petitioner wanted to know if he could stop by Lisa's trailer. JT Day 3 at 107-08. Lisa told him he could and within 15-20 minutes after he called, Petitioner arrived at Lisa's trailer. JT Day 3 at 107-08. Petitioner entered Lisa's trailer through the front door. JT Day 3 at 107-08. Lisa noticed that Gary had made his way towards the restroom when she answered the door. JT Day 3 at 109. Petitioner entered the trailer and Lisa observed that he was holding car keys, a wallet, and a gun. JT Day 3 at 110. Specifically, Lisa noticed the gun was in nylon or cloth-like holster. JT Day 3 at 110. Petitioner then told Lisa, "You know what this is about." JT Day 3 at 128.

After Petitioner's comment, Lisa feared Petitioner was there to rob her so she called out for Gary. JT Day 3 at 111-12. Gary emerged from the back of the trailer and verbally confronted Petitioner. JT Day 3 at 113. Although Gary never touched Petitioner, Lisa testified Petitioner suddenly shot Gary in front of her. JT Day 3 at 113-14. As Gary fell, Lisa reached for her cellphone, but when she turned back to Petitioner he had his gun pointed at her torso. JT Day 3 at 114-15. Lisa "smacked" Petitioner's gun with her left hand. JT Day 3 at 114-15. The gun fired and the bullet struck Lisa's hand. JT Day 3 at 115-16. Petitioner then escaped by running out the front door while Lisa ran out the back door as she sought help. JT Day 3 at 116-17. Lisa noticed some of the maintenance men outside. JT Day 3 at 117.

On the morning of July 9, 2013, Daniel Plumlee ("Daniel"), a maintenance worker at Van's, worked on Lisa's trailer. JT Day 4 at 7-9. That morning, Daniel repaired Lisa's front door. JT Day 4 at 7-9. Once he finished his repairs, Daniel exited Lisa's trailer through the back door and headed towards his office. JT Day 4 at 10-11. As Daniel made his way through

Lisa's yard, he saw Petitioner approaching Lisa's trailer. JT Day 4 at 10-11. Daniel observed Petitioner entering Lisa's yard. JT Day 4 at 10-11. Daniel continued to walk towards his office, but stopped when he heard two gunshots. JT Day 4 at 12-13. Daniel headed back to Lisa's trailer and observed Lisa running out of the backdoor of the trailer as she screamed for help. JT Day 4 at 12-13. Daniel then recognized Petitioner as the man who exited through the front door of Lisa's trailer. JT Day 4 at 12-13. As Petitioner exited the trailer, Daniel observed Petitioner put a gun in his right pocket. JT Day 4 at 14. Petitioner made his way through Lisa's yard and entered the driver's side of a vehicle parked near Lisa's trailer. JT Day 4 at 15-16. Before Petitioner took off, Daniel memorized the license plate of the Petitioner's vehicle and later conveyed the numbers to the responding officers. JT Day 4 at 15-16.

On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he heard screaming and gunshots. JT Day 3 at 68. As Charles looked up, he noticed Bradley Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. JT Day 3 at 69. Both Charles and Bradley entered Lisa's yard. JT Day 3 at 69. Both Charles and Bradley observed Petitioner exiting the front door of Lisa's trailer while holding a gun in his right hand. JT Day 3 at 70, 83, 89, 91. Charles and Bradley testified that when they noticed Petitioners' gun, Petitioner had tucked part of the gun into his pocket. JT Day 3 at 72, 91. Both Charles and Bradley observed Petitioner enter a vehicle that was parked nearby Lisa's trailer. JT Day 3 at 72, 93. Before Petitioner escaped, Bradley noticed a woman sitting in the passenger side of the getaway vehicle. JT Day 3 at 93.

Earlier that morning, Petitioner picked up his daughter and her friend Bridgett from an apartment on Craig and Nellis. Preliminary Hearing Transcript (hereinafter "PHT"), filed July 23, 2014, at 68-69. Bridgett thought Petitioner was giving her a ride to her house. PHT at 68-69. However, Petitioner told the women he needed to retrieve a package and drop some keys off; Petitioner then stopped at Van's. PHT at 69-70. Once he arrived, Petitioner parked his car in front of a trailer. PHT at 69-70. Bridgett saw Petitioner enter a gate and after a few minutes the women heard gunshots. PHT at 71-72. Bridgett then observed Petitioner walking back

towards the car and she asked him what had happened. PHT at 73. Petitioner initially said, "Nothing." PHT at 73. As Petitioner fled the scene in the car Bridgett heard him say, "He shouldn't have wrestled me." PHT at 73-74. Bridgett further testified that a few days prior to July 9, 2013, she heard Petitioner say that he was going "to come up" and "hit a lick." PHT at 78-79, 80. Bridgett believed the former meant Petitioner was going to commit a crime while the latter meant he was going to commit a robbery. PHT at 79-81.

Officer Brett Brosnahan ("Officer Brosnahan") of the Las Vegas Metropolitan Police Department ("Metro") responded to a shooting call at Van's. JT Day 4 at 26-27. On arrival, Officer Brosnahan made contact with Daniel. JT Day 4 at 28-29. Daniel explained to the officer that a shooting occurred and Petitioner fled in a gray vehicle. JT Day 4 at 28-30. Most importantly, Daniel relayed the vehicle's license plate number to Officer Brosnahan. JT Day 4 at 28-30. Officer Brosnahan quickly broadcasted the number over his radio and entered Lisa's trailer. JT Day 4 at 28-30, 32. Inside, he observed a man lying in a semi-fetal position with an apparent gunshot wound to the head. JT Day 4 at 32. Officer Brosnahan also observed a "hysterical" woman with an apparent gunshot wound to her left hand.[1] JT Day 4 at 34. After a backup officer arrived, the officers swept the trailer and did not find any other persons within the trailer. JT Day 4 at 35.

Using the license plate number Daniel reported to Officer Brosnahan and a cell phone number obtained through the course of the investigation, detectives secured a search warrant for an apartment. JT Day 5 at 32-40. Upon executing the warrant, case agent Matthew Gillis ("Officer Gillis") located the vehicle Petitioner used as a getaway car. JT Day 5 at 32-40. Metro then towed the vehicle to a crime lab where it was processed. JT Day 5 at 40-41. Officer Gillis learned that Cynthia Lacey ("Cynthia"), who was later identified as Petitioner's girlfriend, lived in the apartment. JT Day 5 at 42. During their search, officers found

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[1] Both Lisa and Gary were transported to UMC hospital. JT Day 3 at 118; JT Day 4 at 47. Lisa received treatment for a gunshot wound to the hand. JT Day 3 at 118. Gary was pronounced dead and Dr. Telgenhoff performed an autopsy on Gary. JT Day 5 at 47-49. The autopsy revealed the cause of death to be an intermediate-range gunshot wound to the head. JT Day 5 at 47-49. The entrance wound was near the crown of the head, with the projectile traveling left to right, and slightly downward. JT Day 5 at 47-49.

Petitioner's identification cards in Cynthia's apartment. JT Day 5 at 42. Cynthia gave officers information as to Petitioner's whereabouts. JT Day 5 at 43-44. Officers managed to track and arrest Petitioner in the parking lot of a local Jack in the Box by using Cynthia's information. JT Day 5 at 44. Officers arrested Petitioner because Lisa had identified Petitioner as the shooter in a photo lineup. JT Day 5 at 35-38. Additionally, other witnesses participated in double-blind lineups and identified Petitioner as the shooter. JT Day 5 at 35-37, 44-45.

ARGUMENT

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

In the instant Petition and Memorandum, Petitioner claims that trial counsel was ineffective because counsel failed to: (1) conduct an adequate and thorough investigation when he did not communicate with Petitioner, did not independently investigate the victim's propensity for violence, and did not interview witnesses; (2) call expert witness Dr. Levy to testify about the behavioral effects of drug addiction; (3) request a special cautionary jury instruction concerning the jury's consideration of testimony from a drug addict. Memorandum at 1-46; Petition at 1-5. Additionally, on page 44 of his Memorandum he generally asserts that in addition to trial counsel being ineffective, "appellate counsel [was] ineffective [...] in asserting his claims." Memorandum at 44. However, as discussed below each of Petitioner's claims fail.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Additionally, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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

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A. Ground 1: Failure to Conduct Adequate and Thorough Investigations

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Additionally, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id.

A. Failure to consult and communicate

Under Ground 1, Petitioner argues that trial counsel was ineffective for failing to communicate with him for four (4) years about his case. Memorandum at 18-21; Petition at 2-3. According to Petitioner, the hearings in which he spoke with counsel and the alleged one (1) visit he received from his investigator at the prison were insufficient for him to adequately assist counsel in the preparation of his case. Id. Petitioner's claims fail.

As a preliminary matter, Petitioner interestingly cites to an "Exhibit A" as support for his claim, but there is no such exhibit attached to his filings. To the extent Petitioner is referring to the Affidavit he completed, which is attached to his Petition, such affidavit provides only self-serving claims with no citations to the record.

Notwithstanding, Petitioner has failed to demonstrate that counsel's performance was deficient. Petitioner has failed to establish that a lack of in-person meetings resulted in counsel's deficient performance. Indeed, Petitioner was not entitled to a specific amount of communication or a specific relationship with his attorney. See Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Thus, counsel was not deficient. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068.

Additionally, Petitioner has failed to demonstrate prejudice as he has failed to provide "the critical facts and information" he wished to share with his attorney, let alone whether such information would have changed the outcome of this trial. It bears noting that later in his Memorandum, Petitioner stated that counsel was "aware of [Petitioner's] claim of acting in self-defense," which also seems to indicate that his claim is at least partially belied by his own

admission. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has failed to meet his burden and his claim should fail. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068.

To the extent Petitioner asserts that appellate counsel was ineffective for failing to raise this claim on appeal, his argument fails because, as discussed *supra*, his claim is meritless. Thus, Petitioner cannot demonstrate that had the issue been raised he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, this claim should also be denied.

B. Victim's Propensity for Violence

Petitioner argues that counsel was ineffective for failing to independently investigate the background of the deceased victim, Gary Bly. Memorandum at 22-24; Petition at 3. Specifically, Petitioner believes this independent investigation should have been conducted to secure evidence that would demonstrate that the combination of drugs found in Gary's system caused him to act violently and that he had a propensity for violence to support Petitioner's self-defense claim. Memorandum at 22. Also, he claims that counsel ineffectively told him that the State would need to provide this information, which the State failed to provide. Memorandum at 23; Petition at 3. These claims also fail.

Even if counsel had failed to conduct an independent investigation, a point the State does not concede, Petitioner has not and cannot show that not doing an independent investigation into the victim's propensity of violence resulted in deficient performance. Indeed, Petitioner assumes that information regarding the victim's violent propensity actually existed and that it would have been admissible had it been discovered. However, such assumption is mistaken.

NRS 48.045(1)(b) permits the admission of such evidence under only certain circumstances: "evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those facts*." Daniel v. State, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003) (emphasis in original). This is because such evidence is relevant to a defendant's state of mind, specifically whether their belief in the need to use force in self-defense was reasonable. Id. Moreover, evidence of specific acts of a

victim is admissible only when it establishes what the defendant believed about the character of the victim. Id.

Thus, the speculative belief that Gary had a propensity for violence or was under the influence of a substance that would have made him violent, would have only aided Petitioner's defense if he "*was aware*" that Gary had a propensity for violence. Daniel, 119 Nev. at 515, 78 P.3d at 902. Petitioner has failed to allege, let alone demonstrate that he was aware of such facts. Thus, even if counsel had not conducted an independent investigation into the victim's background, doing so would have been of little use if Petitioner was unaware of such facts. Therefore, counsel's performance was not deficient and Petitioner cannot demonstrate that the outcome of the trial would have been different if an independent investigation had been conducted. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner argues that appellate counsel was ineffective for failing to raise this issue on appeal, he has not demonstrated that the claim would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claim should be denied.

C. Failure to Interview Witnesses

Petitioner argues that counsel was ineffective for failing to contact and interview the "families living in the trailer-park" to demonstrate that the victims, Gary and Lisa, were known drug dealers and users who were aggressive and violent, which would have supported his self-defense claim. Memorandum at 25-26. This claim fails for several reasons.

Petitioner fails to demonstrate how interviewing the residents would have supported his self-defense claim, let alone whether they would have provided information that would have helped his case in any capacity. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, the fact that the victims sold narcotics was presented to the jury at trial. JT Day 3 at 18-19, 143. Thus, having the additional testimony, assuming that the testimony would have consisted of information that the victims sold narcotics and had a propensity of violence, would not have changed the outcome of trial as the jury was provided with evidence that the victims sold narcotics regardless. Ultimately, even if the residents had provided this cumulative testimony,

such testimony would not have aided Petitioner's self-defense claim because he would still have had to prove that he was aware of such facts when he acted in self-defense, which as discussed *supra*, he did not do. Daniel, 119 Nev. at 515, 78 P.3d at 902. Most importantly, there is no mechanism by which propensity for violence is admissible to show that the person acted in conformity with that character. NRS 48.045. Moreover, if Petitioner was attempting to present general evidence of the victims alleged violent nature, which does not seem to be the case, Petitioner would only have been permitted to present testimony regarding the victims' character for violence via opinion or reputation testimony through general impressions, not specific acts. NRS 48.045. Accordingly, Petitioner cannot demonstrate that counsel was deficient or that the outcome of his trial would have been different. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068.

To the extent Petitioner claims that appellate counsel was ineffective for raising this claim, just as with his other claims, this claim is meritless so Petitioner has not and cannot demonstrate that had this issue been raised, it would have succeeded on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claims should be denied.

D. Prejudice

In a separate section under Ground 1, Petitioner appears to argue that as a result of counsel's aforementioned deficient performance, Petitioner suffered prejudice. Memorandum at 27-28. More specifically, he claims that had counsel conducted the aforementioned actions, the jury would have received viable evidence that would have demonstrated Petitioner acted in self-defense and thereby was actually innocent of the charged crimes. Memorandum at 27. However, Petitioner has not demonstrated prejudiced.

A self-defense claim generally requires that the proponent of the defense to testify that he acted in self-defense in order to satisfy what is required for a showing of self-defense. See NRS 200.120; NRS 200.160; NRS 200.200. The killing of another human being is considered "justifiable homicide" when the killing is done in necessary self-defense. NRS 200.120. When pleading self-defense, a defendant must establish that he reasonably believed the was imminent danger that the assailant would either kill him or cause serious injury, and that it was absolutely

necessary to use force that resulted in death to save the defendant's life. NRS 200.120; NRS 200.200. To justify a killing in self-defense, the circumstances must be "sufficient to excite the fears of a reasonable person placed in a similar situation." Runion v. State, 1051, 59. "An honest but reasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter." Id. Importantly, a person cannot claim self-defense when they were the first person to engage in the use of force. Johnson v. State, Nev. 405, 407, 551 P.2d 241, 241 (1976).

In this case, Petitioner exercised his right not to testify, and thus it is doubtful he would have been able to raise such a defense regardless of counsel's actions. For instance, only Petitioner could establish that the danger he faced "was so urgent and pressing that" in order to save his own life or to prevent "great bodily harm," he had to shoot the victims. NRS 200.200. Therefore, in addition to the reasons stated above, Petitioner cannot demonstrate that the outcome of his trial would have been different, but for counsel's actions. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, Petitioner cannot demonstrate that had these claims been raised, he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claims should be denied.

B. Ground 2: Failure to Present Dr. Levy to Testify About Behavioral Effects of Drug Addiction

Under Ground 2, Petitioner argues that counsel was ineffective for failing to call Dr. Levy to provide testimony regarding the victim's propensity for violence based on the combination of drugs found in the victim's body. Memorandum at 29-33. Petitioner claims that calling Dr. Levy or another expert witness to testify would have assisted his claim of self-defense and counsel was deficient by not refuting the State's witness who testified to this information and instead chose only to cross-examine the State's witness. Memorandum at 31. This claim for relief also fails.

As a preliminary matter, Petitioner's claim that Dr. Levy should have been called is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Defense counsel did in fact

call Dr. Levy to testify as an expert on drug use and addiction. Defendant's Notice of Expert Witnesses Pursuant to N.R.S. 174.234(2), filed Sept. 22, 2015; JT Day 5 at 88.

In addition to providing testimony about reviewing the blood results from the deceased victim, Gary, and the urine results from the surviving victim, Lisa, Dr. Levy also provided testimony about the effects of substance abuse. JT Day 5 at 92. Dr. Levy testified that methamphetamine, amphetamine, and ephedrine were found in Gary's system and that there was evidence of recent usage. JT Day 5 at 94-95. Dr. Levy also found that Lisa's toxicology report showed she had amphetamine, opiates, and benzodiazepines in her system. JT Day 5 at 99. Dr. Levy also explained to the jury the possible behaviors and symptoms of ingesting methamphetamine, which could include users exhibiting "rapid movements of their extremities." JT Day 5 at 95-96. He also explained that while studies supported that individuals who ingest the substance may exhibit aggressive, violent behavior, the studies are unclear as to whether methamphetamine was the cause of such behavior. JT Day 5 at 96-97. Further she explained that methamphetamine use can cause days and weeks of sleeplessness, which in turn could cause the user to hallucinate and become delusional due to not having slept. JT Day 5 at 97-98. In fact, Dr. Levy went as far as testifying that users who are in a "tweaking state of mind" could be dangerous. JT Day 5 at 98.

Therefore, not only did counsel call Dr. Levy as an expert, but Dr. Levy testified in a favorable way for Petitioner regarding the effects of substance abuse and how it affects the behaviors of individuals, which would have aided his self-defense claim. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For this same reason, Petitioner cannot demonstrate prejudice as Dr. Levy was called as an expert despite his recollection. Id. To the extent Petitioner believes that Dr. Levy should have testified regarding "how the average person confronted with a similar situation would be forced to defend themselves from the violent attack of a deranged drug addict," the analysis does not change. Indeed, had Dr. Levy testified about how the victim acted, such testimony would have been highly speculative and inadmissible. Hallmark v. Eldridge, 124 Nev. 492, 504, 189 P.3d 646, 654 (2008) (explaining that an expert cannot testify that a victim acted in a particular way and had an expert testified

it would have been purely speculative and inadmissible."). For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Accordingly, Petitioner's claim should be denied.

C. Ground 3: Failure to Request a Special Cautionary Jury Instruction

Under Ground 3, Petitioner argues that counsel was ineffective for failing to request a cautionary jury instruction concerning the surviving victim's, Lisa's, testimony who he suggests was a known "meth and drug addict." Memorandum at 34-39. Specifically, he argues that counsel should have requested an instruction that cautioned the jury to take care when weighing the testimony of a "drug addict." Id. This claim also fails.

As a preliminary matter, Petitioner has misrepresented Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968), and Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), in order to support his argument. Specifically, Crowe discussed police informant testimony, not "drug addict" testimony. Id. at 367, 441 P.2d at 95. Interestingly, Petitioner has attempted to apply Crowe to his argument by omitting the term "police" and inputting the term "addicts" to alter a direct quote from the decision wherein the Court explained that a special cautionary instruction was required for uncorroborated police informant testimony. Id.; Memorandum at 36.

Despite Petitioner's argument, Champion is also not instructive. In Champion, 87 Nev. at 543-44, 490 P.2d at 1057, the State conceded that the addict-informer's testimony was unreliable and his testimony was the only evidence the State presented to prove that the defendant sold narcotics. Such factual scenario is completely different from the instant case because: (1) Lisa was not an informer, but instead was a direct victim of the crimes, (2) the State did not and does not concede that Lisa was unreliable, and (3) Lisa's testimony was corroborated by substantial evidence. In addition to being a direct victim of the crime, it does not appear from a review of the record that Lisa was addicted to drugs, but instead was a user. Indeed, Petitioner points to no part of the record where Lisa was referred to as a "drug addict."

Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Lisa was also a percipient witness and was not assisting the police when she observed Petitioner commit the offenses.

Notwithstanding the inapplicability of the cases cited, the jury received the general cautionary instruction pertaining to the weight and credibility of witness testimony, including Jury Instruction Nos. 54 and 57. Instructions to the Jury, filed Mar. 1, 2017. Thus, an "addict-informer" instruction was not needed. Accordingly, counsel was not deficient in failing to request one and Petitioner cannot demonstrate that the outcome of the trial would have been different because the jury was instructed on how to weigh witness testimony. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claim should be denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

In his Memorandum, Petitioner offers a bare and naked explanation that he needs counsel pursuant to NRS 34.750. Memorandum at 4. Likewise, he has included boilerplate language in his Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. Motion at 1-2. However, Petitioner is not entitled to the appointment of counsel.

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se postconviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his

claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Pursuant to NRS 34.750, Petitioner has not demonstrated that counsel should be appointed. Unlike in Renteria-Novoa, Petitioner's Petition should be summarily dismissed because his claims are meritless. Notwithstanding summary dismissal, Petitioner's request should still be denied as he has failed to meet the additional statutory factors under NRS 34.750. Although Petitioner is facing life sentences, that fact alone does not require the appointment of counsel.

Moreover, Petitioner's claims are meritless, as discussed *supra*. Thus, despite Petitioner's assertion, the issues are not difficult. Further, despite the futility of his claims, Petitioner does not and cannot demonstrate that he had any trouble raising his claims.

Additionally, there has been no indication that Petitioner is unable to comprehend the proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the English language, here Petitioner has failed to demonstrate any inability to understand these proceedings. There is also no indication from the record that Petitioner cannot comprehend the instant proceedings as he managed to file the instant Petition, Memorandum, and Motion without the assistance of counsel.

Finally, counsel is not necessary to proceed with further discovery in this case. Due to habeas relief not being warranted, there is no need for additional discovery, let alone counsel's assistance to conduct such investigation. Additionally, Petitioner's claims can be disposed of with the existing record. Therefore, Petitioner's request should be denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

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

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities, and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing.

DATED this 10th day of May, 2021.

Respectfully submitted,

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

BY /s/ KAREN MISHLER
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of May, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

GARY CHAMBERS, BAC #76089
ELY STATE PRISON
P.O. BOX 1989
ELY, NV, 89301

BY /s/ J. MOSLEY
Secretary for the District Attorney's Office

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DISTRICT COURT
CLARK COUNTY, NEVADA

GARY LAMAR CHAMBERS,
#0877763

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-831669-W

DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 3, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable CARLI KIERNY, District Judge, on the 3rd day of June, 2021, the Petitioner not being present, in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARIYA MALKOVA, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On September 9, 2013, GARY CHAMBERS (hereinafter "Petitioner") was charged by way of Criminal Complaint with one (1) count of Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060), one (1) count of Murder with Use of A Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165), one (1) count of Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165), one (1) count of Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 193.330, 200.010, 200.030, 193.165), one (1) count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481.2e), one (1) count of Trafficking in Controlled Substance (Category B Felony – NRS 453.3385.1), and one (1) count of Possession of a Firearm by Ex-Felon (Category B Felony – NRS 202.360). On September 27, 2013, a preliminary hearing was held in Justice Court, Department 5. Bridgett Graham ("Bridgett") was among the witnesses that testified at the preliminary hearing. Subsequently, the Court held Petitioner to answer as to all of the charges alleged in the Criminal Complaint.

On October 10, 2013, the State charged Petitioner by way of Information as follows: Count 1– Burglary While in Possession of a Firearm; Count 2– Murder with Use of a Deadly Weapon; Count 3– Attempt Robbery With Use of a Deadly Weapon; Count 4– Attempt Murder With use of a Deadly Weapon; Count 5– Battery With Use of a Deadly Weapon; and Count 6– Possession of Firearm by Ex-Felon.

After several trial date continuances, on January 26, 2016, Petitioner filed a Motion in Limine to preclude the State from admitting Petitioner's prior convictions. The State filed its opposition on March 2, 2016. Petitioner filed his reply on April 28, 2016. On July 7, 2016, the Court heard argument and denied Petitioner's motion.

On February 21, 2017, Petitioner's jury trial commenced. That same day, and prior to the start of trial, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. On February 22, 2017, the State filed a Motion to Admit Preliminary Hearing Transcript

regarding Bridgett's testimony because she refused to appear at trial despite the State's efforts. On February 24, 2017, the State filed a Motion for Audiovisual Testimony of Cynthia Lacey ("Cynthia").

On March 1, 2017, after seven (7) days of trial, the jury found Petitioner guilty of: Counts 2– Second Degree Murder with Use of a Deadly Weapon, Count 4– Attempt Murder with Use of a Deadly Weapon, and Count 5– Battery With Use of a Deadly Weapon. The jury found Petitioner not guilty on Counts 1 and 3. That same day, Petitioner entered into a Guilty Plea Agreement (hereinafter "GPA") regarding Count 6 – Possession of a Firearm by Ex-Felon (Category B Felony - NRS 202.360).

After the State and Petitioner filed sentencing memoranda, Petitioner was sentenced on May 23, 2017. The Court sentenced Petitioner to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 2– life without the possibility of parole; Count 4– life without the possibility of parole, concurrent with Count 1; Count 5– life without the possibility of parole, concurrent with Count 2; Count 6– life without the possibility of parole, concurrent with Count 2. Petitioner was sentenced under NRS 207.012 for Counts 2 and 4 as well as NRS 207.010 for Counts 5 and 6. Petitioner was awarded zero (0) days credit for time served. The Judgment of Conviction was filed on June 5, 2017.

On July 2, 2017, Petitioner filed a Notice of Appeal. On July 24, 2019, the Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on April 17, 2020.

On November 3, 2020, the Court held a Clarification of Sentence Hearing and noted that although Petitioner was adjudicated guilty under the Large Habitual Criminal Statute, his Judgment of Conviction did not include that language. On November 5, 2020, this clerical error was fixed and an Amended Judgment of Conviction was filed.

On March 24, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), Memorandum of Points and Authorities (hereinafter "Memorandum"), a Motion for Appointment of Attorney and a Request for

Evidentiary Hearing (hereinafter "Motion"). The State filed its Response on May 10, 2021. On June 3, 2021, the Court denied Petitioner's pleadings and found as follows.

FACTS

On the morning of Tuesday, July 9, 2013, Lisa Papoutsis ("Lisa") was in her trailer at Van's Trailer Oasis, Mobile Home Park ("Van's)". JT Day 3 at 103-04. That morning Lisa decided to run some errands and returned to her trailer around 9:00 a.m. JT Day 3 at 105. Lisa's friend, Gary Bly ("Gary"), had spent the night at Lisa's and planned on running errands with Lisa after she returned that morning. JT Day 3 at 104-05, 109. Once Lisa returned to her trailer she ate breakfast with Gary. JT Day 3 at 106. As Lisa and Gary ate, Lisa received a call from Petitioner. JT Day 3 at 107-08. Petitioner wanted to know if he could stop by Lisa's trailer. JT Day 3 at 107-08. Lisa told him he could and within 15-20 minutes after he called, Petitioner arrived at Lisa's trailer. JT Day 3 at 107-08. Petitioner entered Lisa's trailer through the front door. JT Day 3 at 107-08. Lisa noticed that Gary had made his way towards the restroom when she answered the door. JT Day 3 at 109. Petitioner entered the trailer and Lisa observed that he was holding car keys, a wallet, and a gun. JT Day 3 at 110. Specifically, Lisa noticed the gun was in nylon or cloth-like holster. JT Day 3 at 110. Petitioner then told Lisa, "You know what this is about." JT Day 3 at 128.

After Petitioner's comment, Lisa feared Petitioner was there to rob her so she called out for Gary. JT Day 3 at 111-12. Gary emerged from the back of the trailer and verbally confronted Petitioner. JT Day 3 at 113. Although Gary never touched Petitioner, Lisa testified Petitioner suddenly shot Gary in front of her. JT Day 3 at 113-14. As Gary fell, Lisa reached for her cellphone, but when she turned back to Petitioner he had his gun pointed at her torso. JT Day 3 at 114-15. Lisa "smacked" Petitioner's gun with her left hand. JT Day 3 at 114-15. The gun fired and the bullet struck Lisa's hand. JT Day 3 at 115-16. Petitioner then escaped by running out the front door while Lisa ran out the back door as she sought help. JT Day 3 at 116-17. Lisa noticed some of the maintenance men outside. JT Day 3 at 117.

On the morning of July 9, 2013, Daniel Plumlee ("Daniel"), a maintenance worker at Van's, worked on Lisa's trailer. JT Day 4 at 7-9. That morning, Daniel repaired Lisa's front

door. JT Day 4 at 7-9. Once he finished his repairs, Daniel exited Lisa's trailer through the back door and headed towards his office. JT Day 4 at 10-11. As Daniel made his way through Lisa's yard, he saw Petitioner approaching Lisa's trailer. JT Day 4 at 10-11. Daniel observed Petitioner entering Lisa's yard. JT Day 4 at 10-11. Daniel continued to walk towards his office, but stopped when he heard two gunshots. JT Day 4 at 12-13. Daniel headed back to Lisa's trailer and observed Lisa running out of the backdoor of the trailer as she screamed for help. JT Day 4 at 12-13. Daniel then recognized Petitioner as the man who exited through the front door of Lisa's trailer. JT Day 4 at 12-13. As Petitioner exited the trailer, Daniel observed Petitioner put a gun in his right pocket. JT Day 4 at 14. Petitioner made his way through Lisa's yard and entered the driver's side of a vehicle parked near Lisa's trailer. JT Day 4 at 15-16. Before Petitioner took off, Daniel memorized the license plate of the Petitioner's vehicle and later conveyed the numbers to the responding officers. JT Day 4 at 15-16.

On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he heard screaming and gunshots. JT Day 3 at 68. As Charles looked up, he noticed Bradley Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. JT Day 3 at 69. Both Charles and Bradley entered Lisa's yard. JT Day 3 at 69. Both Charles and Bradley observed Petitioner exiting the front door of Lisa's trailer while holding a gun in his right hand. JT Day 3 at 70, 83, 89, 91. Charles and Bradley testified that when they noticed Petitioners' gun, Petitioner had tucked part of the gun into his pocket. JT Day 3 at 72, 91. Both Charles and Bradley observed Petitioner enter a vehicle that was parked nearby Lisa's trailer. JT Day 3 at 72, 93. Before Petitioner escaped, Bradley noticed a woman sitting in the passenger side of the getaway vehicle. JT Day 3 at 93.

Earlier that morning, Petitioner picked up his daughter and her friend Bridgett from an apartment on Craig and Nellis. Preliminary Hearing Transcript (hereinafter "PHT"), filed July 23, 2014, at 68-69. Bridgett thought Petitioner was giving her a ride to her house. PHT at 68-69. However, Petitioner told the women he needed to retrieve a package and drop some keys off; Petitioner then stopped at Van's. PHT at 69-70. Once he arrived, Petitioner parked his car

in front of a trailer. PHT at 69-70. Bridgett saw Petitioner enter a gate and after a few minutes the women heard gunshots. PHT at 71-72. Bridgett then observed Petitioner walking back towards the car and she asked him what had happened. PHT at 73. Petitioner initially said, "Nothing." PHT at 73. As Petitioner fled the scene in the car Bridgett heard him say, "He shouldn't have wrestled me." PHT at 73-74. Bridgett further testified that a few days prior to July 9, 2013, she heard Petitioner say that he was going "to come up" and "hit a lick." PHT at 78-79, 80. Bridgett believed the former meant Petitioner was going to commit a crime while the latter meant he was going to commit a robbery. PHT at 79-81.

Officer Brett Brosnahan ("Officer Brosnahan") of the Las Vegas Metropolitan Police Department ("Metro") responded to a shooting call at Van's. JT Day 4 at 26-27. On arrival, Officer Brosnahan made contact with Daniel. JT Day 4 at 28-29. Daniel explained to the officer that a shooting occurred and Petitioner fled in a gray vehicle. JT Day 4 at 28-30. Most importantly, Daniel relayed the vehicle's license plate number to Officer Brosnahan. JT Day 4 at 28-30. Officer Brosnahan quickly broadcasted the number over his radio and entered Lisa's trailer. JT Day 4 at 28-30, 32. Inside, he observed a man lying in a semi-fetal position with an apparent gunshot wound to the head. JT Day 4 at 32. Officer Brosnahan also observed a "hysterical" woman with an apparent gunshot wound to her left hand.[1] JT Day 4 at 34. After a backup officer arrived, the officers swept the trailer and did not find any other persons within the trailer. JT Day 4 at 35.

Using the license plate number Daniel reported to Officer Brosnahan and a cell phone number obtained through the course of the investigation, detectives secured a search warrant for an apartment. JT Day 5 at 32-40. Upon executing the warrant, case agent Matthew Gillis ("Officer Gillis") located the vehicle Petitioner used as a getaway car. JT Day 5 at 32-40.

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[1] Both Lisa and Gary were transported to UMC hospital. JT Day 3 at 118; JT Day 4 at 47. Lisa received treatment for a gunshot wound to the hand. JT Day 3 at 118. Gary was pronounced dead and Dr. Telgenhoff performed an autopsy on Gary. JT Day 5 at 47-49. The autopsy revealed the cause of death to be an intermediate-range gunshot wound to the head. JT Day 5 at 47-49. The entrance wound was near the crown of the head, with the projectile traveling left to right, and slightly downward. JT Day 5 at 47-49.

Metro then towed the vehicle to a crime lab where it was processed. JT Day 5 at 40-41. Officer Gillis learned that Cynthia Lacey ("Cynthia"), who was later identified as Petitioner's girlfriend, lived in the apartment. JT Day 5 at 42. During their search, officers found Petitioner's identification cards in Cynthia's apartment. JT Day 5 at 42. Cynthia gave officers information as to Petitioner's whereabouts. JT Day 5 at 43-44. Officers managed to track and arrest Petitioner in the parking lot of a local Jack in the Box by using Cynthia's information. JT Day 5 at 44. Officers arrested Petitioner because Lisa had identified Petitioner as the shooter in a photo lineup. JT Day 5 at 35-38. Additionally, other witnesses participated in double-blind lineups and identified Petitioner as the shooter. JT Day 5 at 35-37, 44-45.

ANALYSIS

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

In the instant Petition and Memorandum, Petitioner claims that trial counsel was ineffective because counsel failed to: (1) conduct an adequate and thorough investigation when he did not communicate with Petitioner, did not independently investigate the victim's propensity for violence, and did not interview witnesses; (2) call expert witness Dr. Levy to testify about the behavioral effects of drug addiction; (3) request a special cautionary jury instruction concerning the jury's consideration of testimony from a drug addict. Memorandum at 1-46; Petition at 1-5. Additionally, on page 44 of his Memorandum he generally asserts that in addition to trial counsel being ineffective, "appellate counsel [was] ineffective [...] in asserting his claims." Memorandum at 44. However, this Court finds that while Petitioner may have satisfied the deficiency prong of the Strickland analysis as counsel should have been diligent in trial preparedness, each of Petitioner's claims fail for the reasons stated below and are therefore denied.

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

104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711

(1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"

allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Additionally, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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

counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

A. Ground 1: Failure to Conduct Adequate and Thorough Investigations

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Additionally, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id.

1. Failure to consult and communicate

Under Ground 1, Petitioner argues that trial counsel was ineffective for failing to communicate with him for four (4) years about his case. Memorandum at 18-21; Petition at 2-3. According to Petitioner, the hearings in which he spoke with counsel and the alleged one (1) visit he received from his investigator at the prison were insufficient for him to adequately assist counsel in the preparation of his case. Id. Petitioner's claim is denied.

As a preliminary matter, Petitioner interestingly cites to an "Exhibit A" as support for his claim, but there is no such exhibit attached to his filings. To the extent Petitioner is referring to the Affidavit he completed, which is attached to his Petition, such affidavit provides only self-serving claims with no citations to the record.

As discussed *infra*, while this Court finds that Petitioner may have satisfied the first prong of Strickland as trial counsel should have been prepared, Petitioner has failed to demonstrate prejudice as he has failed to provide "the critical facts and information" he wished to share with his attorney, let alone whether such information would have changed the outcome of this trial as he is still serving his sentence. Moreover, Petitioner received the benefit of his corrected sentence following the State's Motion to Correct. It bears noting that later in his Memorandum, Petitioner stated that counsel was "aware of [Petitioner's] claim of acting in self-defense," which also seems to indicate that his claim is at least partially belied by his own

admission. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has failed to meet his burden and his claim fails. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068.

To the extent Petitioner asserts that appellate counsel was ineffective for failing to raise this claim on appeal, his argument fails because, as discussed *supra*, his claim is meritless. Thus, Petitioner cannot demonstrate that had the issue been raised he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, this claim is denied.

2. Victim's Propensity for Violence

Petitioner argues that counsel was ineffective for failing to independently investigate the background of the deceased victim, Gary Bly. Memorandum at 22-24; Petition at 3. Specifically, Petitioner believes this independent investigation should have been conducted to secure evidence that would demonstrate that the combination of drugs found in Gary's system caused him to act violently and that he had a propensity for violence to support Petitioner's self-defense claim. Memorandum at 22. Also, he claims that counsel ineffectively told him that the State would need to provide this information, which the State failed to provide. Memorandum at 23; Petition at 3. These claims are also meritless and therefore denied.

Even if counsel had failed to conduct an independent investigation, a point the State does not concede, Petitioner has not and cannot show that not doing an independent investigation into the victim's propensity of violence resulted in deficient performance. Indeed, Petitioner assumes that information regarding the victim's violent propensity actually existed and that it would have been admissible had it been discovered. However, such assumption is mistaken.

NRS 48.045(1)(b) permits the admission of such evidence under only certain circumstances: "evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those facts*." Daniel v. State, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003) (emphasis in original). This is because such evidence is relevant to a defendant's state of mind, specifically whether their belief in the need to use force in self-defense was reasonable. Id. Moreover, evidence of specific acts of a

victim is admissible only when it establishes what the defendant believed about the character of the victim. Id.

Thus, the speculative belief that Gary had a propensity for violence or was under the influence of a substance that would have made him violent, would have only aided Petitioner's defense if he "*was aware*" that Gary had a propensity for violence. Daniel, 119 Nev. at 515, 78 P.3d at 902. Petitioner has failed to allege, let alone demonstrate that he was aware of such facts. Thus, even if counsel had not conducted an independent investigation into the victim's background, doing so would have been of little use if Petitioner was unaware of such facts. Therefore, counsel's performance was not deficient and Petitioner cannot demonstrate that the outcome of the trial would have been different if an independent investigation had been conducted. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner argues that appellate counsel was ineffective for failing to raise this issue on appeal, he has not demonstrated that the claim would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

3. Failure to Interview Witnesses

Petitioner argues that counsel was ineffective for failing to contact and interview the "families living in the trailer-park" to demonstrate that the victims, Gary and Lisa, were known drug dealers and users who were aggressive and violent, which would have supported his self-defense claim. Memorandum at 25-26. This is also meritless and therefore denied.

Petitioner fails to demonstrate how interviewing the residents would have supported his self-defense claim, let alone whether they would have provided information that would have helped his case in any capacity. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, the fact that the victims sold narcotics was presented to the jury at trial. JT Day 3 at 18-19, 143. Thus, having the additional testimony, assuming that the testimony would have consisted of information that the victims sold narcotics and had a propensity of violence, would not have

changed the outcome of trial as the jury was provided with evidence that the victims sold narcotics regardless. Ultimately, even if the residents had provided this cumulative testimony, such testimony would not have aided Petitioner's self-defense claim because he would still have had to prove that he was aware of such facts when he acted in self-defense, which as discussed *supra*, he did not do. Daniel, 119 Nev. at 515, 78 P.3d at 902. Most importantly, there is no mechanism by which propensity for violence is admissible to show that the person acted in conformity with that character. NRS 48.045. Moreover, if Petitioner was attempting to present general evidence of the victims alleged violent nature, which does not seem to be the case, Petitioner would only have been permitted to present testimony regarding the victims' character for violence via opinion or reputation testimony through general impressions, not specific acts. NRS 48.045. Accordingly, even if counsel should have been more prepared, which the Court is not definitively finding, Petitioner cannot demonstrate the outcome of his trial would have been different. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. Further, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence.

To the extent Petitioner claims that appellate counsel was ineffective for raising this claim, just as with his other claims, this claim is meritless so Petitioner has not and cannot demonstrate that had this issue been raised, it would have succeeded on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claim is denied.

4. Prejudice

In a separate section under Ground 1, Petitioner appears to argue that as a result of counsel's aforementioned deficient performance, Petitioner suffered prejudice. Memorandum at 27-28. More specifically, he claims that had counsel conducted the aforementioned actions, the jury would have received viable evidence that would have demonstrated Petitioner acted in self-defense and thereby was actually innocent of the charged crimes. Memorandum at 27. However, Petitioner has not demonstrated prejudice.

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A self-defense claim generally requires that the proponent of the defense to testify that he acted in self-defense in order to satisfy what is required for a showing of self-defense. See NRS 200.120; NRS 200.160; NRS 200.200. The killing of another human being is considered "justifiable homicide" when the killing is done in necessary self-defense. NRS 200.120. When pleading self-defense, a defendant must establish that he reasonably believed the was imminent danger that the assailant would either kill him or cause serious injury, and that it was absolutely necessary to use force that resulted in death to save the defendant's life. NRS 200.120; NRS 200.200. To justify a killing in self-defense, the circumstances must be "sufficient to excite the fears of a reasonable person placed in a similar situation." Runion v. State, 1051, 59. "An honest but reasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter." Id. Importantly, a person cannot claim self-defense when they were the first person to engage in the use of force. Johnson v. State, Nev. 405, 407, 551 P.2d 241, 241 (1976).

In this case, Petitioner exercised his right not to testify, and thus it is doubtful he would have been able to raise such a defense regardless of counsel's actions. For instance, only Petitioner could establish that the danger he faced "was so urgent and pressing that" in order to save his own life or to prevent "great bodily harm," he had to shoot the victims. NRS 200.200. Therefore, in addition to the reasons stated above, Petitioner cannot demonstrate that the outcome of his trial would have been different, but for counsel's actions. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, Petitioner cannot demonstrate that had these claims been raised, he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Moreover, Petitioner cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

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B. Ground 2: Failure to Present Dr. Levy to Testify About Behavioral Effects of Drug Addiction

Under Ground 2, Petitioner argues that counsel was ineffective for failing to call Dr. Levy to provide testimony regarding the victim's propensity for violence based on the combination of drugs found in the victim's body. Memorandum at 29-33. Petitioner claims that calling Dr. Levy or another expert witness to testify would have assisted his claim of self-defense and counsel was deficient by not refuting the State's witness who testified to this information and instead chose only to cross-examine the State's witness. Memorandum at 31. This claim is also meritless and therefore denied.

As a preliminary matter, Petitioner's claim that Dr. Levy should have been called is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Defense counsel did in fact call Dr. Levy to testify as an expert on drug use and addiction. Defendant's Notice of Expert Witnesses Pursuant to N.R.S. 174.234(2), filed Sept. 22, 2015; JT Day 5 at 88.

In addition to providing testimony about reviewing the blood results from the deceased victim, Gary, and the urine results from the surviving victim, Lisa, Dr. Levy also provided testimony about the effects of substance abuse. JT Day 5 at 92. Dr. Levy testified that methamphetamine, amphetamine, and ephedrine were found in Gary's system and that there was evidence of recent usage. JT Day 5 at 94-95. Dr. Levy also found that Lisa's toxicology report showed she had amphetamine, opiates, and benzodiazepines in her system. JT Day 5 at 99. Dr. Levy also explained to the jury the possible behaviors and symptoms of ingesting methamphetamine, which could include users exhibiting "rapid movements of their extremities." JT Day 5 at 95-96. He also explained that while studies supported that individuals who ingest the substance may exhibit aggressive, violent behavior, the studies are unclear as to whether methamphetamine was the cause of such behavior. JT Day 5 at 96-97. Further she explained that methamphetamine use can cause days and weeks of sleeplessness, which in turn could cause the user to hallucinate and become delusional due to not having slept. JT Day 5 at 97-98. In fact, Dr. Levy went as far as testifying that users who are in a "tweaking state of mind" could be dangerous. JT Day 5 at 98.

Therefore, not only did counsel call Dr. Levy as an expert, but Dr. Levy testified in a favorable way for Petitioner regarding the effects of substance abuse and how it affects the behaviors of individuals, which would have aided his self-defense claim. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For this same reason, Petitioner cannot demonstrate prejudice as Dr. Levy was called as an expert despite his recollection. Id. To the extent Petitioner believes that Dr. Levy should have testified regarding "how the average person confronted with a similar situation would be forced to defend themselves from the violent attack of a deranged drug addict," the analysis does not change. Indeed, had Dr. Levy testified about how the victim acted, such testimony would have been highly speculative and inadmissible. Hallmark v. Eldridge, 124 Nev. 492, 504, 189 P.3d 646, 654 (2008) (explaining that an expert cannot testify that a victim acted in a particular way and had an expert testified it would have been purely speculative and inadmissible."). For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Furthermore, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Accordingly, Petitioner's claim is denied.

C. Ground 3: Failure to Request a Special Cautionary Jury Instruction

Under Ground 3, Petitioner argues that counsel was ineffective for failing to request a cautionary jury instruction concerning the surviving victim's, Lisa's, testimony who he suggests was a known "meth and drug addict." Memorandum at 34-39. Specifically, he argues that counsel should have requested an instruction that cautioned the jury to take care when weighing the testimony of a "drug addict." Id. This claim is also meritless and therefore denied.

As a preliminary matter, Petitioner has misrepresented Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968), and Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), in order to support his argument. Specifically, Crowe discussed police informant testimony, not "drug addict" testimony. Id. at 367, 441 P.2d at 95. Interestingly, Petitioner has attempted to apply

Crowe to his argument by omitting the term "police" and inputting the term "addicts" to alter a direct quote from the decision wherein the Court explained that a special cautionary instruction was required for uncorroborated police informant testimony. Id.; Memorandum at 36.

Despite Petitioner's argument, Champion is also not instructive. In Champion, 87 Nev. at 543-44, 490 P.2d at 1057, the State conceded that the addict-informer's testimony was unreliable and his testimony was the only evidence the State presented to prove that the defendant sold narcotics. Such factual scenario is completely different from the instant case because: (1) Lisa was not an informer, but instead was a direct victim of the crimes, (2) the State did not and does not concede that Lisa was unreliable, and (3) Lisa's testimony was corroborated by substantial evidence. In addition to being a direct victim of the crime, it does not appear from a review of the record that Lisa was addicted to drugs, but instead was a user. Indeed, Petitioner points to no part of the record where Lisa was referred to as a "drug addict." Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Lisa was also a percipient witness and was not assisting the police when she observed Petitioner commit the offenses.

Notwithstanding the inapplicability of the cases cited, the jury received the general cautionary instruction pertaining to the weight and credibility of witness testimony, including Jury Instruction Nos. 54 and 57. Instructions to the Jury, filed Mar. 1, 2017. Thus, an "addict-informer" instruction was not needed. Accordingly, counsel was not deficient in failing to request one and Petitioner cannot demonstrate that the outcome of the trial would have been different because the jury was instructed on how to weigh witness testimony. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

In his Memorandum, Petitioner offers a bare and naked explanation that he needs counsel pursuant to NRS 34.750. Memorandum at 4. Likewise, he has included boilerplate language in his Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. Motion at 1-2. However, Petitioner is not entitled to the appointment of counsel.

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors

listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se postconviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Pursuant to NRS 34.750, Petitioner has not demonstrated that counsel should be appointed. Unlike in Renteria-Novoa, Petitioner's Petition warrants summary dismissal because his claims are meritless. Notwithstanding summary dismissal, Petitioner's request is denied as he has failed to meet the additional statutory factors under NRS 34.750. Although Petitioner is facing life sentences, that fact alone does not require the appointment of counsel.

Moreover, Petitioner's claims are meritless, as discussed *supra*. Thus, despite Petitioner's assertion, the issues are not difficult. Further, despite the futility of his claims, Petitioner does not and cannot demonstrate that he had any trouble raising his claims.

Additionally, there has been no indication that Petitioner is unable to comprehend the proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the English language, here Petitioner has failed to demonstrate any inability to understand these

proceedings. There is also no indication from the record that Petitioner cannot comprehend the instant proceedings as he managed to file the instant Petition, Memorandum, and Motion without the assistance of counsel.

Finally, counsel is not necessary to proceed with further discovery in this case. Due to habeas relief not being warranted, there is no need for additional discovery, let alone counsel's assistance to conduct such investigation. Additionally, Petitioner's claims can be disposed of with the existing record. Therefore, Petitioner's request is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities, Motion for Appointment of Attorney, and Request for an Evidentiary Hearing shall be, and are, hereby denied.

DATED this _____ day of June, 2021.

Dated this 23rd day of June, 2021

Carli Kierny

DISTRICT JUDGE

E2A D2F 48E9 CA57
Carli Kierny
District Court Judge

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

BY BB For
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

jm/L2

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Gary Chambers, Plaintiff(s)	CASE NO: A-21-831669-W
vs.	DEPT. NO. Department 2
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

Electronically Filed
7/2/2021 9:57 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ

DISTRICT COURT
CLARK COUNTY, NEVADA

GARY CHAMBERS,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-21-831669-W

Dept. No: II

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

PLEASE TAKE NOTICE that on June 23, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on July 2, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 2 day of July 2021, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:
Gary Chambers # 76089
P.O. Box 1989
Ely, NV 89301

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

GARY LAMAR CHAMBERS,
#0877763

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-831669-W

DEPT NO: II

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JUNE 3, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable CARLI KIERNY, District Judge, on the 3rd day of June, 2021, the Petitioner not being present, in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through MARIYA MALKOVA, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On September 9, 2013, GARY CHAMBERS (hereinafter "Petitioner") was charged by way of Criminal Complaint with one (1) count of Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060), one (1) count of Murder with Use of A Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165), one (1) count of Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165), one (1) count of Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 193.330, 200.010, 200.030, 193.165), one (1) count of Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS 200.481.2e), one (1) count of Trafficking in Controlled Substance (Category B Felony – NRS 453.3385.1), and one (1) count of Possession of a Firearm by Ex-Felon (Category B Felony – NRS 202.360). On September 27, 2013, a preliminary hearing was held in Justice Court, Department 5. Bridgett Graham ("Bridgett") was among the witnesses that testified at the preliminary hearing. Subsequently, the Court held Petitioner to answer as to all of the charges alleged in the Criminal Complaint.

On October 10, 2013, the State charged Petitioner by way of Information as follows: Count 1– Burglary While in Possession of a Firearm; Count 2– Murder with Use of a Deadly Weapon; Count 3– Attempt Robbery With Use of a Deadly Weapon; Count 4– Attempt Murder With use of a Deadly Weapon; Count 5– Battery With Use of a Deadly Weapon; and Count 6– Possession of Firearm by Ex-Felon.

After several trial date continuances, on January 26, 2016, Petitioner filed a Motion in Limine to preclude the State from admitting Petitioner's prior convictions. The State filed its opposition on March 2, 2016. Petitioner filed his reply on April 28, 2016. On July 7, 2016, the Court heard argument and denied Petitioner's motion.

On February 21, 2017, Petitioner's jury trial commenced. That same day, and prior to the start of trial, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. On February 22, 2017, the State filed a Motion to Admit Preliminary Hearing Transcript

regarding Bridgett's testimony because she refused to appear at trial despite the State's efforts. On February 24, 2017, the State filed a Motion for Audiovisual Testimony of Cynthia Lacey ("Cynthia").

On March 1, 2017, after seven (7) days of trial, the jury found Petitioner guilty of: Counts 2– Second Degree Murder with Use of a Deadly Weapon, Count 4– Attempt Murder with Use of a Deadly Weapon, and Count 5– Battery With Use of a Deadly Weapon. The jury found Petitioner not guilty on Counts 1 and 3. That same day, Petitioner entered into a Guilty Plea Agreement (hereinafter "GPA") regarding Count 6 – Possession of a Firearm by Ex-Felon (Category B Felony - NRS 202.360).

After the State and Petitioner filed sentencing memoranda, Petitioner was sentenced on May 23, 2017. The Court sentenced Petitioner to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 2– life without the possibility of parole; Count 4– life without the possibility of parole, concurrent with Count 1; Count 5– life without the possibility of parole, concurrent with Count 2; Count 6– life without the possibility of parole, concurrent with Count 2. Petitioner was sentenced under NRS 207.012 for Counts 2 and 4 as well as NRS 207.010 for Counts 5 and 6. Petitioner was awarded zero (0) days credit for time served. The Judgment of Conviction was filed on June 5, 2017.

On July 2, 2017, Petitioner filed a Notice of Appeal. On July 24, 2019, the Nevada Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on April 17, 2020.

On November 3, 2020, the Court held a Clarification of Sentence Hearing and noted that although Petitioner was adjudicated guilty under the Large Habitual Criminal Statute, his Judgment of Conviction did not include that language. On November 5, 2020, this clerical error was fixed and an Amended Judgment of Conviction was filed.

On March 24, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), Memorandum of Points and Authorities (hereinafter "Memorandum"), a Motion for Appointment of Attorney and a Request for

Evidentiary Hearing (hereinafter "Motion"). The State filed its Response on May 10, 2021. On June 3, 2021, the Court denied Petitioner's pleadings and found as follows.

FACTS

On the morning of Tuesday, July 9, 2013, Lisa Papoutsis ("Lisa") was in her trailer at Van's Trailer Oasis, Mobile Home Park ("Van's)". JT Day 3 at 103-04. That morning Lisa decided to run some errands and returned to her trailer around 9:00 a.m. JT Day 3 at 105. Lisa's friend, Gary Bly ("Gary"), had spent the night at Lisa's and planned on running errands with Lisa after she returned that morning. JT Day 3 at 104-05, 109. Once Lisa returned to her trailer she ate breakfast with Gary. JT Day 3 at 106. As Lisa and Gary ate, Lisa received a call from Petitioner. JT Day 3 at 107-08. Petitioner wanted to know if he could stop by Lisa's trailer. JT Day 3 at 107-08. Lisa told him he could and within 15-20 minutes after he called, Petitioner arrived at Lisa's trailer. JT Day 3 at 107-08. Petitioner entered Lisa's trailer through the front door. JT Day 3 at 107-08. Lisa noticed that Gary had made his way towards the restroom when she answered the door. JT Day 3 at 109. Petitioner entered the trailer and Lisa observed that he was holding car keys, a wallet, and a gun. JT Day 3 at 110. Specifically, Lisa noticed the gun was in nylon or cloth-like holster. JT Day 3 at 110. Petitioner then told Lisa, "You know what this is about." JT Day 3 at 128.

After Petitioner's comment, Lisa feared Petitioner was there to rob her so she called out for Gary. JT Day 3 at 111-12. Gary emerged from the back of the trailer and verbally confronted Petitioner. JT Day 3 at 113. Although Gary never touched Petitioner, Lisa testified Petitioner suddenly shot Gary in front of her. JT Day 3 at 113-14. As Gary fell, Lisa reached for her cellphone, but when she turned back to Petitioner he had his gun pointed at her torso. JT Day 3 at 114-15. Lisa "smacked" Petitioner's gun with her left hand. JT Day 3 at 114-15. The gun fired and the bullet struck Lisa's hand. JT Day 3 at 115-16. Petitioner then escaped by running out the front door while Lisa ran out the back door as she sought help. JT Day 3 at 116-17. Lisa noticed some of the maintenance men outside. JT Day 3 at 117.

On the morning of July 9, 2013, Daniel Plumlee ("Daniel"), a maintenance worker at Van's, worked on Lisa's trailer. JT Day 4 at 7-9. That morning, Daniel repaired Lisa's front

door. JT Day 4 at 7-9. Once he finished his repairs, Daniel exited Lisa's trailer through the back door and headed towards his office. JT Day 4 at 10-11. As Daniel made his way through Lisa's yard, he saw Petitioner approaching Lisa's trailer. JT Day 4 at 10-11. Daniel observed Petitioner entering Lisa's yard. JT Day 4 at 10-11. Daniel continued to walk towards his office, but stopped when he heard two gunshots. JT Day 4 at 12-13. Daniel headed back to Lisa's trailer and observed Lisa running out of the backdoor of the trailer as she screamed for help. JT Day 4 at 12-13. Daniel then recognized Petitioner as the man who exited through the front door of Lisa's trailer. JT Day 4 at 12-13. As Petitioner exited the trailer, Daniel observed Petitioner put a gun in his right pocket. JT Day 4 at 14. Petitioner made his way through Lisa's yard and entered the driver's side of a vehicle parked near Lisa's trailer. JT Day 4 at 15-16. Before Petitioner took off, Daniel memorized the license plate of the Petitioner's vehicle and later conveyed the numbers to the responding officers. JT Day 4 at 15-16.

On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he heard screaming and gunshots. JT Day 3 at 68. As Charles looked up, he noticed Bradley Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. JT Day 3 at 69. Both Charles and Bradley entered Lisa's yard. JT Day 3 at 69. Both Charles and Bradley observed Petitioner exiting the front door of Lisa's trailer while holding a gun in his right hand. JT Day 3 at 70, 83, 89, 91. Charles and Bradley testified that when they noticed Petitioners' gun, Petitioner had tucked part of the gun into his pocket. JT Day 3 at 72, 91. Both Charles and Bradley observed Petitioner enter a vehicle that was parked nearby Lisa's trailer. JT Day 3 at 72, 93. Before Petitioner escaped, Bradley noticed a woman sitting in the passenger side of the getaway vehicle. JT Day 3 at 93.

Earlier that morning, Petitioner picked up his daughter and her friend Bridgett from an apartment on Craig and Nellis. Preliminary Hearing Transcript (hereinafter "PHT"), filed July 23, 2014, at 68-69. Bridgett thought Petitioner was giving her a ride to her house. PHT at 68-69. However, Petitioner told the women he needed to retrieve a package and drop some keys off; Petitioner then stopped at Van's. PHT at 69-70. Once he arrived, Petitioner parked his car

in front of a trailer. PHT at 69-70. Bridgett saw Petitioner enter a gate and after a few minutes the women heard gunshots. PHT at 71-72. Bridgett then observed Petitioner walking back towards the car and she asked him what had happened. PHT at 73. Petitioner initially said, "Nothing." PHT at 73. As Petitioner fled the scene in the car Bridgett heard him say, "He shouldn't have wrestled me." PHT at 73-74. Bridgett further testified that a few days prior to July 9, 2013, she heard Petitioner say that he was going "to come up" and "hit a lick." PHT at 78-79, 80. Bridgett believed the former meant Petitioner was going to commit a crime while the latter meant he was going to commit a robbery. PHT at 79-81.

Officer Brett Brosnahan ("Officer Brosnahan") of the Las Vegas Metropolitan Police Department ("Metro") responded to a shooting call at Van's. JT Day 4 at 26-27. On arrival, Officer Brosnahan made contact with Daniel. JT Day 4 at 28-29. Daniel explained to the officer that a shooting occurred and Petitioner fled in a gray vehicle. JT Day 4 at 28-30. Most importantly, Daniel relayed the vehicle's license plate number to Officer Brosnahan. JT Day 4 at 28-30. Officer Brosnahan quickly broadcasted the number over his radio and entered Lisa's trailer. JT Day 4 at 28-30, 32. Inside, he observed a man lying in a semi-fetal position with an apparent gunshot wound to the head. JT Day 4 at 32. Officer Brosnahan also observed a "hysterical" woman with an apparent gunshot wound to her left hand.[1] JT Day 4 at 34. After a backup officer arrived, the officers swept the trailer and did not find any other persons within the trailer. JT Day 4 at 35.

Using the license plate number Daniel reported to Officer Brosnahan and a cell phone number obtained through the course of the investigation, detectives secured a search warrant for an apartment. JT Day 5 at 32-40. Upon executing the warrant, case agent Matthew Gillis ("Officer Gillis") located the vehicle Petitioner used as a getaway car. JT Day 5 at 32-40.

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[1] Both Lisa and Gary were transported to UMC hospital. JT Day 3 at 118; JT Day 4 at 47. Lisa received treatment for a gunshot wound to the hand. JT Day 3 at 118. Gary was pronounced dead and Dr. Telgenhoff performed an autopsy on Gary. JT Day 5 at 47-49. The autopsy revealed the cause of death to be an intermediate-range gunshot wound to the head. JT Day 5 at 47-49. The entrance wound was near the crown of the head, with the projectile traveling left to right, and slightly downward. JT Day 5 at 47-49.

Metro then towed the vehicle to a crime lab where it was processed. JT Day 5 at 40-41. Officer Gillis learned that Cynthia Lacey ("Cynthia"), who was later identified as Petitioner's girlfriend, lived in the apartment. JT Day 5 at 42. During their search, officers found Petitioner's identification cards in Cynthia's apartment. JT Day 5 at 42. Cynthia gave officers information as to Petitioner's whereabouts. JT Day 5 at 43-44. Officers managed to track and arrest Petitioner in the parking lot of a local Jack in the Box by using Cynthia's information. JT Day 5 at 44. Officers arrested Petitioner because Lisa had identified Petitioner as the shooter in a photo lineup. JT Day 5 at 35-38. Additionally, other witnesses participated in double-blind lineups and identified Petitioner as the shooter. JT Day 5 at 35-37, 44-45.

ANALYSIS

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

In the instant Petition and Memorandum, Petitioner claims that trial counsel was ineffective because counsel failed to: (1) conduct an adequate and thorough investigation when he did not communicate with Petitioner, did not independently investigate the victim's propensity for violence, and did not interview witnesses; (2) call expert witness Dr. Levy to testify about the behavioral effects of drug addiction; (3) request a special cautionary jury instruction concerning the jury's consideration of testimony from a drug addict. Memorandum at 1-46; Petition at 1-5. Additionally, on page 44 of his Memorandum he generally asserts that in addition to trial counsel being ineffective, "appellate counsel [was] ineffective [...] in asserting his claims." Memorandum at 44. However, this Court finds that while Petitioner may have satisfied the deficiency prong of the Strickland analysis as counsel should have been diligent in trial preparedness, each of Petitioner's claims fail for the reasons stated below and are therefore denied.

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

104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711

(1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"

allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992).

Additionally, there is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

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

counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

A. Ground 1: Failure to Conduct Adequate and Thorough Investigations

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Additionally, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id.

1. Failure to consult and communicate

Under Ground 1, Petitioner argues that trial counsel was ineffective for failing to communicate with him for four (4) years about his case. Memorandum at 18-21; Petition at 2-3. According to Petitioner, the hearings in which he spoke with counsel and the alleged one (1) visit he received from his investigator at the prison were insufficient for him to adequately assist counsel in the preparation of his case. Id. Petitioner's claim is denied.

As a preliminary matter, Petitioner interestingly cites to an "Exhibit A" as support for his claim, but there is no such exhibit attached to his filings. To the extent Petitioner is referring to the Affidavit he completed, which is attached to his Petition, such affidavit provides only self-serving claims with no citations to the record.

As discussed *infra*, while this Court finds that Petitioner may have satisfied the first prong of Strickland as trial counsel should have been prepared, Petitioner has failed to demonstrate prejudice as he has failed to provide "the critical facts and information" he wished to share with his attorney, let alone whether such information would have changed the outcome of this trial as he is still serving his sentence. Moreover, Petitioner received the benefit of his corrected sentence following the State's Motion to Correct. It bears noting that later in his Memorandum, Petitioner stated that counsel was "aware of [Petitioner's] claim of acting in self-defense," which also seems to indicate that his claim is at least partially belied by his own

admission. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner has failed to meet his burden and his claim fails. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068.

To the extent Petitioner asserts that appellate counsel was ineffective for failing to raise this claim on appeal, his argument fails because, as discussed *supra*, his claim is meritless. Thus, Petitioner cannot demonstrate that had the issue been raised he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, this claim is denied.

2. Victim's Propensity for Violence

Petitioner argues that counsel was ineffective for failing to independently investigate the background of the deceased victim, Gary Bly. Memorandum at 22-24; Petition at 3. Specifically, Petitioner believes this independent investigation should have been conducted to secure evidence that would demonstrate that the combination of drugs found in Gary's system caused him to act violently and that he had a propensity for violence to support Petitioner's self-defense claim. Memorandum at 22. Also, he claims that counsel ineffectively told him that the State would need to provide this information, which the State failed to provide. Memorandum at 23; Petition at 3. These claims are also meritless and therefore denied.

Even if counsel had failed to conduct an independent investigation, a point the State does not concede, Petitioner has not and cannot show that not doing an independent investigation into the victim's propensity of violence resulted in deficient performance. Indeed, Petitioner assumes that information regarding the victim's violent propensity actually existed and that it would have been admissible had it been discovered. However, such assumption is mistaken.

NRS 48.045(1)(b) permits the admission of such evidence under only certain circumstances: "evidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those facts*." Daniel v. State, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003) (emphasis in original). This is because such evidence is relevant to a defendant's state of mind, specifically whether their belief in the need to use force in self-defense was reasonable. Id. Moreover, evidence of specific acts of a

victim is admissible only when it establishes what the defendant believed about the character of the victim. Id.

Thus, the speculative belief that Gary had a propensity for violence or was under the influence of a substance that would have made him violent, would have only aided Petitioner's defense if he "*was aware*" that Gary had a propensity for violence. Daniel, 119 Nev. at 515, 78 P.3d at 902. Petitioner has failed to allege, let alone demonstrate that he was aware of such facts. Thus, even if counsel had not conducted an independent investigation into the victim's background, doing so would have been of little use if Petitioner was unaware of such facts. Therefore, counsel's performance was not deficient and Petitioner cannot demonstrate that the outcome of the trial would have been different if an independent investigation had been conducted. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner argues that appellate counsel was ineffective for failing to raise this issue on appeal, he has not demonstrated that the claim would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

3. Failure to Interview Witnesses

Petitioner argues that counsel was ineffective for failing to contact and interview the "families living in the trailer-park" to demonstrate that the victims, Gary and Lisa, were known drug dealers and users who were aggressive and violent, which would have supported his self-defense claim. Memorandum at 25-26. This is also meritless and therefore denied.

Petitioner fails to demonstrate how interviewing the residents would have supported his self-defense claim, let alone whether they would have provided information that would have helped his case in any capacity. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, the fact that the victims sold narcotics was presented to the jury at trial. JT Day 3 at 18-19, 143. Thus, having the additional testimony, assuming that the testimony would have consisted of information that the victims sold narcotics and had a propensity of violence, would not have

changed the outcome of trial as the jury was provided with evidence that the victims sold narcotics regardless. Ultimately, even if the residents had provided this cumulative testimony, such testimony would not have aided Petitioner's self-defense claim because he would still have had to prove that he was aware of such facts when he acted in self-defense, which as discussed *supra*, he did not do. Daniel, 119 Nev. at 515, 78 P.3d at 902. Most importantly, there is no mechanism by which propensity for violence is admissible to show that the person acted in conformity with that character. NRS 48.045. Moreover, if Petitioner was attempting to present general evidence of the victims alleged violent nature, which does not seem to be the case, Petitioner would only have been permitted to present testimony regarding the victims' character for violence via opinion or reputation testimony through general impressions, not specific acts. NRS 48.045. Accordingly, even if counsel should have been more prepared, which the Court is not definitively finding, Petitioner cannot demonstrate the outcome of his trial would have been different. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. Further, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence.

To the extent Petitioner claims that appellate counsel was ineffective for raising this claim, just as with his other claims, this claim is meritless so Petitioner has not and cannot demonstrate that had this issue been raised, it would have succeeded on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Therefore, Petitioner's claim is denied.

4. Prejudice

In a separate section under Ground 1, Petitioner appears to argue that as a result of counsel's aforementioned deficient performance, Petitioner suffered prejudice. Memorandum at 27-28. More specifically, he claims that had counsel conducted the aforementioned actions, the jury would have received viable evidence that would have demonstrated Petitioner acted in self-defense and thereby was actually innocent of the charged crimes. Memorandum at 27. However, Petitioner has not demonstrated prejudice.

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A self-defense claim generally requires that the proponent of the defense to testify that he acted in self-defense in order to satisfy what is required for a showing of self-defense. See NRS 200.120; NRS 200.160; NRS 200.200. The killing of another human being is considered "justifiable homicide" when the killing is done in necessary self-defense. NRS 200.120. When pleading self-defense, a defendant must establish that he reasonably believed the was imminent danger that the assailant would either kill him or cause serious injury, and that it was absolutely necessary to use force that resulted in death to save the defendant's life. NRS 200.120; NRS 200.200. To justify a killing in self-defense, the circumstances must be "sufficient to excite the fears of a reasonable person placed in a similar situation." Runion v. State, 1051, 59. "An honest but reasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter." Id. Importantly, a person cannot claim self-defense when they were the first person to engage in the use of force. Johnson v. State, Nev. 405, 407, 551 P.2d 241, 241 (1976).

In this case, Petitioner exercised his right not to testify, and thus it is doubtful he would have been able to raise such a defense regardless of counsel's actions. For instance, only Petitioner could establish that the danger he faced "was so urgent and pressing that" in order to save his own life or to prevent "great bodily harm," he had to shoot the victims. NRS 200.200. Therefore, in addition to the reasons stated above, Petitioner cannot demonstrate that the outcome of his trial would have been different, but for counsel's actions. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, Petitioner cannot demonstrate that had these claims been raised, he would have had a reasonable probability of success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Moreover, Petitioner cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

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B. Ground 2: Failure to Present Dr. Levy to Testify About Behavioral Effects of Drug Addiction

Under Ground 2, Petitioner argues that counsel was ineffective for failing to call Dr. Levy to provide testimony regarding the victim's propensity for violence based on the combination of drugs found in the victim's body. Memorandum at 29-33. Petitioner claims that calling Dr. Levy or another expert witness to testify would have assisted his claim of self-defense and counsel was deficient by not refuting the State's witness who testified to this information and instead chose only to cross-examine the State's witness. Memorandum at 31. This claim is also meritless and therefore denied.

As a preliminary matter, Petitioner's claim that Dr. Levy should have been called is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Defense counsel did in fact call Dr. Levy to testify as an expert on drug use and addiction. Defendant's Notice of Expert Witnesses Pursuant to N.R.S. 174.234(2), filed Sept. 22, 2015; JT Day 5 at 88.

In addition to providing testimony about reviewing the blood results from the deceased victim, Gary, and the urine results from the surviving victim, Lisa, Dr. Levy also provided testimony about the effects of substance abuse. JT Day 5 at 92. Dr. Levy testified that methamphetamine, amphetamine, and ephedrine were found in Gary's system and that there was evidence of recent usage. JT Day 5 at 94-95. Dr. Levy also found that Lisa's toxicology report showed she had amphetamine, opiates, and benzodiazepines in her system. JT Day 5 at 99. Dr. Levy also explained to the jury the possible behaviors and symptoms of ingesting methamphetamine, which could include users exhibiting "rapid movements of their extremities." JT Day 5 at 95-96. He also explained that while studies supported that individuals who ingest the substance may exhibit aggressive, violent behavior, the studies are unclear as to whether methamphetamine was the cause of such behavior. JT Day 5 at 96-97. Further she explained that methamphetamine use can cause days and weeks of sleeplessness, which in turn could cause the user to hallucinate and become delusional due to not having slept. JT Day 5 at 97-98. In fact, Dr. Levy went as far as testifying that users who are in a "tweaking state of mind" could be dangerous. JT Day 5 at 98.

Therefore, not only did counsel call Dr. Levy as an expert, but Dr. Levy testified in a favorable way for Petitioner regarding the effects of substance abuse and how it affects the behaviors of individuals, which would have aided his self-defense claim. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For this same reason, Petitioner cannot demonstrate prejudice as Dr. Levy was called as an expert despite his recollection. Id. To the extent Petitioner believes that Dr. Levy should have testified regarding "how the average person confronted with a similar situation would be forced to defend themselves from the violent attack of a deranged drug addict," the analysis does not change. Indeed, had Dr. Levy testified about how the victim acted, such testimony would have been highly speculative and inadmissible. Hallmark v. Eldridge, 124 Nev. 492, 504, 189 P.3d 646, 654 (2008) (explaining that an expert cannot testify that a victim acted in a particular way and had an expert testified it would have been purely speculative and inadmissible."). For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Furthermore, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Accordingly, Petitioner's claim is denied.

C. Ground 3: Failure to Request a Special Cautionary Jury Instruction

Under Ground 3, Petitioner argues that counsel was ineffective for failing to request a cautionary jury instruction concerning the surviving victim's, Lisa's, testimony who he suggests was a known "meth and drug addict." Memorandum at 34-39. Specifically, he argues that counsel should have requested an instruction that cautioned the jury to take care when weighing the testimony of a "drug addict." Id. This claim is also meritless and therefore denied.

As a preliminary matter, Petitioner has misrepresented Crowe v. State, 84 Nev. 358, 441 P.2d 90 (1968), and Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), in order to support his argument. Specifically, Crowe discussed police informant testimony, not "drug addict" testimony. Id. at 367, 441 P.2d at 95. Interestingly, Petitioner has attempted to apply

Crowe to his argument by omitting the term "police" and inputting the term "addicts" to alter a direct quote from the decision wherein the Court explained that a special cautionary instruction was required for uncorroborated police informant testimony. Id.; Memorandum at 36.

Despite Petitioner's argument, Champion is also not instructive. In Champion, 87 Nev. at 543-44, 490 P.2d at 1057, the State conceded that the addict-informer's testimony was unreliable and his testimony was the only evidence the State presented to prove that the defendant sold narcotics. Such factual scenario is completely different from the instant case because: (1) Lisa was not an informer, but instead was a direct victim of the crimes, (2) the State did not and does not concede that Lisa was unreliable, and (3) Lisa's testimony was corroborated by substantial evidence. In addition to being a direct victim of the crime, it does not appear from a review of the record that Lisa was addicted to drugs, but instead was a user. Indeed, Petitioner points to no part of the record where Lisa was referred to as a "drug addict." Hargrove, 100 Nev. at 502, 686 P.2d at 225. Regardless, Lisa was also a percipient witness and was not assisting the police when she observed Petitioner commit the offenses.

Notwithstanding the inapplicability of the cases cited, the jury received the general cautionary instruction pertaining to the weight and credibility of witness testimony, including Jury Instruction Nos. 54 and 57. Instructions to the Jury, filed Mar. 1, 2017. Thus, an "addict-informer" instruction was not needed. Accordingly, counsel was not deficient in failing to request one and Petitioner cannot demonstrate that the outcome of the trial would have been different because the jury was instructed on how to weigh witness testimony. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, to the extent Petitioner claims that appellate counsel was ineffective for failing to raise this issue on appeal, he cannot demonstrate that had the issue been raised he would have been successful because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner cannot demonstrate prejudice because, as mentioned *supra*, he received the benefit of his corrected sentence and the proceedings would not have been different as he is still serving his sentence. Therefore, Petitioner's claim is denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

In his Memorandum, Petitioner offers a bare and naked explanation that he needs counsel pursuant to NRS 34.750. Memorandum at 4. Likewise, he has included boilerplate language in his Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. Motion at 1-2. However, Petitioner is not entitled to the appointment of counsel.

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

The Nevada Legislature has, however, given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition *is not dismissed summarily*, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
> (a) The issues are difficult;
> (b) The Defendant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors

listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se postconviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Pursuant to NRS 34.750, Petitioner has not demonstrated that counsel should be appointed. Unlike in Renteria-Novoa, Petitioner's Petition warrants summary dismissal because his claims are meritless. Notwithstanding summary dismissal, Petitioner's request is denied as he has failed to meet the additional statutory factors under NRS 34.750. Although Petitioner is facing life sentences, that fact alone does not require the appointment of counsel.

Moreover, Petitioner's claims are meritless, as discussed *supra*. Thus, despite Petitioner's assertion, the issues are not difficult. Further, despite the futility of his claims, Petitioner does not and cannot demonstrate that he had any trouble raising his claims.

Additionally, there has been no indication that Petitioner is unable to comprehend the proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the English language, here Petitioner has failed to demonstrate any inability to understand these

proceedings. There is also no indication from the record that Petitioner cannot comprehend the instant proceedings as he managed to file the instant Petition, Memorandum, and Motion without the assistance of counsel.

Finally, counsel is not necessary to proceed with further discovery in this case. Due to habeas relief not being warranted, there is no need for additional discovery, let alone counsel's assistance to conduct such investigation. Additionally, Petitioner's claims can be disposed of with the existing record. Therefore, Petitioner's request is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities, Motion for Appointment of Attorney, and Request for an Evidentiary Hearing shall be, and are, hereby denied.

DATED this _____ day of June, 2021.

Dated this 23rd day of June, 2021

Carli Kierny

DISTRICT JUDGE

E2A D2F 48E9 CA57
Carli Kierny
District Court Judge

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

BY BB For
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730

jm/L2

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Gary Chambers, Plaintiff(s)	CASE NO: A-21-831669-W
vs.	DEPT. NO. Department 2
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

DISTRICT COURT

CLARK COUNTY, NEVADA

GARY CHAMBERS,

PETITIONER, CASE NO. A-21-831669-W

VS DEPT NO. 2

THE STATE OF NEVADA,

RESPONDENT,

/

NOTICE OF APPEAL

PLEASE TAKE NOTICE; THAT PETITIONER, GARY CHAMBERS, THE PETITIONER, DO HEREBY FILE THIS NOTICE OF APPEAL FROM THE DENIAL OF EIGHTH JUDICIAL DISTRICT COURT, DEPT NO. II, ON JUNE 23, 2021.

PURSUANT TO NRS 34.560 PROCEDURE IN NEW TRIALS AND APPEALS FROM THE DISTRICT COURT, EXCEPT SO FAR AS THEY ARE INCONSISTENT WITH THE PROVISIONS OF NRS 34.010 TO 34.120, SEE HABEAS CORPUS WRIT

THE DISTRICT COURT ERRORED WITH PREJUDICE WHEN IT HELD A HEARING OUT SIDE THE PRESENCE OF PETITIONER DISCUSSING THE MERITS OF THE HABEAS CORPUS ON JUNE 3, 2021. FACT FINDINGS AND CONCLUSION OF LAW ORDER, PRODUCED A 22 PAGE MERITORIUS HEARING, IN VIOLATION OF NRS 34.440 PERSONS SERVED (MUST) BRING BODY OF PERSON IN CUSTODY; EXCEPTIONS.

"IF THE WRIT OF HABEAS CORPUS BE SERVED, THE PERSON OR OFFICER TO WHOM THE SAME IS DIRECTED SHALL ALSO BRING THE BODY OF THE PARTY IN THE PERSON'S OR OFFICER'S CUSTODY OR UNDER THE PERSON'S OR OFFICER'S RESTRAINT, ACCORDING TO THE COMMAND OF THE WRIT, EXCEPT IN THE CASES SPECIFIED IN NRS 34.450."

//

ALSO, A JUDGE ABUSES THEIR DISCRETION BY DENIAL OF COUNSEL TO BE PRESENT TO REPRESENT THE WRIT ON THE MERITS OF A HABEAS CORPUS. PREJUDICE INTENT SHOWN BY THE EIGHTH DISTRICT COURTS ORDER, AND A EVIDENTIARY HEARING SHOULD OF BEEN HELD BY THE COURTS SIGNING OF A 22 PAGE (FACT FINDING AND CONCLUSION OF LAW ORDER) DISPLAYING THE PRESENTATION ON RECORD ABOUT THE WRIT OF HABEAS CORPUS THAT WAS NOT DEFENDED BY PETITIONER LACK COUNSEL, GOOD CAUSE DO SHOW BY THE ORDER.

THEREFORE, PETITIONER SUBMITS THIS NOTICE OF APPEAL FOR REVIEWING OF THE SAID CAUSE "WRIT OF HABEAS CORPUS".

DATED THIS 11TH DAY OF JULY 2021.

RESPECTFULLY

BY, Gary Chambers #76089

GARY CHAMBERS # 76089

ELY STATE PRISON (ESP)

POST OFFICE BOX 1989

ELY, NEVADA 89301

PETITIONER IN PRO SE...

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MR. Gary Chambers #0076089
PO Box 1989
ELY, NEVADA
89301

LAS VEGAS NV 890
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EIGHTH DISTRICT COURT
200 Lewis Ave
Las Vegas, NEVADA
89101

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ELY STATE PRISON
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ASTA

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

GARY CHAMBERS,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-21-831669-W

Dept No: II

CASE APPEAL STATEMENT

1. Appellant(s): Gary Chambers

2. Judge: Carli Kierny

3. Appellant(s): Gary Chambers

Counsel:

Gary Chambers #76089
P.O. Box 1989
Ely, NV 89301

4. Respondent (s): State of Nevad

Counsel:

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

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

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

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

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

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

9. Date Commenced in District Court: March 24, 2021

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 16 day of July 2021.

Steven D. Grierson, Clerk of the Court

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

cc: Gary Chambers

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus **COURT MINUTES** **June 03, 2021**

A-21-831669-W Gary Chambers, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

June 03, 2021 **11:00 AM** **All Pending Motions**

HEARD BY: Kierny, Carli **COURTROOM:** RJC Courtroom 16B

COURT CLERK: Alan Castle

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Petition for Writ of Habeas Corpus ... Petitioner's Motion for Appointment of Attorney and Request for Evidentiary Hearing

Matter submitted on the pleadings. Court Denies the petition as, Petitioner's petition is untimely. The Supreme Court remittitur was returned on November 21, 2019 and the instant petition was filed on March 24, 2021; further, Petitioner failed to make a showing of ineffective assistance of counsel under the two prong test in Strickland,
The NV Supreme Court adopted the two prong test in Strickland in Warden v. Lyons. The two prong test provides: "A defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different." The grounds for dismissal applies uniformly to all claims.

Petitioner argues his trial counsel was ineffective for a number of reasons listed supra in relief requested. While Petitioner may meet the first prong of Strickland as his counsel should have been diligent in the trial preparedness. More importantly, Petitioner fails to meet the second prong of Strickland as Petitioner received the benefit of the corrected sentence following the State's motion to correct. Further, Petitioner has not established that the proceedings would have been different as he

is still serving his sentence.

Petitioner has failed to show good cause to overcome common, mandatory procedural bars for post-conviction relief. Pellegrini v. State, 117 Nev. 860, 870 (2001); Rippo v. State, 132 Nev. Adv. Op. 11 (2016).

The petition requests that Petitioner be appointed counsel, but Petitioner has failed to demonstrate that he is entitled to counsel. NRS 34.750 empowers the court to appoint counsel for any petition that is not summarily dismissed, provided that (a) the issues presented are difficult, (b), the Petitioner is unable to comprehend the proceedings, and (c) counsel is necessary to proceed with discovery.

COURT ORDERS, Petition DENIED, WRIT DISCHARGED. FURTHER ORDERED,Petitioner's Motion for Appointment of Attorney and Request for Evidentiary Hearing is DENIED. State to prepare the order and serve interested parties.

Certification of Copy and Transmittal of Record

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

Pursuant to the Supreme Court order dated July 29, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 143.

GARY CHAMBERS,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-21-831669-W

Dept. No: II

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 10 day of August 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk