IN THE SUPREME COURT OF THE STATE OF NEVADA

LARENZO PINKEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83336

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

LARENZO PINKEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83336

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court because it relates to a postconviction appeal of a Category 'A' felony.

STATEMENT OF THE ISSUES

1. Whether counsel was ineffective for allowing Appellant to plead guilty.

2. Whether counsel was ineffective for failing to file an appeal.

3. Whether the district court erred in failing to grant to evidentiary hearing.

STATEMENT OF THE CASE

On November 8, 2017, an Indictment was filed charging Appellant Larenzo Pinkey aka, Larenzo Pinkney (hereinafter "Appellant"), and Co-Defendant Adrian Powell (hereinafter "Co-defendant Powell") with two (2) counts of Conspiracy To Commit Robbery (Category B Felony - NRS 200.380, 199.480), two (2) counts of

Burglary While In Possession Of A Deadly Weapon (Category B Felony - NRS 205.060), three (3) counts of First Degree Kidnapping With Use Of A Deadly Weapon (Category A Felony - NRS 200.310, 200.320, 193.165), seven (7) counts of Robbery With Use Of A Deadly Weapon (Category B Felony - NRS 200.380, 193.165) and one (1) count of Unlawful Taking Of Vehicle (Gross Misdemeanor - NRS 205.2715). I AA 1-8. All charges stemmed from robberies that occurred at a Pepe's Tacos restaurant and a Walgreens store in Las Vegas, Nevada on September 28, 2017. I AA 16-76, 106-76.

The case ultimately proceeded to jury trial on July 30, 2018. I RA 1. Voir Dire commenced on July 30, 2018. I RA 1. The district court concluded for the day, and the parties returned the following day to resume jury selection. I RA 2. On July 31, 2018, the parties negotiated for hours, and the State ultimately agreed to allow both Appellant and Co-Defendant Powell to plead guilty. I RA 2. Appellant pled guilty to Counts 1 and 8 - Conspiracy to Commit Robbery, Counts 2 and 9 - Burglary While in Possession of a Deadly Weapon, Counts 3 and 13 - First Degree Kidnapping With Use of a Deadly Weapon, Counts 4, 5, 6, 7, 10, 11 and 14 - Robbery With Use of a Deadly Weapon, and Count 12 - Unlawful Taking of Vehicle (GM). II AA 217. The terms of the Guilty Plea Agreement (hereinafter "GPA") were as follows:

> The Defendants agree to plead guilty to all counts in the Amended Indictment. The State will maintain the full right to argue, including for consecutive time between the counts, however, the State agrees to not seek a Life

sentence on any count. The State retains the full right to argue the facts and circumstances, but agrees to not file charges, for the following events:

1. LVMPD Event No. 170605-0220: Armed robbery at 7-Eleven located at 4800 West Washington, Las Vegas, Clark County, Nevada, on June 5, 2017.
2. LVMPD Event No. 170614-0524: Armed robbery at Roberto's/Mangos located at 6650 Vegas Drive, Las Vegas, Clark County, Nevada, on June 14, 2017.
3. LVMPD Event No. 170618-0989: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on June 18, 2017.
4. LVMPD Event No. 170701-0545: Armed robbery at Roberto's located at 2685 South Eastern Avenue, Las Vegas, Clark County, Nevada, on July 1, 2017.
5. LVMPD Event No. 170812-3809: Armed robbery at Pizza Bakery located at 6475 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 12, 2017.
6. LVMPD Event No. 170817-0241: Armed robbery at Terrible Herbst located at 6380 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.
7. LVMPD Event No. 170817-0470: Armed robbery at Rebel located at 6400 West Lake Mead Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.
8. LVMPD Event No. 170824-0521: Armed robbery at Roberto's located at 6820 West Flamingo Road, Las Vegas, Clark County, Nevada, on August 24, 2017.
9. LVMPD Event No. 170824-0645: Armed robbery at Roberto's located at 907 North Rainbow Boulevard, Las Vegas, Clark County, Nevada, on August 24, 2017.
10. LVMPD Event No. 170825-0589: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on August 25, 2017.

> The Defendants agree to take no position at sentencing regarding the aforementioned ten (10) armed-robbery events. This Agreement is contingent upon the co-defendant's acceptance and adjudication on his respective Agreement.

II AA 217-19.

On January 30, 2019, Appellant filed a Motion to Withdraw Guilty Plea through newly appointed counsel Lucas Gaffney, Esq. II AA 253. The State filed an Opposition on February 12, 2019. I RA 19. On April 24, 2019, an evidentiary hearing was held, and Appellant's plea counsel, Ben Durham, Esq., and Appellant testified. I RA 40-43. At the conclusion of the evidentiary hearing, the district court made verbal findings that Mr. Durham's testimony was credible, he knew Appellant's condition before the plea, he spoke to him about all the charges and involving potential sentencing, he read the entire GPA to him, discussed concurrent and consecutive time, and Appellant stated he understood everything. I RA 80-84. The district court further found Appellant was examined and found competent and he knowingly and voluntarily entered his plea. I RA 80-84. The district court also found no evidence under Strickland that Mr. Durham failed to render reasonable effective assistance. I RA 80-84. The district court then denied Appellant's Motion to Withdraw Guilty Plea. I RA 80-84.

On May 20, 2019, Mr. Gaffney filed a Sentencing Memorandum. I RA 86. On May 22, 2019, Appellant was ordered to pay Restitution in the total amount of

$3,942.00, jointly and severally with Co-Defendant Powell ($1,100.00 to Pepe's Tacos; $2,342.00 to Rebel Oil Co; and $500.00 to Roberto's on Rainbow). II AA 297, 320, 322. Appellant was sentenced as follows: Count 1 - twelve (12) to forty-eight (48) months in the Nevada Department of Corrections ("NDC"); Count 2 - twenty-four (24) to one hundred twenty (120) months in the NDC, concurrent with Count 1; Count 3 - sixty (60) to one hundred eighty (180) months, plus a consecutive term of twelve (12) to sixty (60) months in the NDC for the use of a deadly weapon, consecutive to Count 2; Count 4 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, consecutive to Count 3; Count 5 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon,, concurrent with Count 4; Count 6 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, concurrent with Count 5; Count 7 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, concurrent with Count 6; Count 8 - a twelve (12) to forty-eight (48) months in the NDC, concurrent with Count 1; Count 9 - thirty-six (36) to one hundred twenty (120) months in the NDC, concurrent with Count 3; Count 10 - twenty-four

(24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, concurrent with Count 7; Count 11 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, concurrent with Count 10; Count 12 - three hundred sixty-four days (364) in the Clark County Detention Center ("CCDC"), concurrent with Count 11; Count 13 - sixty (60) to one hundred eighty (180) months, plus a consecutive term of twelve (12) to sixty (60) months in the NDC for the use of a deadly weapon, concurrent with Count 3; and Count 14 - twenty-four (24) to one hundred twenty (120) months, plus a consecutive term of twelve (12) to one hundred twenty (120) months in the NDC for the use of a deadly weapon, concurrent with Count 11. II AA 322-24. Appellant's aggregate total sentence was one hundred thirty-two (132) to six hundred (600) months in the NDC. II AA 322-24.

The Judgment of Conviction was filed on May 24, 2019. II AA 321.

On November 21, 2019, Appellant filed a Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). I RA 130. On January 6, 2020, the Court appointed Betsy Allen, Esq. II RA 186. On January 18, 2021, Appellant filed a Supplemental Memorandum of Points and Authorities in Support of Petitioner's Writ of Habeas Corpus (Post-Conviction) ("Supplemental Petition"). II RA 184. On

March 24, 2021, the State filed a Response to Appellant's Petition and Supplemental Petition. II RA 235. On May 20, 2021, Appellant filed a Reply to the State's Response. II RA 297. On July 12, 2021, the district court denied the Petition and Supplemental Petition. The Findings of Fact, Conclusions of Law and Order was filed on July 29, 2021. II RA 307.

On August 5, 2021, Appellant filed a Notice of Appeal.

STATEMENT OF THE FACTS

A. Testimony of Jose Chavarria

Jose Alfredo Chavarria Valenzuela (hereinafter "Chavarria") was working as a cook at Pepe's Tacos located at 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. I AA 42-43. At approximately 2:40 AM, Chavarria was in the kitchen area when two (2) gunmen entered the restaurant. I AA 45. Chavarria ran toward the back refrigerator where his co-worker was located, when one of the gunman jumped the counter, followed Chavarria and pointed a gun at him. I AA 45. The gunman told Chavarria to get on the ground and that he "wanted the money." I AA 45. The gunman then forced Chavarria at gunpoint from the back of the store to the front cash registers. I AA 45-46.

At the cash registers, the gunman began jabbing Chavarria in his side, but Chavarria was unable to open the till because he did not have the correct passcode. I AA 46. The second gunman then retrieved Chavarria's coworker from the back of

the store and forced her to open the cash registers at the front of the store. I AA 47. One of the gunmen then took Chavarria to the second cash register, threw him on the ground, and pointed a gun to Chavarria's head. I AA 47. The gunmen took the money from the cash registers but did not take any property from Chavarria. I AA 47-48.

B. Testimony of Yenir Hessing

Yenir Hessing (hereinafter "Hessing") works as the shift lead at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada. I AA 17. On September 28, 2017, Hessing was working the graveyard shift with four (4) other Walgreens employees when, at approximately 4:05 AM, two (2) masked gunmen entered the store. I AA 18-20.

Hessing was stocking the shelves in the food aisle when one of the gunmen pointed a gun to her stomach and demanded she move to the front of the store. I AA 20. The food aisle is located near the store's photo section, away from the registers and store entrance. I AA 24. While pushing her to the front of the store, the gunman told Hessing to go to the cash registers in the front of the store, passing the cash register in the photo section. I AA 24. As the gunman pushed Hessing, he told her this is "not a game and I'm going to kill you." I AA 20.

At the front of the store, the gunman told her to open the three (3) cash registers, which Hessing did. I AA 20. At that moment, another Walgreens

employee, Tifnie Bobbitt (hereinafter "Bobbitt"), was returning from lunch and, upon seeing Bobbitt, the gunman ordered her to the front of the store too. I AA 20. Hessing testified that the gunman was "swearing and saying like really bad things … grabbed both of us and he asked me where is the big money, where is the safe, and I tell him it was in the office." I AA 20. The gunman then used the gun to again push Hessing, this time toward the office located at the back of the store. I AA 20.

While the gunman pushed Hessing toward the back of the store, Hessing saw down an aisle that the Walgreen's pharmacist, Darlene Orat, was being held up by another gunman in the pharmacy. I AA 19, 22. As the gunman pushed Hessing toward the back office at gunpoint, he told Hessing "I'm going to kill you." I AA 24-25. Hessing responded to the gunman, telling him "please don't hurt me, I'm nine weeks pregnant, don't do anything to me." I AA 25-27. To which the gunman responded, "I don't give a [fuck] I'm going to kill you if you do the wrong code or … try to call [police]." I AA 24, 27-29.

Upon reaching the back office, which is behind two doors that each have a different pin code, Hessing entered the code and the gunman forced Hessing and Bobbitt into the office. I AA 25-26. The door to the office closed behind them, leaving Hessing, Bobbitt and the gunman isolated from the rest of the store. I AA 27-28. In the office, the gunman began hitting Hessing in the ribs with the gun and demanding that she open the safe. I AA 27. Hessing opened the first of two safes

and the gunman grabbed everything. I AA 27. The gunman then demanded Hessing open the second safe, which she did. I AA 28. The gunman grabbed the contents from the second safe and fled from the office. I AA 28.

C. Testimony of Tifnie Bobbitt.

Bobbitt was working as a cashier at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada, on September 28, 2017. I AA 108. Around 4:00 AM, Bobbitt was headed to breakroom to take her lunch break when she heard a man "say the F word." I AA 109-10. Bobbitt looked over to see the man crouching and walking behind Hessing. I AA 110. Bobbitt entered the code to the breakroom, entered the room and approached the second code-locked door to the office, which she knocked on to alert the Walgreen's manager. I AA 110-11. Bobbitt's manager left and did not return, so Bobbitt, thinking the situation was taken care of, walked out of the breakroom into the store. I AA 111. At that moment, the gunman saw her and yelled at her "Where the fuck do you think you're going, bitch?" I AA 111.

The gunman then ordered Bobbitt to the front of the store where Hessing was opening the cash registers for the gunman. I AA 113. From there, the gunman forced Bobbitt and Hessing from the front of the store to the back office, pushing Bobbitt while telling the women they were walking too slowly. I AA 113-14. At the breakroom door, they entered the code and entered the breakroom. I AA 114. From there, Hessing entered the code to the office door and the gunman forced the women

into the office. I AA 114-15. In the office, the gunman "kept jabbing the gun" into Hessing's side as he was forcing her to open the safes. I AA 115. Once the safes were open, the gunman took the money from the safes and fled. I AA 115.

SUMMARY OF THE ARGUMENT

The district court correctly exercised its discretion in denying Appellant's Petition for Writ of Habeas Corpus because Appellant received effective assistance of counsel.

First, counsel was not ineffective regarding the events surrounding his guilty plea. Appellant's claim that he was induced by counsel to plead guilty is meritless. Appellant's chose to plead guilty because the agreement guaranteed the State would not seek a potential life sentence. The agreement also prevented Appellant from being charged with ten (10) additional robberies. Additionally, Appellant's claim that counsel did not review the evidence is belied by the record. The record establishes that counsel reviewed the evidence regarding the other cases. As such, the district court correctly denied this claim.

Second, counsel was not ineffective for not filing an appeal. Counsel is only obligated to file an appeal in certain circumstances. Appellant only makes a conclusory claim that had an appeal been filed, the district court's decision would have been reversed. As such, his claim constitutes a bare and naked assertion suitable only for summary denial. Accordingly, the district court correctly denied this claim.

Third, the district court properly denied Appellant's request for an evidentiary hearing. Appellant's arguments are either without merit or bare and naked allegations that are belied by the record. As such, there was no need for an evidentiary hearing.

Accordingly, the district court properly denied Appellant's Petition and Supplemental Petition for Writ of Habeas Corpus.

ARGUMENT

This Court reviews the district court's application of the law de novo, and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

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.

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

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).

Appellant appeals from the district court's denial of his Petition for Writ of Habeas Corpus. Appellant only challenges the claims denied in his Supplemental Petition. These claims include: (1) that trial counsel was ineffective when moving to withdraw Appellant's guilty plea because counsel did not argue that Appellant was induced to plead guilty; (2) that counsel was ineffective for failing to appeal the

district court's denial of his Motion to Withdraw Guilty Plea; and (3) that he was entitled to an evidentiary hearing. Opening Brief, at 2.

I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR ADVISING APPELLANT TO PLEAD GUILTY

Appellant argues that trial counsel was ineffective when moving to withdraw his guilty plea, as well as that he failed to properly advise him. Opening Brief, at 17-19. Specifically, Appellant claims that counsel should have argued that his plea was invalid because part of his inducement to plead guilty was that the State agreed not to file criminal charges against Appellant and Co-defendant Powell for ten (10) additional armed robberies. Id. Appellant claims that because he was not given the opportunity to review discovery related to the other possible criminal charges and because there was no way that the State could have proved that Appellant was guilty of the other robberies, counsel was ineffective for telling Appellant to accept the State's plea offer. Id.

As an initial matter, Appellant's claim is nothing but a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to

present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]…Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Regardless, Appellant cannot demonstrate ineffective assistance of counsel. First, Appellant's claim that "the only reason he entered into this agreement was due to the assurances that the State would not pursue charge [sic] in approximately 8 other robberies" is belied by the record. Opening Brief, at 19. Not only did the State agree not to seek charges against Appellant in ten (10) additional robberies, but Appellant also forgets that in exchange for his guilty plea, the State agreed not to

seek a potential life sentence on the two (2) First Degree Kidnapping with Use of Deadly Weapon counts in the instant case. II AA 217-18. Based on this agreement and the evidence against Appellant, counsel cannot be deemed ineffective for recommending that Appellant plead guilty. Specifically, during the evidentiary hearing on Appellant's Motion to Withdraw Guilty Plea, counsel for Appellant testified that he knew there were several witnesses prepared to testify as well as DNA and fingerprint evidence linking Appellant to all of the crimes charged:

> Q I want to go briefly into the evidence that you are aware of once we started the trial essentially. Do you recall there being a series of multiple victims -- or multiple victims per event in this case?
> A Yes.
> Q Meaning several people at the Walgreen's and then several people at the Pepe's Tacos that were robbed?
> A Right.
> Q And do you recall there being DNA evidence and fingerprints implicating both Mr. Pinkney and Mr. Powell in this case?
> A Yes.
> Q Did that type of evidence and the other evidence that you're aware of factor into your determination on to advising whether to take a plea or not to take a plea?
> **A It wasn't just that. It was also the fact that they were apparently under other events under investigation.**
> Q Understood. With regard to these charges that are just for now, --
> A Uh-huh.
> Q -- when you -- when you come in to start a trial day of, you're aware of the evidence in the case, is what I'm asking.
> A Yes.
> Q And based upon the evidence, if the evidence is strong against him, you might advise someone to take a plea. Is that fair?
> A That's fair.

I RA 54-55.

Additionally, Appellant's claim that he was not satisfied with counsel's representation and advice fails. When Appellant pled guilty, he affirmed that he had spoken with counsel, that counsel answered all his questions, and he was satisfied with counsel's representation:

> THE COURT: Have you discussed this case with your attorney?
> DEFENDANT PINKNEY: Yes.
> THE COURT: Are you satisfied with his representation and the advice given to you by your attorney?
> DEFENDANT PINKNEY: Yes, I have. Or, yes, I am. Sorry.
> […]
> THE COURT: And do you understand everything contained in the guilty plea agreement?
> DEFENDANT PINKNEY: Yes.
> THE COURT: And you had an opportunity to discuss this with your attorney?
> DEFENDANT PINKNEY: Yes.
> THE COURT: And if you had any questions, did he answer your questions?
> DEFENDANT PINKNEY: Yes, he did.
> THE COURT: Do you have any questions of me regarding that at this time?
> DEFENDANT PINKNEY: No, Your Honor.

II AA 236-237.

Next, Appellant has not demonstrated that he was entitled to review the evidence tying him to the ten (10) other armed robberies prior to pleading guilty here. Appellant knew what he had and had not reviewed when he pled guilty, and he knew whether he committed the other robberies when he did so. If Appellant was so concerned about whether he could really be tied to these ten (10) other robberies, Appellant could have asked to review that evidence prior to pleading guilty.

Appellant has not alleged that he did so and as that evidence was irrelevant to the weight of evidence in the instant case, Appellant cannot demonstrate that counsel was ineffective.

Further, Appellant cannot show prejudice. Despite Appellant's claim that the State could not have proved that Appellant was guilty of the ten (10) crimes enumerated in the Guilty Plea Agreement, Appellant offers no evidence in support of that claim. Appellant has not pointed to any specific information or fact that establishes that he would not have pled guilty and proceeded to trial had he reviewed the evidence regarding the other ten (10) robberies. Rather, he simply claims that if he had been apprised of the actual evidence against, "there is no possibility he would have entered the plea [because] the other robberies were lacking in any real evidence against him." Opening Statement, at 19. While counsel may personally believe that the evidence in the ten (10) additional cases was not as strong as the evidence in the instant case, that was not a basis to grant this Petition. Appellant provides no specific information about any of the ten (10) additional armed robberies, and therefore cannot say the other robberies were lacking in any real evidence against him and that there is no way the State could have taken those additional cases to trial. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 134-35 (2007) (noting appellant has the burden of providing this court with an adequate appellate record, and when the appellant "fails to include necessary documentation in the

record, [this court] necessarily presume[s] that the missing portion supports the district court's decision").

Indeed, Appellant cannot show that there was no evidence tying Appellant to the other ten (10) armed robberies. Pursuant to the Guilty Plea Agreement, while the State agreed not to seek criminal charges on those robberies, they nevertheless retained the right to argue the facts surrounding those robberies at the time of sentencing. II AA 217-18.

Moreover, Appellant's claim that counsel did not review the evidence pertaining to the ten (10) other robberies prior to advising Appellant to plead guilty fails. While Appellant's counsel did not challenge the validity of his guilty plea based on the State's agreement not to seek additional criminal charges on other armed robberies, Co-Defendant Powell did via a pre-sentence Motion to Withdraw Plea. I RA 19 Like Appellant's Motion to Withdraw Guilty Plea, the district court denied Co-Defendant Powell's Motion to Withdraw Plea. However, unlike Appellant, the district court did so without an evidentiary hearing. I RA 142. Co-Defendant Powell appealed that denial, and the Nevada Court of Appeals reversed the district court's decision, holding that the court erred in denying Co-Defendant Powell's Motion to Withdraw Guilty Plea without first holding an evidentiary hearing. I RA 143.

On August 13, 2020, the district court held an evidentiary hearing regarding whether counsel for Appellant or Co-Defendant Powell reviewed any evidence regarding the ten (10) other armed robberies. There, counsel for Co-defendant Powell confirmed that both himself and counsel for Appellant, Benjamin Durham, reviewed the evidence regarding the other cases prior to pleading guilty:

> Q Understood. One last little area of questioning and I'll be done. Do you recall while we had the jury in the hallway on the second day of jury selection and prior to the deals being entered, you, Mr. Nelson, and Mr. Durham and my co-counsel and I sitting out in the ante room discussing the negotiation for an extended period of time?
> A Yes. Yes.
> Q You were shown photographs in the detective's wall on the quote Jumping Jack Robbery series which included our trial and then ten uncharged acts, right?
> A Yeah, I don't know what it was called but there -- ten, allegedly ten uncharged acts that were –
> Q Right. And you were shown some discovery on those other uncharged acts like photographs -- still shots of photographs from surveillance videos in the uncharged cases, correct?
> A Correct.
> Q And we kind of pointed out, look, you can see the shoes are the exact same in some of the events and the way they all jumped, the MO is the same. Do you recall those conversations?
> A I don't recall specifics. I recall that -- that you guys, the DA's office, you know, thought they had evidence to file.
> Q Okay. And you recall going through some of it or at least having some understanding of there are ten other events that are potentially related and potentially could be charged after this trial occurs, correct?
> A Yeah, that's correct. And then, in fact, after that discussion, we -- Mr. Powell and, I don't know Pinkney or Pinkey, they wanted to have a conversation with all the attorneys together. And so we went back for an extended period of time. And I

> forgot about Ben, but with Ben, co-defendant, Mr. Powell, Mr. Nelson.

I RA 167-68.

Accordingly, Appellant's claim fails that his counsel did not review the discovery in the ten (10) other armed robberies. As such, this Court should affirm the district court's ruling.

II. COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING AN APPEAL

Appellant argues that after the district court denied his Motion to Withdraw Guilty Plea, counsel should have appealed the decision and that counsel was ineffective for failing to do so. Opening Statement, at 19-21.

Counsel is only obligated to file a notice of appeal or to consult with a defendant regarding filing a notice of appeal in certain circumstances. Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011). "[T]rial counsel has a constitutional duty to file a direct appeal in two circumstances: when requested to do so and when the defendant expresses dissatisfaction with his conviction, and that the failure to do so in those circumstances is deficient for purposes of proving ineffective assistance of counsel." Id. at 977, 267 P.3d at 800. Moreover, trial counsel has no constitutional obligation to always inform or consult with a defendant regarding his right to a direct appeal when the defendant is convicted pursuant to a guilty plea. Id. Rather,

> [t]hat duty arises in the guilty-plea context only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, 'such as the existence of a direct appeal claim that has reasonable likelihood of success.'

Id. (quoting Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)).

Courts should consider "all the information counsel knew or should have known" and focus on the totality of the circumstances. Roe v. Flores-Ortega, 528 U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). Importantly, whether the defendant's conviction followed a guilty plea is highly relevant to the inquiry "both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings." Id. Thus, when a defendant who pleaded guilty claims that he was deprived of the right to appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Id.

In this case, Appellant has not alleged, and there is no indication in the record, that he reserved his appellate rights, asked counsel to file an appeal on his behalf, or otherwise wished to challenge his conviction, denial of his Motion to Withdraw Guilty Plea, or sentence. Instead, Appellant simply makes a broad claim that if counsel had appealed the district court's decision, it would have been reversed. However, Appellant does not explain precisely what error the district court made

when denying his Motion to Withdraw Guilty Plea or why it would have been reversed. Indeed, as Appellant is claiming that counsel was ineffective when arguing that Appellant should be allowed to withdraw his plea—which the State does not concede—it would be difficult to also argue that appealing the district court's decision would have been successful. As such, Appellant's claim is nothing but a bare and naked assertion suitable for nothing but summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, this Court should affirm the district court's ruling.

III. THE DISTRICT COURT PROPERLY DENIED HIS REQUEST FOR AN EVIDENTIARY HEARING

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. NRS 34.770; 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.").

There was no need for an evidentiary hearing because Appellant's claims are either without merit, or bare and naked allegations that are belied by the record. As none of Appellant's claims would entitle him to relief, there was no need to expand the record. As such, the district court did not err in denying his request for an evidentiary hearing. Accordingly, this Court should affirm the district court's ruling.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Supplemental Petition.

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Dated this 22nd day of March, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,695 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of March, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on March 22, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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