IN THE SUPREME COURT OF THE STATE OF NEVADA

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

RESPONDENT'S APPENDIX
Volume 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

LARENZO PINKNEY, Petitioner, vs. JAMES DZURENDA, Director of the DOC for the State of Nevada Respondent.	CASE NO.: A-19-806862-W (C-17-327767-1) DEPT. NO. XXVIII HEARING DATE: HEARING TIME:

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner, LARENZO PINKNEY, by and through his attorney, Betsy Allen, Esq., and files his SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). This Memorandum is made and based on the following points and authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

Dated this __18th Day of January, 2021

___/s/ Betsy Allen_____
Betsy Allen, Esq.
Nevada Bar No. 6878

POINTS AND AUTHORITIES

I.
Procedural Background

On or about November 8, 2017 an Indictment was filed charging Mr. Pinkney with Counts 1 and 8: Conspiracy to Commit Robbery (NRS 199.480, 205.380); Counts 2 and 9: Burglary While in Possession of a Deadly Weapon (NRS 205.060); Counts 3, 10 and 14: Kidnapping with Use of a Deadly Weapon (NRS 200.310, 200.320, 193.165); Counts 4-7 and 11-12 and 15 Robbery with Use of a Deadly Weapon (NRS 200.380, 193.165) and Count 13: Unlawful Taking of a Motor Vehicle (NRS 205.2715). The Indictment also named codefendant Adrian Powell.

Transcripts from the Grand Jury were filed on or about November 11, 2017. Counsel for Petitioner filed a Pre-Trial Writ of Habeas Corpus on or about December 13, 2017. The Petition contested Counts 3, 10 and 14, Kidnapping with Use of Deadly Weapon. The Court dismissed Count 10 but denied on the remaining two counts.

On or about July 30, 2018, trial commenced in District Court. However, during the course of jury selection, Petitioner opted to enter into a guilty plea agreement, wherein he plead guilty to an Amended Indictment, listing fourteen counts.[1] Part of the agreement of the parties was the State retaining the full right to argue, including for consecutive time between counts, but would not ask for life sentences on any count. The State further agreed not to file any charges for approximately ten (10) additional event numbers that the State represented would be attributed to Petitioner and charges would be

[1] Petitioner pled to all counts but the one that was dismissed by Court after the filing of the Writ of Habeas Corpus. This included the two Kidnapping with Use of Deadly Weapon counts.

forthcoming. Finally, the agreements were contingent for both Petitioner and co-defendant Powell.

On or about October 31, 2018, Petitioner appeared in court and requested a new attorney in order to explore withdrawal of his plea. The Court granted the withdrawal of his trial attorney, Benjamin Durham, Esq. On or about November 7, 2018, new counsel was appointed.

On or about November 26, 2018, Lucas Gaffney, appointed counsel for Petitioner filed a motion to address concerns surrounding Petitioner's competency. As a result, the Court ordered Petitioner sent for an evaluation. Both evaluation determined that Petitioner was competent and the case was returned to the originating court for further proceedings.

A motion to withdraw plea was filed on January 30, 2019 with an evidentiary hearing held on April 24, 2019. The district court denied the motion to withdraw the plea. Peititoner was sentenced on May 22, 2019 and a judgment of conviction was filed on May 24, 2019.

Petitioner was sentenced to an aggregate sentence of one hundred thirty-two months minimum with six hundred months maximum (11-72 years) in prison. Petitioner had 602 days credit.

On or about November 21, 2019, Petitioner filed a pro per Petition for Writ of Habeas Corpus (post-conviction). On or about January 6, 2020, counsel was appointed to file a Supplemental petition.

II.

Testimonial Statement of Facts

GRAND JURY TESTIMONY

Yenir Hessing

Yenir testified that she was a shift lead a Walgreens, working graveyard. (GJT, Vol I, pp. 7-8) She indicated that he was working on September 28, 2017, along with our other people: Darlene, Kathy, Abrianna and Tiffany.

She testified that around 4 a.m., as she was putting away merchandise on the floor, a person approached her wearing a mask and pointing a gun at her stomach. He pushed Yenir to the front of the store, in order to open the cash register. (GJT, Vol. I, pp. 10) She was opening the first of three registers when Tiffany walked into the situation. The armed man called Tiffany over too.

She described the mask as something that covered his entire face. She described seeing another male with a gun to the pharmacist's head. (GJT, Vol. I, pp. 12-13) She indicated that she opened all three of the registers up front and the armed man took money from all three. The armed men then demanded to know where the safe was and took her to the office. (GJT, Vol I, pp. 14-15) At this point, he demanded that she take him to the safe, which was located in the back of the store, through two doors with a code. (GJT, Vol.1 , pp. 15-16) Tiffany was also forced to the room with the safe. (GJT, Vol 1, pp. 16) She testified that she opened both safes and he cleaned out both of them. (GJT, Vol1, pp. 17) She clarified that once in that room, they (she and Tiffany) were isolated from the rest of the store. (GJT, Vol 1, pp. 18) After he cleaned out both safes, she testified that he ran out. (GJT, Vol 1, pp. 18-19)

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Darlene Orat

Ms. Orat testified that she is a pharmacist at the Walgreens on East Bonanza, working on September 28, 2017 around 4 a.m. (GJT, Vol 1, pp. 21) She testified that she spotted someone out of the corner of her eye, he immediately jumped on the counter and she attempted to run. (GJT, Vol 1, pp. 22) She was only able to see his eyes, as his face was fully covered in a black mask. (GJT, Vol 1, pp. 23)

At some point, he pointed a gun at her head, grabbed the back of her shirt and demanded to know where the Xanax was kept. (GJT, Vol 1, pp. 24-25) She grabbed the Xanax and began putting it in a bag he was carrying. (GJT, Vol 1, pp. 26)

He then demanded she open the register, which she did. After she got it open, she turned her back so she did not see what he was doing. Then, he kept saying "loomis" to her, which she repeatedly told him she did not understand. (GJT, Vol 1, pp. 27) He finally said syrup, which she understood to mean the codeine cough syrup. She pointed out where it was located and he grabbed that, as well. (GJT, Vol 1, pp. 27-28)

Mr. Orat testified that he grabbed her dolphin necklace, at some point, but did not remember to tell the police. (GJT, Vol 1, pp. 28-29) She was, at this point, on the floor and he ordered her to empty her pockets. He did not, however, take anything from what she pulled out. (GJT, Vol 1, pp. 29) She did not see anyone else. (GJT, Vol 1, pp. 30)

Jose Alfredo Chavarria

Mr. Charvarria testified that he worked at Pepe's Tacos on Fremont Street, and was working there on September 28, 2017 at approximately 2 in the morning. (GJT, Vol 1, pp. 32-33) He was working in the kitchen area.

The only other employee was Myriam, the cashier. (GJT, Vol 1, pp. 33) He was in the back and turned around to see one person jump the counter. This person came

towards him with a gun. There were a total of two people. (GJT, Vol 1, pp. 33-34) His face was covered with a red thing, with two holes for the eyes and he had on gloves. (GJT, Vol 1, pp 34-35) He testified that he ran to the back of the store, where the freezer and his co-worker were but the man with the gun followed him. The man then forced Mr. Chavarria to the front of the store to open the register but he was not able to do so. (GJT, Vol 1, pp. 34-35) The second person went to the back to get his co-worker so she could open the register. (GJT, Vol 1, pp. 36-37) They took the money from both registers. (GJT, Vol 1, pp. 38)

Selena Graciano

Ms. Graciano, on September 28, 2017, was eating at Pepe's tacos with her friend Antonio Vallejo, on Fremont Street. Around 2 a.m., two men came into the store. (GJT, Vol 1, pp. 41) She testified that they were black. One had a white face covering and one had a red face covering. (GJT, Vol 1, pp. 41) The one with the red face covering eventually came over to her. Both had guns, she described them as small. (GJT, Vol 1, pp. 41-42)

The two men immediately went to the register first, then upon noticing Ms. Gaciano, headed towards her. She was told not to move and the other one went back to get the money. (GJT, Vol 1, pp. 42) The one that stayed with Ms. Graciano, pointed his gun at her and grabbed her purse, then told her not to move. He then grabbed a necklace off of her friend, Mr. Vallejo. (GJT, Vol 1, pp. 42-43) When the man grabbed her purse, her phone slid out. Her friend grabbed it and hid it so it would be safe. (GJT, Vol 1, pp. 43)

Once the man took her purse, he went to the back and she did not know what happened in the back. (GJT, Vol 1, pp. 44)

Myriam Gaspar

Ms. Gaspar was working at Pepe's Tacos, located on Fremont Street, on September 28, of 2017. She testified that two people came into the store, although she did not see them come in. (GJT, Vol 1, pp. 47) She was in the refrigerator, one of them took her to the register and pulled a gun on her. (GJT, Vol 1, 47)

She could not remember what anyone was wearing or what anyone looked like. (GJT, Vol 1, pp. 47-48) The only thing she really remembered was that one of the men had her co-worker, Jose, kneeling on the floor with a gun on him. (GJT, Vol 1, pp. 49)

One of the men ordered her to open the register, which she did, and he took the money out of it. He was putting inside a dark sweater. (GJT, Vol 1, pp 50) He did this with the second register, as well. (GJT, Vol 1, pp. 50-51)

Raynetta Shine

Ms. Shine testified that she knew Larenzo Pinkney for a few months, admitting that she had a personal relationship with him. (GJT, Vol 1, pp. 53-54)

In the evening of September 27, 2017, into the early morning of the 28th, Petitioner was at her home, watching TV. As she was getting ready to go to bed, Adrian Powell showed up. (GJT, Vol 1, pp. 54-55) At some point around 5 or 6 in the morning (of the 28th), she realized her Chrysler 300 was missing from her home. (GJT, Vol 1, pp. 56-57) Petitioner was no longer in the home. (GJT, Vol 1, pp. 57)

Ms. Shine did call the police about her car. At some point, Petitioner called her to tell her where her car was located. (GJT, Vol 1, pp. 57-58) He told her it was near a Walgreens at 4480 W. Charleston. (GJT, Vol 1, pp. 58) Her car was located in the area of Bonanza and Lamb. (GJT, Vol 1, pp. 59)

She was angry that he took her car, as she had just purchased it. While on the phone with Petitioner, he made some comment about the car being on a large rock. (GJT, Vol 1, pp. 60) She eventually went to that location and found her car wrecked on a large rock, many police officers in the area and Petitioner. (GJT, Vol 1, pp. 60-61)

As she was observing her car, she saw Petitioner go by the area in another car. (GJT, Vol 1, pp. 61)

Tifnie Bobbitt

Ms. Bobbitt, on September 28, 2017, worked at Walgreens on East Bonanza, as a cashier and customer service representative. (GJT, Vol 2, pp. 8) She testified that sometime around 4 in the morning, while she was in the break room for lunch, she heard someone swear and she saw a guy crouching and walking behind Yenir. (GJT, Vol 2, pp. 10) As the man did not see her, she punched the code into the inner office to alert her other manager as to what she saw. (GJT, Vol 2, pp. 10)

She went back to the break room and did not see or hear anything else, thus she went back out to the floor of the store and that's when the man saw her and spoke to her (GJT, Vol 2, pp. 10-11)

She described him as wearing a red cloth on his face and a dark hoodie. (GJT, Vol 2, pp. 12) She did see his skin and described it as black. (GJT, Vol 2, pp. 12) He had Yenir empty the registers and then pushed them both toward the back, where the safes were. (GJT, Vol 2, pp. 12-13) She testified that they were forced into the back room. (GJT, Vol 2, pp. 14) He forced Yenir to open the safe. He then exited to the locker area and took money from a purse. (GJT, Vol 2, pp. 15) She walked him walk out the door from a window.

Antonio Vallejo

Mr. Vallejo was eating at Pepe's Tacos on September 28, 2017 with his girlfriend, Selena Graciano. He testified that he was getting up to leave and he felt something from behind set him down. (GJT, Vol 2, pp. 20) He turned around and saw a gun pointed at his head. At that point, the man grabbed his chain. (GJT, Vol 2, pp. 20)

He described the gun as black and semi-automatic. (GJT, Vol 2, pp. 20) He indicated that after he grabbed his chain, the man grabbed at Selena's purse and the phone the slid out. (GJT, Vol 2, pp. 21) He described the man as wearing a black hoodie, a bandana and gray shorts. He further said he was a light black male or dark Hispanic male. (GJT, Vol 2, pp. 21-22) He also said that there was another man in the store, he was in the back and at the registers. (GJT, Vol 2, pp. 22) As soon as they got the money out of the registers, the men ran out and took off. (GJT, Vol 2, pp. 22)

Raymundo Cruz

Mr. Cruz is a police officer with Las Vegas Metropolitan Police Department (hereinafter referred to as LVMPD) He is in patrol and responded to a robbery at a Walgreens on Bonanza on September 28, 2017 at approximately 4 or 5 in the morning. (GJT, Vol 2, pp. 26)

As he arrived at Walgreens, he saw a man walk out who fit the description of one of the suspects. As he saw Officer Cruz, who drew his weapon, he took off running and jumped into the backyard of the houses north of the Walgreens. (GJT, Vol 2, pp. 27) He assisted with setting up a perimeter and had no other involvement. (GJT, Vol 2, pp. 28)

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Kristina Thomas

Ms. Thomas is a senior crime scene analyst with LVMPD, who testified that she responded to a Walgreens on Bonanza around 7 am on the morning of September 28, 2017. She testified to items she collected along the east exterior side of Walgreens. (GJT, Vol 2, pp. 32)

Located there was a suitcase with various items in it. Included were a mylar bag, sneakers, shorts, necklace and money. (GJT, Vol 2, pp. 32) She also responded to the housing development names Avery Park. Along the street, there was money strewn about. (GJT, Vol 2, pp. 33) She testified to all the pictures she took of the various items.

Kathryn Aoyama

Ms. Aoyama testified that she is a forensic scientist with LVMPD. (GJT, Vol 2, pp. 39) She analyzed latent prints found on several bottles of medication. She found that a left thumb print came back to Petitioner, as well as a palm print. (GJT, Vol 2, pp. 42)

Tullio Pandullo

Mr. Pandullo is a detective with LVMPD, in the commercial robbery unit. He was assigned to the robbery that occurred at the Walgreens on East Bonanza and the Pepe's Tacos on Fremont. (GJT, Vol 2, pp 44-45) He reviewed the surveillance in both locations, from both events. (GJT, Vol 2, pp 45) He then testified about the still photos from the Walgreens that correlated with the video he viewed, specifically the suspects entering the store. (GJT, Vol 2, pp 46-47)

He indicated that he believed the incidents were related, due to similar clothing and motive. He then testified that they became aware of a third scene, north of the Walgreens, where a vehicle was located. (GJT, Vol 2, pp 47-48)

Detective Pandullo testified to various photos taken of the Chrysler 300, which was found north of the Walgreens on a street called Avery Park. (GJT, Vol 2, pp 48) He then testified to various photos taken by crime scene analysts of the items of importance in the Walgreens. (GJT, Vol 2, pp 48-51)

Detective Pandullo then testified that they became aware of another vehicle being involved. (GJT, Vol 2, pp 51-52) There were five people in the car, a number of them males. They did a high risk traffic stop and removed all occupants of the vehicle. (GJT, Vol 2, pp 52-53) In the car, they identified Petitioner and Adrian Powell. (GJT, Vol 2, pp 53-55)

Kyle Toomer

Detective Toomer is employed by LVMPD in the robbery section and was assigned to events involving a robbery at Pepe's Tacos and Walgreens. (GJT, Vol 2, pp 58-59) He testified that he responded to the scene of a Chrysler 300 that had run up on rocks and was not able to be driven. (GJT, Vol 2, pp 59-60) Crime scene analysts were called and latent prints were taken off the vehicle. (GJT, Vol 2, pp 60)

Once Petitioner was identified as having left prints on the vehicle, he made contact with Raynetta Shine. (GJT, Vol 2, pp 61) He made contact with her at the scene, as she walked up and stated that it was her car on the rocks. As she was giving a statement, she looked up and pointed to a car driving by and said "that is them right there." (GJT, Vol 2, pp 62-63)

In the vehicle that was pointed out by Ms. Shine, there were a total of 5 occupants, including Petitioner. All five were interviewed by Detective Toomer. (GJT, Vol 2, pp 63-64) He ultimately arrested Petitioner. (GJT, Vol 2, pp 64) He testified regarding the

clothing seen on the video and the clothing that was worn by Petitioner when he was arrested. (GJT, Vol 2, pp 64-65)

During the interview with Petitioner, he denied any involvement. (GJT, Vol 2, pp 67)

Kathryn Aoyoma

She previously testified that she worked for LVMPD as a forensic scientist. She testified that she processed latent prints from a Chrysler 300, through AFIS, and matched a number of them to Petitioner. (GJT, Vol 2, pp 71-72)

ARGUMENT

A. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL STAGE.

To state a claim for ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness;

2. counsel's errors were so server that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984)). Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's error the result of the trial would probably have been different. Strickland, 466 U.S. at 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601-602, 817 P.2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838 (1993); Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a petitioner's claim of ineffective assistance of counsel.

First, the petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the petitioner. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. Unless both showings can be made, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

The Nevada Supreme Court has held, "claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *See*, Bennet v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

"The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a petitioner must show a reasonable probability that, but for counsel's error, the result of the trial would have been different.

Reasonable probability is probability sufficient to undermine the confidence in the outcome. *See*, Kirksey, 112 Nev. at 980, 923 P.2d at 1102. "Strategy or decisions regarding the conduct of a defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

B. Trial

Trial counsel for Petitioner advised him to plead guilty on the first day of trial. Part of the inducement to plead guilty was numerous uncharged acts which were to remain uncharged in exchange for Petitioner's plea of guilt to all the charges contained in the Amended Indictment filed on July 30, 2018. (See attached Exhibit "A") At sentencing, however, Petitioner requested to withdraw his plea and alternate counsel was appointed.

In the motion to withdraw the plea, filed by Petitioner's newly appointed attorney, indicated that Petitioner had "mental health ailments" which prevented him from understanding the consequences of his plea. (see Exhibit "B") However, he failed to address the issues related to the inducement to the plea.

Petitioner was never given an opportunity to review the discovery or the material related to all these "possible charges" that were being dismissed as a result of his plea.
A "knowing plea" is one entered into with a FULL understanding of the nature of the charge and all the consequences of the plea. Boykin v. Alabama, 395 U.S. 238(1969). There is no possibility this plea was knowing. How could Mr. Pinkney have an "understanding" of the charges when his attorney did not even know? Add to this the underlying mental health issues related to learning and his plea becomes grossly unjust.

A plea agreement is construed according to what the defendant reasonably understood when he entered the plea. Statz v. State, 113 Nev. 987, 993, 994 P.2d 813,

817 (1997); Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). The defendant's reasonable understanding is distinguishable from the mere subjective belief of defendant as to any potential sentence, or hope of leniency, unsupported by a promise from the State or an indication by the court. See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975) There was no way he understood the breadth or gravity of a plea when he was deprived the right to evaluate numerous potential cases that were made part of the plea.

A defendant who enters into a guilty plea based upon advice of counsel may refute the plea by demonstrating the ineffectiveness of counsel's performance violated his right to counsel guaranteed under the 6th Amendment to the United States Constitution. Nollette v. State, 118 Nev. 341, 348-349, 46 P.3d 87, 92 (2002); Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A defendant must substantiate their claim of ineffective assistance of counsel by showing counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's erroneous advice, the defendant would not have pled guilty. Id; Warden v. Lyons, 110 Nev. 430, 432, 683 P.2d 504, 505 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

Mr. Pinkney was on the verge of trial when counsel suggested that he was better off taking a deal, to plead to every single count, rather than take his chances at trial. The only reason he entered into this agreement was due to the assurances that the State would not pursue charge in approximately 8 other robberies. However, Mr. Pinkney was never apprised of the actual evidence against him in these other robberies. Had he been, there is no possibility he would have entered this plea. The other robberies were lacking in any real evidence against him, or anyone, for that matter. There is NO way the state could

have taken those additional cases to trial, thus it was not a "deal" that Mr. Pinkney entered into, it was pleading straight up to every charge in exchange for absolutely NOTHING.

C. APPELLATE PHASE

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See, Jones v. Barnes, 463 U.S. 745, 751-54, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y., 1994), aff'd 47 F. 3d 1157 (2nd Cir.) To establish prejudice, based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F. 2d 962, 967 (5th Cir., 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

In the instant case, appellate counsel failed to meet the standard for effective assistance of counsel. But for appellate counsel, Petitioner would have received a reversal on his direct appeal.

It was clear from both the record made at the evidentiary hearing and from the record at the plea, that Petitioner was not entering into a knowing and voluntary plea. Regardless, counsel did not file an appeal on behalf of Mr. Pinkney.

D. CUMULATIVE ERROR

Petitioner Pinkney claims that the ineffective assistance that his counsel gave him during trial and on appeal amounts to cumulative error. The relevant factors to consider in determining whether error is harmless or prejudicial include whether (1) the issue of innocence or guilt is close, (2) the quantity and character of the error (3) and the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

Therefore, the Mulder factors weigh in favor of finding there is cumulative error warranting reversal of Petitioner Pinkney's conviction.

E. THE PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION.

In Nevada, a post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when he asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); See also *Byford v. State*, 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007); *Nika v. State*, 198 P.3d 839, 124 Nev. Adv. Rep. 103 (2008); Nev. Rev. Stat. Ann. § 34.770.

CONCLUSION

For the foregoing reasons, the accused herein respectfully request that this Court grant appropriate relief requested in the Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this _18th day of January, 2021

By: _/s/ Betsy Allen_____
Betsy Allen, Esq.
Nevada Bar No. 6878
Law Office of Betsy Allen
PO Box 46991
Las Vegas, Nevada 89114
(702) 386-9700

CERTIFICATE OF SERVICE

I hereby certify that I provided the Clark County District Attorney a true and correct copy of the foregoing motion on the 18th day of January, 2021 via email to:

pdmotions@clarkcountyda.com

DATED this 18th day of January, 2021

___/s/Betsy Allen_____
Betsy Allen, Esq.

A

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
JUL 30 2018
BY, Kathy Klein
KATHY KLEIN, DEPUTY

AIND
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
MICHAEL R. DICKERSON
Deputy District Attorney
Nevada Bar #013476
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LARENZO PINKEY, aka,
Larenzo Pinkney, #8295438
ADRIAN POWELL #8387748

Defendant(s).

CASE NO: C-17-327767-1/2

DEPT NO: XXVIII

AMENDED
INDICTMENT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

The Defendant(s) above named, LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL, accused by the Clark County Grand Jury of the crime(s) of **CONSPIRACY TO COMMIT ROBBERY (Category B Felony - NRS 200.380, 199.480 - NOC 50147); BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony - NRS 205.060 - NOC 50426); FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055); ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.380, 193.165 - NOC 50138) and UNLAWFUL TAKING OF VEHICLE (Gross Misdemeanor - NRS 205.2715 - NOC 50567)**, committed at and within the County of Clark, State of Nevada, on or about the 28th day of September, 2017, as follows:

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C-17-327767-1
AIND
Amended Indictment
4767522

COUNT 1 - CONSPIRACY TO COMMIT ROBBERY

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously conspire with each other to commit a robbery, by the Defendants committing the acts as set forth in Counts 4, 5, 6 and 7, said acts being incorporated by this reference as though fully set forth herein.

COUNT 2 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously enter, with intent to commit a felony, to wit: robbery, that certain business occupied by PEPE'S TACOS, located at 2490 Fremont Street, Las Vegas, Clark County, Nevada, while possessing and/or gaining possession of a handgun and/or pneumatic gun, a deadly weapon, during the commission of the crime and/or before leaving the structure; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 3 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away JOSE CHAVARRIA, a human being, with the intent to hold or detain the said JOSE CHAVARRIA against his will, and without his consent, for the purpose of committing robbery, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit

the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 4 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: a necklace, from the person of ANTONIO VALLEJO, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of ANTONIO VALLEJO, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 5 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWEL did willfully, unlawfully, and feloniously take personal property, to wit: a purse and contents, from the person of SELENA GRACIANO, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of SELENA GRACIANO, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

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COUNT 6 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: U.S. Currency, from the person of MYRIAM GASPAR, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of MYRIAM GASPAR, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 7 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: U.S. Currency, from the person of JOSE CHAVARRIA, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of JOSE CHAVARRIA, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 8 - CONSPIRACY TO COMMIT ROBBERY

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously conspire with each other to commit a robbery, by the Defendants committing the acts as set forth in Counts 11 and 12, said acts being incorporated

by this reference as though fully set forth herein.

COUNT 9 - BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously enter, with intent to commit a felony, to wit: robbery, that certain business occupied by WALGREENS, located at 4470 East Bonanza Road, Las Vegas, Clark County, Nevada, while possessing and/or gaining possession of a handgun and/or pneumatic gun, a deadly weapon, during the commission of the crime and/or before leaving the structure; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 10 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: U.S. Currency, from the person of YENEIR HESSING, or in his presence, by means of force or violence, or fear of injury to, and without the consent and against the will of YENEIR HESSING, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

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COUNT 11 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: U.S. Currency and/or pharmaceuticals and/or a necklace with dolphin pendant, from the person of DARLENE ORAT, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of DARLENE ORAT, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 12 - UNLAWFUL TAKING OF VEHICLE

Defendant LARENZO PINKEY, aka, Larenzo Pinkney did willfully, unlawfully, without the consent of the owner, and without intent to permanently deprive the owner thereof, take, carry, or drive away the vehicle of another, to wit: a 2006 Chrysler, bearing Nevada Temporary Tag No. 368-336, belonging to RAYNETTA SHINE.

COUNT 13 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously, seize, confine, inveigle, entice, decoy, abduct, conceal, kidnap, or carry away TIFNIE BOBBITT, a human being, with the intent to hold or detain the said TIFNIE BOBBITT against her will, and without her consent, for the purpose of committing robbery, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit

the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

COUNT 14 - ROBBERY WITH USE OF A DEADLY WEAPON

Defendants LARENZO PINKEY, aka, Larenzo Pinkney and ADRIAN POWELL did willfully, unlawfully, and feloniously take personal property, to wit: U.S. Currency, from the person of TIFNIE BOBBITT, or in her presence, by means of force or violence, or fear of injury to, and without the consent and against the will of TIFNIE BOBBITT, with use of a deadly weapon, to wit: a handgun and/or pneumatic gun; the Defendant(s) being criminally liable under one or more of the following principles of criminal liability, to wit: (1) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendants aiding or abetting and/or conspiring by Defendants acting in concert throughout.

DATED this 26th day of July, 2018.

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

BY M.R. Dickerson
MICHAEL R. DICKERSON
Deputy District Attorney
Nevada Bar #013476

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Attorney for Larenzo Pinkney

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

vs.

LARENZO PINKNEY, aka,
Larenzo Pinkey,

Defendant.

CASE NO.: C-17-327767-1
DEPT NO.: XXVIII

Date of Hearing: 2/25/2019
Time of Hearing: 9:00 a.m.

DEFENDANT LARENZO PINKNEY'S
MOTION TO WITHDRAW GUILTY PLEA

COMES NOW, Defendant LARENZO PINKNEY, by and through his attorney, LUCAS J. GAFFNEY, ESQ., and hereby moves the Honorable Court for an order allowing Defendant to withdraw his guilty plea in this matter. This motion is made and based on the following Memorandum of Points and Authorities, the attached exhibits, all papers and pleadings on file herein, and any oral argument that may be entertained in this matter.

Dated this 30th day of January, 2019.

RESPECTFULLY SUBMITTED BY:

/s/ Lucas Gaffney
LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373

MEMORANDUM OF POINTS AND AUTHORITIES

I.

STATEMENT OF RELEVANT FACTS

On November 8, 2017, the State of Nevada (State) filed a Superseding Indictment that charged the defendant, Larenzo Pinkney (Pinkney), and co-defendant Adrian Powell (Powell), with the following offenses:

- Count 1 – Conspiracy to Commit Robbery.
- Count 2 – Burglary While in Possession of a Deadly Weapon.
- Count 3 – First Degree Kidnapping With Use of a Deadly Weapon.
- Count 4 – Robbery With Use of a Deadly Weapon.
- Count 5 – Robbery With Use of a Deadly Weapon.
- Count 6 – Robbery With Use of a Deadly Weapon.
- Count 7 – Robbery With Use of a Deadly Weapon.
- Count 8 – Conspiracy to Commit Robbery.
- Count 9 – Burglary While in Possession of a Deadly Weapon.
- Count 10 – First Degree Kidnapping With Use of a Deadly Weapon.
- Count 11 – Robbery With Use of a Deadly Weapon.
- Count 12 – Robbery With Use of a Deadly Weapon.
- Count 13 – Unlawful Taking of a Vehicle.
- Count 14 – First Degree Kidnapping With Use of a Deadly Weapon.
- Count 15 – Robbery With Use of a Deadly Weapon.

Trial began on July 30, 2018. The following day, counsel for the defendants informed the Court that their respective clients had decided to enter into a negotiation with the State to resolve the case in lieu of trial. Pursuant to the negotiation, the defendants pleaded guilty to an Amended Information, that charged them with the following offenses:

- Count 1 – Conspiracy to Commit Robbery.
- Count 2 – Burglary While in Possession of a Deadly Weapon.
- Count 3 – First Degree Kidnapping With Use of a Deadly Weapon.

- Count 4 – Robbery With Use of a Deadly Weapon.
- Count 5 – Robbery With Use of a Deadly Weapon.
- Count 6 – Robbery With Use of a Deadly Weapon.
- Count 7 – Robbery With Use of a Deadly Weapon.
- Count 8 – Conspiracy to Commit Robbery.
- Count 9 – Burglary While in Possession of a Deadly Weapon.
- Count 10 – Robbery With Use of a Deadly Weapon.
- Count 11 – Robbery With Use of a Deadly Weapon.
- Count 12 – Unlawful Taking of a Vehicle.
- Count 13 – First Degree Kidnapping With Use of a Deadly Weapon.
- Count 14 – Robbery With Use of a Deadly Weapon.

The negotiations contemplated that the State would maintain the full right to argue, including for consecutive time between the counts, but agreed not to seek a Life sentence on any count. Additionally, the State retained the full right to argue the facts and circumstances, but agreed not to file charges for the following Las Vegas Metropolitan Police Department (LVMPD) event numbers:

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 63 80 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 agreed their guilty pleas were contingent on both of them entering into the plea agreement, and further agreed to take no position at sentencing regarding the aforementioned event numbers.

During Pinkney's plea canvass, he informed the Court he was twenty-two (22) years old and had not completed high school or obtained his General Education Development certification (GED). *See* Transcript of Trial, Day 2 (TT), pages 3-4, attached hereto as Exhibit A. Pinkney also informed the Court that he had grown up with a learning disability, which resulted in him taking Individualized Education Program classes (IEP), also known as special education classes. TT 4. Pinkey also indicated he had been treated for a mental illness in the past but was not currently receiving any treatment. TT 4. The Court inquired if anyone had suggested Pinkney obtain treatment for mental illness or an emotional condition, to which Pinkney replied: "It's a yeah on the -- on the mental affect, it has been where they wanted me to get treated, but I just hadn't." TT 4. The Court then inquired whether Pinkney had taken any medication during his time in custody, to which he replied "No." TT 4.

The Court continued the plea canvass and Pinkney indicated, among other things, that he had discussed the case and the plea agreement with his attorney, understood everything in his plea agreement, and was entering into the plea agreement freely and voluntarily. TT 5-6, 8. Pinkney also indicated he understood that he was not pleading guilty to the offenses alleged under the LVMPD event numbers, but that the State would be allowed to use them to support its sentencing recommendation. TT 7. Pinkney further indicated he understood the sentencing ranges

for the respective counts, which were read to him in open court. TT 8-9. Counsel represented to the Court that although he had informed Pinkney the minimum sentence he could receive was six (6) years, he had not told Pinkney the maximum punishment the Court could impose. TT 9. Pinkney confirmed he had not been told the maximum punishment he could receive, but he understood the sentencing ranges for the individual counts. TT 10. Pinkney further indicated he understood that the counts could be run concurrently or consecutively. TT 9-10. Before concluding the canvass, the following exchange took place:

> MR. GIORDANI: Just with regard to your first few questions of Mr. Pinkney where he indicated he had an IEP, a learning program, learning disabilities growing up, can we just be clear on the record that Mr. Pinkney had sufficient time with his attorney -- it's been a couple hours, I think, since we broke and started really getting into the meat of this -- understood fully both the written words and, you know, the conversations that he had with his attorney.
>
> MR. DURHAM: Your Honor, I signed the certificate of counsel, which indicates that I believe he's fully competent to enter the plea; that I went over it with him.
>
> THE COURT: Okay.
>
> MR. DURHAM: And so I would just ask the Court to adopt that as part of the plea agreement.
>
> THE COURT: That's fine, and I certainly think I've asked him three times at least now if he had any questions regarding this, and he's advised me that he does not. And you had plenty of time, for the record, to go over this with your attorney since it's now 1:30 and you first met with him approximately 11:00 a.m., correct?
>
> DEFENDANT PINKNEY: Yes.
>
> THE COURT: You had plenty of time to discuss this?
>
> DEFENDANT PINKNEY: Yes, sir.
>
> THE COURT: And once again, you have no questions regarding the agreement?
>
> DEFENDANT PINKNEY: No, sir.
>
> THE COURT: All right. Thank you.
>
> MR. DURHAM: Thank you.

> THE COURT: I find it's freely and voluntarily entered into. The Defendant is remanded.

TT 11-12.

II.

LEGAL ARGUMENT

The district court must allow Pinkney to withdraw his guilty plea because it was not entered knowingly and voluntarily.

Nevada Revised Statute § 176.165 provides:

> Except as otherwise provided in this section, a motion to withdraw a plea of guilty, guilty but mentally ill or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea.

Defendant Pinkney is timely moving the Court to allow him to withdraw his plea pursuant to NRS 176.165 as he has not been sentenced in this matter.

In moving to withdraw a guilty plea, a defendant bears "the burden to prove that 'the plea was not entered knowingly or voluntarily.'" Rubio v. State, 124 Nev. 1032, 1038, 194 P.3d 1224, 1229 (2008) *quoting* Barajas v. State, 115 Nev. 440, 442, 991 P.2d 474, 475 (1999). In Rubio, the Nevada Supreme Court held that "[t]o determine the validity of the guilty plea, we require the district court to look beyond the plea canvass to the entire record and the totality of the circumstances." Rubio v. State, 124 Nev. 1032, 1038 (2008). In other words, a district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what he was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea. Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

District courts may grant a motion to withdraw a guilty plea prior to sentencing for any substantial, fair, and just reason. Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-

26 (2001). "Accordingly, Nevada trial courts must apply a more relaxed standard to presentence motions to withdraw guilty pleas than to post-sentencing motions." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004). To determine whether the defendant advanced a substantial, fair, and just reason to withdraw a plea, the district court must consider the totality of the circumstances to determine whether the defendant entered the plea voluntarily, knowingly, and intelligently. Crawford, 117 Nev. at 721-22 (2001). A plea of guilty must be the result of an informed and voluntary decision, not the product of coercion. *see* Smith v. State, 110 Nev. 1009, 1010, 879 P.2d 60, 61 (1994).

A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution." Molina, 120 Nev. at 190 (2004). To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, a defendant must "demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id.

A defense attorney's failure to conduct an adequate investigation denies his client his Sixth Amendment right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *also see* Warner v. State, 102 Nev. 635, 638, 729 P.2d 1359, 1361 (1986).

The United States Supreme Court has found that mental illness itself is not a unitary concept. Indiana v. Edwards, 554 U.S. 164, 175, 128 S. Ct. 2379, 2381 (2008). It varies in degree. Id. It can vary over time. It interferes with an individual's functioning at different times in different ways. Id.

> A judge is required to investigate the defendant's mental state if there are indications at the plea hearing or later of an impairment that made him incompetent to plead. The fact that a defendant seems competent when answering the judge's questions at the plea hearing should not be

> conclusive; mental diseases, or mental impairments brought on by psychotropic drugs, might alter the premises of a person's thinking rather than the articulation of his thoughts or his outward appearance or manner…
>
> Even in a discussion with someone who believes he's Napoleon, you might find his speech lucid and (given the irrational premise) logical, and his affect normal.

United States v. Hardimon, 700 F.3d 940, 943 (7th Cir. 2012).

Here, the Court must allow Pinkney to withdraw his plea because it was not entered knowingly and voluntarily.

First, Pinkney's mental health ailments prevented him from fully understanding the direct consequences of his plea. Pinkney has an extensive psychiatric history. Records obtained from the Social Security Administration (SSA) reveal that Pinkney's past diagnoses include a significant learning disability, Post Traumatic Stress Disorder (PTSD), and Attention Deficit Hyperactivity Disorder (ADHD). *See* Exhibit A, bates numbers 5-6.[1] These ailments impaired Pinkney's ability to understand the complex terms contained in his guilty plea agreement.

The SSA records reveal that during a 2012 psychological evaluation, the psychologist described Pinkney as having a "deficient IQ" and "mild mental retardation." Exhibit A, bates 4-7. The psychologist noted that Pinkney's intellect was "capable only to very early elementary levels academically." Id. A 2016 psychological evaluation noted Pinkney demonstrated "moderate-to-severe impairment on more complex attentional tasks also involving mental flexibility in shifting sets," and that his intellectual functioning was estimated to be in the "borderline range." Exhibit A, bates 8-9. The psychologist also indicated that Pinkney presented with signs of cognitive/short-term memory weakness (Exhibit A, bates 9) and that he showed a "Markedly Limited" ability to understand and remember detailed instructions, and to maintain

[1] Pinkney has received disability benefits for his mental health issues since 2004. For the sake of brevity, counsel has only provided a portion of Pinkney's mental health records which summarize his ailments for the Court.

attention and concentration for extended periods. Exhibit A, bates 10. Notably, due to his learning disabilities, Pinkney attended special education classes until he dropped out of school in the ninth grade. Exhibit A, bates 1.

Pinkney did not understand numerous aspects of the plea agreement due to his limited cognitive abilities and deficient legal advice. Specifically, Pinkney did not understand the overall sentencing structure, or the application of concurrent and consecutive sentences. Although the Court noted Pinkney had approximately two hours to discuss the plea agreement with his attorney, counsel took less than fifteen (15) minutes to explain the entire plea agreement and resulting consequences. During that time, counsel did not adequately inform Pinkney regarding the possible outcomes at sentencing. Based on counsel's advice, Pinkney firmly believed he would receive a sentence of six (6) to fifteen (15) years based on his lack of criminal history. Additionally, Pinkney did not understand that the term "Right to Argue," meant the State could argue for any legal sentence not precluded by the parties' agreement. He did not understand the State could ask for a sentence far in excess of 6 to 15 years. It was not until after Pinkney entered his plea that he learned the Court could impose a sentence beyond what he believed possible.

During the plea canvass, Pinkney indicated he read and understood the plea agreement. Pinkney only did so because his attorney and co-defendant convinced him he would spend the rest of his life in prison if he did not accept the negotiation. To avoid a guaranteed life sentence, Pinkney misrepresented to the Court that he understood everything in the plea agreement. In reality, due to a combination of his cognitive impairments and deficient legal advice, Pinkney did not fully read or understand the terms in the plea agreement. Had Pinkney possessed a full understanding of the terms and direct consequences of his guilty plea, he would have rejected the State's offer and proceeded with trial.

Additionally, Pinkney was induced to enter a guilty plea by his attorney's unreasonable advice to accept the negotiation in order to avoid prosecution of the uncharged LVMPD events. Pinkney's attorney did not receive discovery related to the events until after Pinkney entered his plea. And after Pinkney had agreed to take no position at sentencing regarding the events. Upon reviewing the discovery, it became apparent that counsel misrepresented the strength of the State's case. The discovery revealed that none of witnesses identified Pinkney as a suspect, and no forensic evidence connected Pinkney to the events. Had counsel adequately investigated the events and properly advised Pinkney regarding the strength of the evidence against him, Pinkney would have rejected the State's offer and proceeded with trial.

A defendant has the right to make a reasonably informed decision whether to accept a plea offer. *See* Hill v. Lockhart, 474 U.S. 52, 56-57, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985) (voluntariness of guilty plea depends on adequacy of counsel's advice); Von Moltke v. Gillies, 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."). A defendant's knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty. United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). Defense counsel's mischaracterization of possible sentence could constitute fair and just reason for withdrawal of plea. United States v. Davis, 428 F.3d 802 (9th Cir. 2005). An affirmative misrepresentation by counsel as to the consequences of a conviction is objectively unreasonable and satisfies the first prong of Strickland. *See* Rubio, 124 Nev. at 1042 (2008).

Based on the totality of the circumstances, it is evident that Pinkney did not understand the direct consequences of his guilty plea, and therefore did not enter his plea knowingly and

voluntarily. Pinkney's cognitive impairments combined with counsel's ineffective assistance resulted in Pinkney failing to comprehend the sentencing structure, the term "Right to Argue," and the strength of the evidence supporting the uncharged events at the time he entered his guilty plea. As such, this Court must allow him to withdraw his guilty plea.

III.

CONCLUSION

Pinkney submits that he did not enter his plea knowingly and intelligently due to his mental health ailments and the actions of his attorney. Based on the foregoing facts and legal argument, Pinkney respectfully requests an older allowing him to withdraw his guilty plea and proceed to trial. In the alternative, Pinkney requests an evidentiary hearing in order to develop the facts as alleged herein.

Dated this 30th day of January, 2019.

GAFFNEY LAW

/s/ Lucas Gaffney
LUCAS J. GAFFNEY, ESQ.
Nevada Bar No. 12373
1050 Indigo Drive, Suite 120
Las Vegas, Nevada 89145
Telephone: (702) 742-2055
Facsimile: (702) 920-8838

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2019, I served a true and correct copy of the foregoing Defendant Larenzo Pinkney's Motion to Withdraw Guilty Plea on the following:

STEVEN B. WOLFSON
Clark County District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
PDMotions@clarkcountyda.com

JOHN GIORDANI
Chief Deputy District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101
Motions@clarkcountyda.com

/s/ Lucas Gaffney
An employee of GAFFNEY LAW

EXHIBIT A

Mark D. Pierce, Ph.D., Clinical Psychologist
DYNASTY MEDICAL GROUP
44439 N 17th St W. Ste 105
Lancaster CA 93534
(661) 940-5125

February 29, 2012

DEPARTMENT OF SOCIAL SERVICES
Disability And Adult Programs Division
Los Angeles, North Branch
P.O. Box 54800
Los Angeles, CA 90054-0800

RE: **Larenzo Pinkney**
SSN: [redacted]

ATTN: **A. Son**

The following is a summary report of the **PSYCHOLOGICAL EVALUATION** performed at this medical facility at the request of your department.

TESTS ADMINISTERED:

Complete Psychological Evaluation
Mental Status Exam

Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV)
Wide Range Achievement Test-IV (WRAT-IV)*
Vineland Adaptive Behavior Scale*

*The WRAT-IV is added for reported history of all day special education placement, in the absence of school records.
*The VABS is added to measure adaptive deficits, in light of apparent developmental delay.

GENERAL OBSERVATIONS:

The claimant is a 15-year-9-month-old, African-American male who arrived on time for the appointment. The claimant was brought to the clinic by his mother. The claimant's mother provided a somewhat limited insight historical record.

The claimant's posture, gait, and mannerisms were within normal range, except that he presented as cognitively slowed. The claimant was fairly dressed in clean but baggy clothing. He is taken back alone initially, as his mother completes the Patient History, with mother being interviewed subsequently.

PRESENTING COMPLAINTS:

This claimant has been diagnosed with ADHD but cannot take medications because of his having a heart condition which continues to be under evaluation, and is not yet treated. Of likely greater significance, this teen has the extreme trauma history of having been shot in the face at age 7 when a peer was playing with a gun by him, which broke his jaw. Since then he has been "jittery with noises and is always worried that something bad is going to happen", clearly showing posttraumatic adjustment. He is reportedly only a part day special education student, for mathematics and English as a 9th grader, with his today showing extreme challenges both with I.Q. and achievement testing, which does appear to be well motivated. He is a behavior problem at school, will not pull his pants up or take his cap off during the day, with history of suspensions, both in and out of school and full school expulsions, with his having attended an extreme 22 schools to

present.

REVIEW OF MEDICAL RECORDS

There are no records available for review today.

PAST MEDICAL HISTORY:

Medical history is significant for an undiagnosed heart condition preventing him from taking psychiatric medications, and he was accidentally shot in the face at age 7, sustaining a broken jaw.

CURRENT MEDICATIONS

The claimant is not currently taking prescription medication.

DEVELOPMENTAL HISTORY

The mother reports no complications with the birth or pregnancy. The claimant sat at 3 months, stood at 9 months, walked at 9 months and was toilet-trained by 2 years. First 'mama-papa' speech was heard at 10 months, identification speech emerged by 1 year, with short, 2-3-word sentences by 1 year.

PAST PSYCHIATRIC OR PSYCHOLOGICAL HISTORY:

The claimant has never been psychiatrically hospitalized. He reportedly has an open door policy for accessing counseling at school, without benefit of needed professional counseling and medication management.

PERSONAL HISTORY:

SOCIAL: The claimant was born in Long Beach, CA. He resides with his single mother, 6-year-old brother, and 5-year-old sister. Dad is not in his life, while mom has history of SLD and diagnosed ADHD, herself.

EDUCATION: The claimant is described as only a part day special education student as a 9th grader with special services from 2nd grade.

LEGAL: The claimant apparently was not arrested for reportedly breaking into a classroom at school in the middle of the day on a nonschool day.

CURRENT LEVEL OF FUNCTIONING

At the present time, the claimant goes to school everyday. In addition to attending school, the claimant enjoys watching TV and listening to music.

The claimant also goes outside the home to shop, attend sports events, go to movies, and visit friends.

The claimant can use eating utensils appropriately. He can dress and bathe himself and can use the bathroom independently.

The mother reports the claimant helps out at home by taking out the trash, feeding the pets, cleaning his room, and sweeping, "when I make him".

The claimant is described as getting along "excellent" with family and "fair" with friends ("He treats them like they don't matter").

The claimant relies on family members for transportation. He is able to handle small amounts of spending money independently.

Mother concludes, "I have problems getting him to stay on task. He always talks back and tries to talk his way out of stuff."

MENTAL STATUS EXAMINATION:

ATTITUDE AND BEHAVIOR: The claimant was alert, responsive, and cooperative during the evaluation, though shows quite challenged cognitive capacities. His general attitude was characterized by fair effort, interest, and compliance. Clothing, grooming, and hygiene were adequate.

INTELLECTUAL FUNCTIONING: The claimant is estimated to be functioning within the well deficient intellectual range, based on intake interview and the history obtained.

MOOD AND AFFECT: The claimant's mood and affect were under-modulated, and consistent with depressive and anxious, posttraumatic adjustment. Mother endorsed mood and/or behavioral problems included: "nervous and poor habits." "He always thinks something bad is going to happen. He will do good, but just for a period of time." At home he acts up and at school there are teacher complaints, fights, suspensions and history of expulsion. He adds, "I fight if somebody tries to mess with me." When asked directly how he typically feels, the claimant responded, "I feel pissed at having to do the work at school 'cause I can't do the work. At home I feel good." He indicates having "no" friends; "but that's no problem." This youngster appears to suffer from fairly severe, unresolved posttraumatic adjustment from having been shot at age 7, with reported hypervigilance, attention deficits and significant acting out behavior as described. There was no indication of psychotic, suicidal or homicidal ideation or behavior noted during the contact period.

SPEECH: The claimant's speech is mildly dysarthric. Verbal response time was slowed. The claimant's tone is under-modulated.

CONCENTRATION/ATTENTION SPAN: The claimant's concentration and attention span were deficient. Formal measures of attention and concentration (WISC-4 Working Memory and Processing Speed Composite) are higher deficient and mild to moderately deficient range, respectively, commensurate with overall I.Q. composite scores.

INSIGHT AND JUDGMENT: Insight and judgment were mildly deficient and mild to moderately deficient, respectively. When asked what an apple and banana have in common, the claimant said, "You eat." When asked, 'What would you do if you saw thick smoke coming from your neighbor's house?' he responded, "Call 911."

TEST RESULTS:

The claimant was administered the: Wechsler Intelligence Scale for Children-IV, Wide Range Achievement Test-IV, and Vineland Adaptive Behavior Scales.

The results are as follows:

WECHSLER INTELLIGENCE SCALE FOR CHILDREN-IV (WISC-IV):

The claimant was administered the WISC-IV, obtaining the following subtest scale scores.

Verbal Comprehension		Perceptual Reasoning		Working Memory		Processing Speed	
Similarities	4	Block Design	2	Digit Span	4	Coding	1
Vocabulary	2	Picture Concepts	2	Letter Number Sequencing	4	Symbol Search	1
Comprehension	1	Matrix Reasoning	3				
V C Composite		P R Comp		W M Comp		P S Comp	Full Scale
55		53		65		50	48

The claimant's performance is extremely limited, from the mild to mostly mild to moderately deficient range. The full scale I.Q. is in the moderately deficient range, while this claimant is estimated to show lower, mild developmental delays overall.

WIDE RANGE ACHIEVEMENT TEST (WRAT) - IV:

The claimant was administered the Wide Range Achievement Test-IV. The results are as follows:

DOMAIN	Raw Score	Standard Score	Grade Equivalence
Word Reading	24	64	1.8
Sentence Comprehension	3	55	K.6
Spelling	20	62	1.4
Math Computation	21	63	2.2
Reading Composite	119	59	N/A

The claimant shows very limited capacity with language-related achievement screening, with Reading, Sentence Comprehension and Spelling scores from the lower mild to mild to moderately deficient range. Mathematical achievement is also lower mildly deficient range. This is *not* a profile of diagnosable learning disorder for language-related or mathematics achievement, for obtained WRAT-IV standard scores paralleling, to rising somewhat higher than his tested low I.Q. scores, and are best subsumed under the primary mild mental retardation diagnosis. Notably, he is capable only to very early elementary levels academically.

VINELAND ADAPTIVE BEHAVIOR SCALES: INTERVIEW EDITION:

The claimant was administered the Vineland Adaptive Behavior Scales.

The claimant achieved the following scores:

Domain	Raw Score	Standard Score	Adaptive Level
Communication	67	20	Severely to profoundly deficient
Daily Living Skills	109	33	Severely deficient
Socialization	55	22	Severely to profoundly deficient
Adaptive Composite		22	Severely to profoundly deficient

Overall, mother rates extreme, severely to profound adaptive deficits across the board, which seems to be an overestimate of the level of actual challenge for this troubled teen.

Given fair, estimated typical effort and rapport, the following diagnostic and prognostic impressions are estimated reliable and valid and appear to accurately represent the claimant's abilities and functional level at this time.

DIAGNOSTIC IMPRESSIONS:

Given the test results and clinical data, the claimant is diagnosed as:

AXIS I: Posttraumatic stress disorder (severe, unresolved, from sustaining a GSW at age 7, thought to underlie additional behavior disorders below, the claimant has attended 22 schools, untreated).

Disruptive behavior disorder, not otherwise specified (estimated pre-conduct disordered aggression as well as oppositional-defiance at school, also not treated).

AXIS II: Mild mental retardation (moderately deficient I.Q. testing, lower mildly deficient achievement screening against severe to profound adaptive deficits per mother).

AXIS III: Sustained GSW to the face at age 7, resulting in a broken jaw and a still undiagnosed/untreated heart condition.

Deferred to the appropriate specialists.

PROGNOSTIC IMPRESSIONS:

This claimant appears to require aggressive psychiatric intervention for what today is diagnosed as an untreated, severe PTSD adjustment from his having been shot in the face as a 7-year-old. He

shows classic hypervigilance, "always worried that something bad is going to happen", with likely underreported nightmares and flashbacks. This condition has expanded into extreme disruptive behavior, oppositional-defiance and aggression in the classroom, with serious potential for delinquent behavior if not aggressively intervened upon soon. Mother reports that he cannot take ADHD medications for an undiagnosed heart condition, while he makes a severe psychiatric presentation per his history, compounded by very likely high familial instability for his having attended 22 schools to present. He presents as well mentally retarded, with commensurate adaptive deficits such that he likely requires a highly structured school environment, possibly of the non-public variety, where he could obtain the aggressive mental health services that he seems to require.

The claimant shows related, quite challenged social skills with this examiner.

The claimant can follow simple one and two part instructions. However, he appears unable to reason sufficiently to avoid typical, age-related hazards, by the generally challenged testing effort obtained today.

Thank you for the opportunity of assisting in this interesting consultation.

Submitted by,

MARK D. PIERCE, Ph.D.
Clinical Psychologist
CA License Exp. 06/13

CASE ANALYSIS	SSN: [redacted]
	Name: LARENZO ISAIAH PINKNEY
	Date: October 14, 2016

FROM: MS. MOORE/V80	CEMOOR
NAME:LARENZO ISAIAH PINKNEY	DATE OF BIRTH: [redacted]
SSN: [redacted]	AGE: 20 SEX: M
CASE NUMBER: 1185340	HEIGHT: 70 IN WEIGHT: 153 LB
AOD 05/25/2014	EDUCATION: 11
CASE FILING DATE	CASE LEVEL: PH
DATE LAST INSURED: 00/00/0000	CASE TITLE: T16
PRIOR DENIAL DATE 00/00/0000	CASE TYPE:
PP CONTROLLING DATE 00/00/0000	PP/AGE22: 00/00/0000

T16 Age 18 Redet

PH CASE

ALLEGATIONS:
ADHD; Learning problems;, Condition Changed Start Date 01/2014, Condition Changed Description WELL H E BEEN HAVING HEADACHES ALMOST EVERYDAY. LORENZO W AS SHOT IN THE FACE AT 7 YEARS OLD, New Conditions Start Date 02/2016, New Conditions Description UN CONTROLLABLE OUT BRAKES

SOURCES:
CHERRY MEDICAL CLINIC report received 09/21/2016

DISCUSSION OF EVIDENCE AND ISSUES INVOLVED

SIGNIFICANT OBJECTIVE FINDINGS:

CPD: MET 112.05C. FUNCTIONING BELOW GRADE LEVEL. HX OF ADHD BUT NOT ON MEDS. DEFFICIENT IQ SCORES PER 2/2012 YOCE: WISC IV- VC 55, PR 53, WM 65, PS 50, FIQ 48.
GIVEN: MEETS LISTING 112.05C.

CDR: CASE RETURNED FROM FO AFTER CASE WAS CLOSED FOR FTC. 2014 MEOR NOTES CT IS NOT IN TX WITH PSYCHIATRIST OR PSYCHOLOGIST. HE HAS NO PEDIATRICIAN OR PCP. ATTENDING MISSION VIEW CHARTER HS. 4/14

IEP NOTES HE IS ELIGIBLE UNDER SLD. FUNCTIONING ACADEMICALLY BELOW GRADE LEVEL. NO PROBLEMS NOTED IN MOTOR SKILLS, COMMUNICATION, SOCIAL INTERACTION, ADAPTIVE SKILLS. NO MEDICAL PROBLEMS NOTED.

DETERMINATION: INSUFFICIENT EVIDENCE 2/2 WAU. THIS IS THE 2ND TIME CT'S WHEREABOUTS ARE UNKNOWN.

CASE RETURNED ON 03/18/16 AFTER THE CASE WAS CLOSED TO W AU FOR THE 2ND TIME. THE CLAIM, IS NOW BEING CLOSED FOR FTC. THE UPDATED ADDRESS WAS RECEIVED AND A CE WAS SCHEDULED BUT THE CLAIMANT FAILED TO KEEP THE EXAM AGAIN. DUE PROCESS 2 CALLS AND LETTERS SENT TO THE CLAIMANT AND MOTHER W/O RESPONSE. RETURNED MAIL HAS BEEN RECEIVED BUT UNABLE TO ENTER INTO SYSTEM 2/2 BARCODE ISSUES.

YMC REC INSUFFICIENT EVIDENCE 2/2 FAILURE TO COOPERATE WITH A CONSULTATIVE EXAM. NO EVIDENCE AVAILABLE FOR REVIEW.
GIVEN: IE.

PH: CHERRY MEDICAL CLINIC 9/7/16 MSE: the clmt was able to state his full name, age, and date of birth. His thinking was coherent, though concrete. The clmt's speech was clear and understandable. Response time was average. No psychomotor retardation was noted. The clmt's mood was withdrawn. Affect was constricted. Current symptoms of depression and anxiety were reported. Present suicidal ideation was denied. No unusual perceptual experiences were reported. Signs of paranoia were evident during the exam. The clmt could repeat 4 digits forward and 3 digits backwards. He could recall the names of 2 out of 3 familiar objects after an interval of 5 minutes and an interference task. The clmt could provide general details regarding his daily activities. Remote memory appeared grossly intact. The clmt demonstrated a mildly diminished attention span in responding interview questions and following test instructions. During performance tasks, the clmt lacked persistence as he tended to give up easily when challenged. The clmt knew how many months there are in a year but could not identify the direction in which the sun rises. He could name the current president of the United States and the last president. The clmt's legal history suggests a proneness to lapses in impulse control and judgment. When asked, what is the thing to do if he was the first person in a movie theater to see smoke and fire, the patient responded, "Yell for help." When asked, how he would find his way out if he was lost in the forest during the daytime, the patient responded, "Yell for help."
TESTING: WAIS 4- VERBAL COMP 74, PR 77,WM 71, PS 84, FSIQ IS 82. WMS4- AUDITORY MEMORY 75, VISUAL MEMORY 76, VISUAL WORKING MEMORY IS 73, INTERMEDIATE MEMORY IS 72, DEALYED MEMORY IS 72.

TRAILS- Trails A was completed in 38 seconds, which is in the non-impaired range. On Trails B, the clmt made repeated errors. He was able to correct some of the initial errors with feedback but ultimately gave up at 115 seconds, having completing less than half of the task. Results indicate no signs of impairment on simple tasks requiring sustained

attention or visual-tracking ability, and moderate-to-severe impairment on more complex attentional tasks also involving mental flexibility in shifting sets.

DX: Axis I: Conduct Disorder, NOS, given the clmt's legal/school district juvenile disciplinary history. Learning Disorder, NOS, by report. Depressive Disorder, NOS, given the report of chronic depressed mood, sadness over losses, anhedonia, pessimism about the future, irritability, constriction of interests and restriction of daily activities. Axis II: Intellectual functioning is estimated to be in the Borderline Range. Antisocial/paranoid Traits, given the clmt's legal history. Axis III: Deferred to the appropriate medical specialist.

MSS: The clmt would be able to learn a simple, repetitive nonverbal task but may have moderate limitations in performing detailed, varied, or complex tasks. His ability to sustain attention and concentration for extended periods of time may be moderately diminished, due to cognitive and emotional factors. During testing, the clmt demonstrated mild to moderately diminished attention, concentration, persistence, and pace in completing tasks. From a psychological perspective, the clmt presents with signs of cognitive/short-term memory weakness, depressive/anxiety symptoms, and proneness to engage in impulsive, antisocial behaviors, which may result to moderate limitations in ability to manage customary work stress and persist for a regular workday. Given test results and current activities of daily living, the clmt appears capable of following a routine but may have moderate limitations in organizing for high level tasks. Given his dysphoria, test behavior, and school dropout record, the clmt may have difficulty persisting despite obstacles. The effects of any medical conditions upon work functioning should be evaluated by the appropriate medical specialist. The clmt would be able to work independently on basic tasks. Given his dysphoria, irritability, and preference for social isolation, the clmt may have mild limitations in sustaining cooperative relationships with co-workers and supervisors. He may function most optimally in a semi-isolated work setting. The clmt relates in a cooperative manner with supportive authority figures, as demonstrated by his behavior with this evaluator. The clmt appears technically capable for the self-management of funds, given test results, though he would benefit from continued assistance, due to impulse control/judgment problems.

QUESTIONS/RECOMMENDATIONS: less than SRT?

10/12/16 Y less than SRT. gfjohnsonmd

☒ THESE FINDINGS COMPLETE THE MEDICAL PORTION OF THE DISABILITY DETERMINATION

SIGNATURE:	SPECIALTY:	OFFICE
G. Johnson MD	37	**Covina**
		DATE October 12, 2016

NFM V09 (04/16)
Form **SSA-416 (11-2004) ef (12-2004)** (8/1981)

FORM APPROVED
OMB NO. 0960-0431

MENTAL RESIDUAL FUNCTIONAL CAPACITY ASSESSMENT

NAME	SOCIAL SECURITY NUMBER
LARENZO ISAIAH PINKNEY	[redacted]

CATEGORIES (*From 1C of the PRTF*)	ASSESSMENT IS FOR:
12.02, 12.04, 12.08	☒ Current Evaluation ☐ 12 Months After Onset: ☐ Date Last Insured: ☐ Other: to

I. SUMMARY CONCLUSIONS

This section is for recording summary conclusions derived from the evidence in file. Each mental activity is to be evaluated within the context of the individual's capacity to sustain that activity over a normal workday and workweek, on an ongoing basis. Detailed explanation of the degree of limitation for each category (A through D), as well as any other assessment information you deem appropriate, is to be recorded in Section III (Functional Capacity Assessment).

If rating category 5 is checked for any of the following items, you MUST specify in Section II the evidence that is needed to make the assessment. If you conclude that the record is so inadequately documented that no accurate functional capacity assessment can be made, indicate in Section II what development is necessary, but DO NOT COMPLETE SECTION III.

	Not Significantly Limited	Moderately Limited	Markedly Limited	No Evidence of Limitation in this Category	Not Ratable on Available Evidence
A. UNDERSTANDING AND MEMORY					
1. The ability to remember locations and work-like procedures.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
2. The ability to understand and remember very short and simple instructions.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
3. The ability to understand and remember detailed instructions.	1. ☐	2. ☐	3. ☒	4. ☐	5. ☐
B. SUSTAINED CONCENTRATION AND PERSISTENCE					
4. The ability to carry out very short and simple instructions.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
5. The ability to carry out detailed instructions.	1. ☐	2. ☒	3. ☐	4. ☐	5. ☐
6. The ability to maintain attention and concentration for extended periods.	1. ☐	2. ☐	3. ☒	4. ☐	5. ☐
7. The ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances.	1. ☐	2. ☒	3. ☐	4. ☐	5. ☐
8. The ability to sustain an ordinary routine without special supervision.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
9. The ability to work in coordination with or proximity to others without being distracted by them.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
10. The ability to make simple work-related decisions.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐

	Not Significantly Limited	Moderately Limited	Markedly Limited	No Evidence of Limitation in this Category	Not Ratable on Available Evidence
Continued---SUSTAINED CONCENTRATION AND PERSISTENCE					
11. The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods.	1. ☐	2. ☒	3. ☐	4. ☐	5. ☐
C. SOCIAL INTERACTION					
12. The ability to interact appropriately with the general public.	1. ☐	2. ☐	3. ☒	4. ☐	5. ☐
13. The ability to ask simple questions or request assistance.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
14. The ability to accept instructions and respond appropriately to criticism from supervisors.	1. ☐	2. ☒	3. ☐	4. ☐	5. ☐
15. The ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
16. The ability to maintain socially appropriate behavior and to adhere to basic standards of neatness and cleanliness.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
D. ADAPTATION					
17. The ability to respond appropriately to changes in the work setting.	1. ☐	2. ☐	3. ☒	4. ☐	5. ☐
18. The ability to be aware of normal hazards and take appropriate precautions.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
19. The ability to travel in unfamiliar places or use public transportation.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐
20. The ability to set realistic goals or make plans independently of others.	1. ☒	2. ☐	3. ☐	4. ☐	5. ☐

II. REMARKS: If you checked box 5 for any of the preceding items or if any documentation deficiencies were identified, you MUST specify what additional documentation is needed. Cite the item number(s), as well as any other specific deficiency, and indicate the development to be undertaken.

Continued on Page 3

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LARENZO PINKNEY,
#8295438

Defendant.

CASE NO: A-19-806862-W

DEPT NO: XXVIII

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION) AND SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: MAY 10, 2021
TIME OF HEARING: 11:00 AM

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

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

//

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On November 8, 2017, an Indictment was filed charging Petitioner Larenzo Pinkey aka, Larenzo Pinkney (hereinafter "Petitioner"), and Co-Defendant Adrian Powell ("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). 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.

The case ultimately proceeded to jury trial on July 30, 2018. Voir Dire commenced on July 30, 2018. The Court concluded for the day, and the parties returned the following day to resume jury selection. On July 31, 2018, the parties negotiated for hours, and the State ultimately agreed to allow both Petitioner and his Co-Defendant to plead guilty. Petitioner 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). 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.

On January 30, 2019, Petitioner filed a Motion to Withdraw Guilty Plea through newly appointed counsel Lucas Gaffney, Esq. The State filed an Opposition on February 12, 2019. On April 24, 2019, an evidentiary hearing was held, and Petitioner's plea counsel, Ben Durham, Esq., and Petitioner testified. At the conclusion of the evidentiary hearing, the Court made verbal findings that Mr. Durham's testimony was credible, he knew Petitioner'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 Petitioner stated he understood everything. The Court further found Petitioner was examined and found competent and he knowingly and voluntarily entered his plea. The Court also found no evidence under Strickland that Mr. Durham failed to render reasonable effective assistance. The Court then denied Petitioner's Motion to Withdraw Guilty Plea.

On May 20, 2019, Mr. Gaffney filed a Sentencing Memorandum. On May 22, 2019, Petitioner was ordered to pay Restitution in the total amount of $3,942.00, jointly and severally

with the Co-Defendant ($1,100.00 to Pepe's Tacos; $2,342.00 to Rebel Oil Co; and $500.00 to Roberto's on Rainbow). Petitioner 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. Petitioner's aggregate total sentence was one hundred thirty-two (132) to six hundred (600) months in the NDC.

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

On November 21, 2019, Petitioner filed a Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). On January 6, 2020, the Court appointed Betsy Allen, Esq. On January 18, 2021, Petitioner filed a Supplemental Memorandum of Points and Authorities in Support of Petitioner's Writ of Habeas Corpus (Post-Conviction) ("Supplemental Petition"). The State's Response now follows.

STATEMENT OF FACTS

A. Testimony of Jose Chavarria

Jose Alfredo Chavarria Valenzuela was working as a cook at Pepe's Tacos located at 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. Reporter's Transcript of Proceedings, October 17, 2017, ("RT1") at 32-33. At approximately 2:40 AM, Chavarria was in the kitchen area when two (2) gunmen entered the restaurant. RT1 at 35. 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. RT1 at 35. The gunman told Chavarria to get on the ground and that he "wanted the money." Id. The gunman then forced Chavarria at gunpoint from the back of the store to the front cash registers. RT1 35-36.

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. RT1 at 36. 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. RT1 at 37. 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. Id. The gunmen took the money from the cash registers, but did not take any property from Chavarria. RT1 at 37-38.

B. Testimony of Yenir Hessing

Yenir Hessing works as the shift lead at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada. RT1 at 7. 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. RT1 at 8-10.

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. RT1 at 10. The food aisle is located near the store's photo section, away from the registers and store entrance. RT1 at 14. 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. RT1 at 14. As the gunman pushed Hessing, he told her this is "not a game and I'm going to kill you." RT1 at 10.

At the front of the store, the gunman told her to open the three (3) cash registers, which Hessing did. Id. At that moment, another Walgreens employee, Tifnie Bobbitt, was returning from lunch and, upon seeing Bobbitt, the gunman ordered her to the front of the store too. Id. 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." RT1. The gunman then used the gun to again push Hessing, this time toward the office located at the back of the store. RT1 at 10 .

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. RT1 at 9, 12. As the gunman pushed Hessing toward the back office at gunpoint, he told Hessing "I'm going to kill you." RT1 at 14:15. Hessing responded to the gunman, telling him "please don't hurt me, I'm nine weeks pregnant, don't do anything to me." RT1 at 15-17. 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]." RT1 at 14:17-19.

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. RT1 at 15-16. The door to the office closed behind them, leaving Hessing, Bobbitt and the gunman isolated from the rest of the store. RT1 at 17-18. In the office, the gunman began hitting Hessing in the ribs with the gun and demanding that she open the safe. RT1 at 17.

Hessing opened the first of two safes and the gunman grabbed everything. Id. The gunman then demanded Hessing open the second safe, which she did. The gunman grabbed the contents from the second safe and fled from the office. Id.

C. Testimony of Tifnie Bobbitt.

Tifnie Bobbitt was working as a cashier at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada, on September 28, 2017. Reporter's Transcript of Proceedings, November 7, 2017, ("RT2") 8. Around 4:00 AM, Bobbitt was headed to breakroom to take her lunch break when she heard a man "say the F word." RT2 9-10:1. Bobbitt looked over to see the man crouching and walking behind Yenir Hessing. RT2 at 1. 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. RT2 at 10-11. 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. RT2 at 11. At that moment, the gunman saw her and yelled at her "Where the fuck do you think you're going, bitch?" RT2 at 11.

The gunman then ordered Bobbitt to the front of the store where Hessing was opening the cash registers for the gunman. RT2 at 13. 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. RT2 at 13-14. At the breakroom door, they entered the code and entered the breakroom. RT2 at 14. From there, Hessing entered the code to the office door and the gunman forced the women into the office. RT2 at 14-15. In the office, the gunman "kept jabbing the gun" into Hessing's side as he was forcing her to open the safes. RT2 at 15. Once the safes were open, the gunman took the money from the safes and fled. Id.

ARGUMENT

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

> [. . .]
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

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

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).

In his Petition, Petitioner claims that "counsel failed to show muster in his duty" and that the prosecution did not serve a proper Marcum notice. Petition at 5-6. In his Supplemental Petition,

Petitioner raises four (4) other claims: (1) that trial counsel was ineffective when moving to withdraw Petitioner's guilty plea because counsel did not argue that Petitioner was induced to plead guilty by the State's agreement not to seek criminal charges against Petitioner for crimes they never could have tied to Petitioner; (2) that counsel was ineffective for failing to appeal the district court's denial of his Motion to Withdraw Guilty Plea; (3) that cumulative error warrants reversing Petitioner's conviction; and (4) that Petitioner is entitled to an evidentiary hearing. Supplemental Petition at 14-17. All of Petitioner's claims fail.

I. PETITIONER'S PETITION SHOULD BE DENIED

Petitioner raises two (2) claims within Ground One of his Petition. Specifically, Petitioner claims that "counsel failed to show muster in his duty" and that the prosecution did not serve a proper Marcum notice. Petition at 5-6. Petitioner alleges that the State did not provide him with a notice of his right to testify at Grandy Jury and that the Indictment was void because it was issued the day after the second grand jury hearing. Id. at 6. Petitioner claims that this is what caused him to plead guilty and that counsel was ineffective for not taking notice of this violation. Petitioner's claims fail.

As an initial matter, Petitioner waived these claims when he pled guilty. NRS 34.810(1)(a). Nothing about Petitioner's claim that counsel did not show enough muster alleges that counsel actions rendered his plea invalid or that counsel was ineffective in the plea process. Additionally, Petitioner's claim that the Marcum notice was not timely served is not even a claim of ineffective assistance of counsel and thus should have been raised on direct appeal. Therefore, both claims are beyond the scope of habeas proceedings and must be denied.

Moreover, Petitioner's claim that counsel did not show "muster" during his representation of Petitioner is nothing but a bare and naked claim suitable only for summary denial. Petitioner does not explain specifically what counsel should have done or how those actions would have caused him to reject any plea deal and proceed to trial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, his claim must be denied.

Next, Petitioner's claim that the Marcum notice was not timely served is belied by the record. NRS 172.241(2) provides that a district attorney "shall serve reasonable notice" to a

defendant that a grand jury indictment is being sought. The Nevada Supreme Court has held that even five (5) days' notice is reasonable. Sheriff v. Marcum, 105 Nev. 824, 825-269, 783 P.2d 1389, 1390-91 (1989).

In this case, the Marcum notice was served on defense counsel on October 18, 2017. Exhibit A. While the grand jury first convened on October 17, 2017, the grand jury met a second time on November 7, 2017 and subsequently returned a true bill against that same day, twenty (20) days after Petitioner was informed of his right to testify before the grand jury. Twenty (20) days is more than "reasonable notice" for Petitioner to decide whether he wished to testify or present evidence at the hearing. NRS 172.241. Despite Petitioner's belief that his Indictment is invalid because it was issued a day after the grand jury met, that does not change the fact that Marcum was served twenty (20) days before the grand jury met. As such, Petitioner's claim is belied by the record.

Additionally, Petitioner cannot show prejudice. Petitioner does not even claim that he would have testified at the grand jury, much less what he would have testified to or how that would have impacted the outcome at the grand jury. Despite Petitioner's claim that this is what caused him to plead guilty, Petitioner has failed to articulate specific facts or evidence supporting this allegation. As such, this is nothing but a bare and naked allegation suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. For these same reasons, Petitioner's claim that counsel was ineffective for not taking notice of this alleged violation of his rights fails. Petitioner failed to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Molina, 120 Nev. at 190-91, 87 P.3d at 537. Thus, Petitioner cannot show that counsel was ineffective. Accordingly, this Court must deny Petitioner's Petition.

II. PETITIONER'S SUPPLEMENTAL PETITION SHOULD BE DENIED

A. Trial counsel was not ineffective when moving to withdraw Petitioner's guilty plea.

Petitioner argues that trial counsel was ineffective when moving to withdraw Petitioner's guilty plea. Supplemental Petition at 14-16. Specifically, Petitioner 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 Petitioner and his Co-defendant for ten (10) additional armed robberies. Id. Petitioner 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 Petitioner was guilty of the other robberies, counsel was ineffective for telling Petitioner to accept the State's plea offer. Id. Petitioner's claim fails.

As an initial matter, Petitioner'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, Petitioner cannot demonstrate ineffective assistance of counsel. First, Petitioner'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. Supplemental Petition at 15. Not only did the State agree not to seek charges against Petitioner in ten (10), not eight (8), additional robberies, but Petitioner 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. Guilty Plea Agreement, at 1-2 (filed July 31, 2018). Based on this agreement and the evidence against Petitioner, counsel cannot be deemed ineffective for recommending that Petitioner plead guilty. Specifically, during the evidentiary hearing on Petitioner's Motion to Withdraw Guilty Plea, counsel for Petitioner testified that he knew there were several witnesses prepared to testify as well as DNA evidence linking Petitioner 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.

Recorder's Transcript of Hearing Evidentiary Hearing Re: Motion to Withdraw Guilty Plea Deft. Larenzo Pinkey's Motion to Withdraw Guilty Plea, at 15-16 (April 24, 2019).

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

Recorder's Transcript of Jury Trial – Day 2 Guilty Plea Agreements, 5-6 (November 2, 2018).

Next, Petitioner 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. Petitioner 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 Petitioner was so concerned about whether he could really be tied to these ten (10) other robberies, Petitioner could have asked to review that evidence prior to pleading guilty. Petitioner has not alleged that he did so and as that evidence was irrelevant to the weight of evidence in the instant case, Petitioner cannot demonstrate that counsel was ineffective.

Further, Petitioner cannot show prejudice. Despite Petitioner's claim that the State could not have proved that Petitioner was guilty of the ten (10) crimes enumerated in the Guilty Plea Agreement, Petitioner offers no evidence in support of that claim. Petitioner 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." Supplemental Petition at 15. 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 is not a basis to grant this Petition. Petitioner 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").

Moreover, Petitioner's claim that counsel did not review the evidence pertaining to the ten (10) other robberies prior to advising Petitioner to plead guilty fails. While Petitioner'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. State v. Adrian Powell, C-17-327767-2, Motion to Withdraw Guilty Plea, (filed January 4, 2019). Like Petitioner's Motion to Withdraw Guilty Plea, the district court denied Co-defendant Powell's Motion to Withdraw Plea. However, unlike Petitioner, the district court did so without an evidentiary hearing. State v. Adrian Powell, C-17-327767-2, Court Minutes: Hearing: RE: Withdrawal of Plea, February 27, 2019. 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. Order of Reversal and Remand, Docket No. 79037-COA, at 2 (filed May 11, 2020).

On August 13, 2020, the district court held an evidentiary hearing regarding whether counsel for Petitioner or Co-defendant Powell had reviewed any evidence regarding the ten (10) other armed robberies. There, counsel for Co-defendant Powell confirmed that both himself and counsel for Petitioner, 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.

Exhibit B, at 21-22 (August 13, 2020).

Accordingly, Petitioner's claim fails that his counsel did not review the discovery in the ten (10) other armed robberies.

B. Petitioner cannot show that counsel was ineffective for not filing an appeal.

Petitioner 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. Supplemental Petition at 16-17. Petitioner's claim fails.

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, Petitioner has not alleged, and there is no indication in the record, that he reserved his appeal 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, Petitioner simply makes a broad claim that if counsel had appealed the district court's decision, it would have been reversed. However, Petitioner 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 Petitioner is claiming that counsel was ineffective when arguing that Petitioner 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. Accordingly, Petitioner'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.

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C. Petitioner's claim of cumulative error fails.

Petitioner argues that the cumulation of all of the above errors warrants relief. Supplemental Petition at 17. However, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the petitioner fails to demonstrate any single violation of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there are no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either belied by the record or otherwise meritless. As such, Petitioner has failed to establish cumulative error.

D. Petitioner is not entitled to 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.").

At this stage, there is no need for an evidentiary hearing because all of the claims are either waived, without merit, or bare and naked allegations that are belied by the record. As none of Petitioner's claims would entitle him to relief and there is no need to expand the record, the request for another evidentiary hearing should be denied.

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CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this 24th day of March, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #

BY ***/s/ TALEEN PANDUKHT***
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 24th day of March, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

LARENZO PINKEY, #1217414
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89070

BY ***/s/ E. DEL PADRE***
E. DEL PADRE
Secretary for the District Attorney's Office

TP/jb/GCU

EXHIBIT A

STATE'S NOTICE OF INTENT TO SEEK INDICTMENT

TO: LARENZO PINKEY aka LARENZO PINKNEY ID#8295438 AND/OR YOUR LEGAL COUNSEL BEN DURHAM

YOU ARE HEREBY NOTIFIED THAT THE DISTRICT ATTORNEY MAY SEEK AN INDICTMENT AGAINST YOU FOR THE CRIMES OF:

CONSPIRACY TO COMMIT ROBBERY; ROBBERY WITH USE OF A DEADLY WEAPON; FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON; BURGLARY WHILE IN POSSESSION OF A FIREARM; AND/OR ANY OTHER CHARGES ARISING OUT OF THE INCIDENTS OCCURRING ON OR BETWEEN JUNE 1, 2017 - SEPTEMBER 28, 2017; AGENCY EVENT NUMBERS: LVMPD 170605-0220, 170614-0524, 170618-0989, 170701-0545, 170821-4119, 170823-3211, 170812-3809, 170817-0241, 170817-0470, 170824-0521, 170824-0645, 170825-0589, 170928-0314, 170928-0495, 170928-1894

A person whose indictment the District Attorney intends to seek or the Grand Jury on its own motion intends to return, but who has not been subpoenaed to appear before the Grand Jury, may testify before the Grand Jury if he requests to do so and executes a valid waiver in writing of his constitutional privilege against self-incrimination. Nev. Rev. Stat. 172.241

You are advised that you may testify before the Grand Jury only if you submit a written request to the District Attorney and include an address where the District Attorney may send a notice of the date, time and place of the scheduled proceeding of the Grand Jury. Nev. Rev. Stat. 172.241

A person whose indictment the District Attorney intends to seek or the Grand Jury on its own motion intends to return, may be accompanied by legal counsel during any appearance before the Grand Jury. The legal counsel who accompanies a person may advise his client, but shall not address directly the members of the Grand Jury, speak in such a manner as to be heard by members of the Grand Jury, or in any other way participate in the proceedings of the Grand Jury. The court or the foreperson of the Grand Jury may have the legal counsel removed if he violates any of these provisions or in any other way disrupts the proceedings of the Grand Jury. Nev. Rev. Stat. 172.239

If you are aware of any evidence which tends to explain away the above crimes, and it is your desire that this evidence be presented to the Grand Jury, then you or your attorney must furnish such evidence to the office of the District Attorney immediately. **Responses to testify or present evidence must be addressed to:**

Clark County District Attorney, 200 Lewis Avenue, 3rd Floor, Rm. 3418 - Grand Jury, Las Vegas, NV89155-2211. The Grand Jury telephone numbers are operative 8:00 A.M. - 5:00 P.M. (702) 671-2570/ 671-2575

THIS IS THE ONLY NOTICE YOU WILL RECEIVE. It is your duty to respond as set forth above. Any response inconsistent with the above directions will be disregarded.

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 18TH day of OCTOBER, 2017, by CDDA to:

BEN DURHAM

By: CDDA
District Attorney's Office

I certify that I received the above Notice of Intent To Seek Indictment _____

17F17626A

EXHIBIT B

Electronically Filed
2/11/2021 9:57 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff, vs. ADRIAN POWELL, Defendant.	CASE#: C-17-327767-2 DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

THURSDAY, AUGUST 13, 2020

RECORDER'S TRANSCRIPT OF HEARING
HEARING RE: APPEAL REMAND-DENIAL OF WITHDRAWAL OF GUILTY PLEA

APPEARANCES:

For the State: JOHN L. GIORDANI III, ESQ.
Chief Deputy District Attorney
(via Bluejeans)

For the Defendant: MONIQUE A. MCNEILL, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

Las Vegas, Nevada, Thursday, August 13, 2020

[Case called at 1:21 p.m.]

THE COURT: 327767, Powell.

Counsel, state your appearance for the record.

MS. MCNEILL: Monique McNeill, Bar Number 9862, on behalf of Mr. Powell, who is joining us via video from Southern Desert Correctional Facility.

MR. GIORDANI: Good afternoon, John Giordani on behalf of the State.

THE COURT: Okay. And who's testifying?

MS. MCNEILL: Michael Kane.

THE COURT: Okay. This is on remand so we can have a hearing.

State.

MR. GIORDANI: I'm sorry, Your Honor, you cut out.

THE COURT: Oh, I just -- before we get started, is there anything you want to say?

MR. GIORDANI: Not much other than in looking at the [audio cut out] it appears that things that we're to discuss are the claim that Mr. Kane was ineffective for advising Mr. Powell to enter a plea when part of the purported benefit was the State foregoing filing new charges.

And then the other claim is that he claimed Counsel advised him would receive a sentence of approximately 6 to 15 years and this

untrue assurance led him into accepting the guilt. I believe that's what the remand was limited to.

MS. MCNEILL: That's correct. My questions are focused only to those two issues.

THE COURT: Okay. And before Ms. McNeill -- is that correct?

MS. MCNEILL: Yes.

THE COURT: Okay. Is your client going to be waiving his right to -- regarding attorney-client privilege?

MS. MCNEILL: Well, Judge, I don't think that Mr. Powell is going to be testifying because the affidavit that we submitted is part of the record. So.

THE COURT: But if he's basing his ineffective assistance, we need to inquire of the whole purpose that Mr. Kane is here as to discussions which are --

MS. MCNEILL: Sure.

THE COURT: -- generally protected by attorney-client.

MS. MCNEILL: Correct and --

THE COURT: And my understanding is if you're making that, you have waive attorney-client privilege.

MS. MCNEILL: That is correct, Judge, and I know Mr. Powell and I discussed this a long time ago when I first did the motion.

Mr. Powell, you understand that they're going to ask Mr. Kane questions about his conversations with you and so attorney-client privilege is waived between you and Mr. Kane for the purposes of this

hearing --

THE DEFENDANT: Yes, ma'am.

MS. MCNEILL: -- today. Okay.

THE COURT: So and because it was a while ago, do you have any questions you'd like to ask your attorney outside the presence of us? In other words, you are going to be waiving your attorney-client privilege. Mr. Kane is going to be talking about conversations you and he had that normally would be confidential, private, and would not be allowed to be discussed. But you fully understand you're waiving that privilege, correct?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And did you want to ask your attorney any questions? Because apparently you may not have been able to talk to her. We'll -- we could take a break.

THE DEFENDANT: Is there -- is there a possible, is there a possibility she can come see me or I can get a video conference with her?

THE COURT: Well --

MS. MCNEILL: No, he means right now, Adrian, before we start the hearing.

THE DEFENDANT: Okay. No, I'm okay.

MS. MCNEILL: Okay.

THE DEFENDANT: No, I'm okay. I just need to know my next court date.

THE COURT: Okay. Call -- it's Mr. Kane. Who's calling

Mr. Kane?

MS. MCNEILL: I'll call Mr. Kane, Judge. Before we begin, Mr. Giordani and I, just to sort of streamline things because I know that some of these dates might not be in Mr. Kane's head. We did -- we have a stipulation to some dates.

THE COURT: Go ahead.

MS. MCNEILL: So we are stipulating that the day Mr. Kane was appointed was November 13th, 2017. That the first day of trial in this case was July 30th, 2018. And then based on an email I received from co-defendant's attorney, Ben Durham, that the discovery on the uncharged cases was received September 11th, 2018. I believe Mr. Giordani is stipulating to that date.

THE COURT: Is that correct?

MR. GIORDANI: I'm stipulating to those dates, but just so we're clear, Your Honor, the discovery referenced just now by Ms. McNeill was the same packet that was provided to Your Honor prior to sentencing. And I think we'll get into this during the hearing, but there was discovery shown prior to that date. Just the packet is what we're discussing. The packet was received on September 11th, 2018.

MS. MCNEILL: Right.

THE COURT: All right.

MS. MCNEILL: And that's on the uncharged cases, not -- we're not saying that's the discovery in total on the charged cases.

MR. GIORDANI: Right.

THE COURT: Okay, fine.

Go ahead and swear Mr. Kane in.

MICHAEL KANE

[having been called as a witness and being first duly affirmed, testified, via bluejeans, as follows:]

THE CLERK: Please state your name for the record.

THE WITNESS: Michael Kane.

THE COURT: Okay, just one second. The packet that --

Will you tell you Sandy? Or, okay, go ahead.

That I had with the remand and everything that's supposed to be on the bench. That's --

Did you get -- okay, thank you.

Okay, go ahead.

MS. MCNEILL: Thank you, Judge.

DIRECT EXAMINATION

BY MS. MCNEILL:

Q Mr. Kane, you heard the dates that we discussed which were that trial began July 30, 2018, correct?

A I did.

Q Okay. Prior to that date, well actually can you explain to us when you told -- discussed the deal with Mr. Powell? The deal to which he pled. Sorry that was a bad question.

A Okay. I believe it was the second day of trial during jury selection. At that time, Mr. Giordani approached myself and co-counsel, Roy Nelson, with an offer. And that is the first time that I told him of the deal. Then we went into the back and discussed it.

Q Okay. And part of the leverage that the State was offering for that deal was that they would not file some charges on a series of other criminal offenses, correct?

A No. I have a problem with the term leverage. That wasn't really a consideration for Mr. Powell during our discussions. It was more just a benefit of not having to go through that.

Q Okay. So you never had a --

A Yes, we definitely had a conversation about that -- about the ten, some of the ten other cases that were out there.

Q Okay. Did you see then not filing charges on those cases as a benefit to taking the deal? Or did you -- what were your conversations in that regard?

A Yeah, it was definitely a benefit.

Q Okay. Prior to having a conversation about the deal, had you seen the discovery on the uncharged cases?

A So I don't remember when exactly when I first became aware of the potential filing the other cases. It was during a private hearing and we discussed this. Said, hey, you know what, they had mentioned, before the hearing, they had mentioned that they may have him on ten other cases. Sometime -- well after the offer and after we had a discussion with Mr. Powell, he asked, if I remember correctly, he asked me and Roy to see what they had. Because he adamantly denied, he's like, I don't care about those cases.

THE DEFENDANT: This dude cracks me up.

THE WITNESS: So at that point, we went up to -- it was either

Mr. Giordani's office or somebody else's office in the DA, and they had, we saw photos, we saw there was a police board, like a picture of the police board that had, you know, the events circled with lines. Yeah, I mean, yeah, that's when I first, I believe it's when I first saw.

BY MS. MCNEILL:

Q Okay, but when you -- the day that you told him what the deal was, the second day of trial, and you mentioned that they weren't going to file charges on those cases, had you actually reviewed the police reports in those cases that they were willing to not file charges on?

A I don't believe so, no.

Q Okay. So we had a stipulation that Ben Durham said that that discovery was received September 11, 2018. Does that sound accurate to you as to about the timeframe that you also received that discovery on those uncharged cases?

A I have no reason to dispute that.

Q Okay. And that's after Mr. Powell entered the plea, correct?

A Right.

Q So you had a dispute with me over the term leverage, but you would agree that you said it was one of the benefits of taking the deal would be that those charges would not get filed.

A Correct.

Q Would you agree with me that it would be important to know if the State could have actually proceeded with filing those charges against Mr. Powell and that would require reviewing the discovery?

A No.

Q Okay. So you do not believe you needed to know if the State would have ever actually been able to file those charges.

A No, I do not believe so.

Q Okay. When you were discussing the deal with Mr. Powell, did you tell him that you were going to get him a 6-to-15-year sentence?

A Never.

Q You never told him that.

A Nope.

Q Okay. Did you tell him that if it weren't for the uncharged cases, you could have gotten the 3 to 8?

A No.

Q How much contact have you had with Mr. Powell prior to the start of the trial?

A Okay. So I reviewed -- I went back today. I looked at it for about an hour and I looked at the original Motion to Withdraw and the attached visits which candidly didn't seem right to me. So I looked at Rob Lawson's billing records which showed that he had been there eight times. And I believe I had been there at least two, if not three times. The communication that we had was he had my cell phone number and with the direct bill line that he called quite frequently usually always at the same time. And so we did discuss things over the phone as well.

Q Okay. Do you have any recollection of how many phone calls?

A Between Mr. Powell, his mom, it's either his girlfriend or fiancée, and his dad --

Q Well let's just narrow it to Mr. Powell.

A So for Mr. Powell, how many times he called or how many times we actually spoke? I mean, he called --

Q How many times you actually spoke?

A Okay. We probably spoke 15 plus times [indiscernible due to interruption by inmate] --

THE DEFENDANT: Oh, really?

THE COURT: Mr. Powell, this isn't your chance to speak. Please remain quiet. If you have to talk or would like to talk to your attorney, then you can tell me and we'll take a break and you can talk to your attorney.

MS. MCNEILL: Thank you, Judge.

THE DEFENDANT: Okay. Can I talk to my attorney?

THE COURT: If you want to take a break and talk to your attorney, sure. Is that -- do you want to do it now? Or --

THE DEFENDANT: Yes, sir.

THE COURT: -- wait and --

MS. MCNEILL: Judge, I'll do it --

THE DEFENDANT: Just afterwards.

MS. MCNEILL: Mr. Powell, just relax.

If we do it now, maybe we can cut down the interruptions if he can get his question out.

THE DEFENDANT: Okay.

THE COURT: All right. We'll take a break.

MS. MCNEILL: Thank you, Judge.

MR. GIORDANI: Do you want me to log off?

THE COURT: You're going -- can you, usually they have a number to call.

MS. MCNEILL: They do to CCDC. I don't know about to -- is there an officer in the room?

THE DEFENDANT: Yeah.

THE COURT RECORDER: You know what? I can do --

THE DEFENDANT: Yes.

THE COURT RECORDER: I can do that conference, like I did yesterday.

MS. MCNEILL: Oh, okay.

THE COURT: All right.

THE DEFENDANT: I didn't --

MS. MCNEILL: I'll trust the tech woman to make it happen.

THE COURT: Okay.

THE COURT RECORDER: Mr. Giordani, I'm going to just -- I'm going to mute you for a while so you can't hear the conversation, if you want to stay on.

MR. GIORDANI: Okay.

THE COURT: All right. And I'll step out.

MS. MCNEILL: Thank you, Judge.

THE WITNESS: I think you probably need to mute me too.

THE COURT RECORDER: Oh, yeah, you too. Thanks.

MS. MCNEILL: Yeah.

THE COURT RECORDER: Thanks for the reminder of that.

THE WITNESS: Thank you.

[Proceeding recessed at 1:37 p.m.]

[Proceeding resumed at 1:49 p.m.]

DIRECT EXAMINATION CONTINUED

BY MS. MCNEILL:

Q Thank you. Mr. Kane, I just have one last question. So you indicated that you didn't believe that you used the uncharged cases as leverage or incentive to take the deal even though you did discuss it as part of the reason. What was the reason that you advised Mr. Powell to take the deal?

A I don't believe I advised him to take the deal. Ultimately it's up to him whether he wants to proceed with trial or not as explained to him what the possible -- possibilities were going through trial as opposed to taking this which the offer was. And he decided to -- that he wanted to accept the deal as opposed to going to trial. Roy and I were fully capable and ready to proceed with trial. It was our turn to conduct voir dire which we had prepared for. We got the deal, we explained it to him. He made the decision that he wanted to take it.

Q Okay. But as part of explaining to a client what the deal is from the State, it's not part of your practice to give your opinion on whether or not you think it's a deal a client should consider.

A Yeah it is part. That's true.

Q Okay. So what was the reason you thought he might consider this deal?

A I don't remember the specifics, but knowing what the charges

were and knowing what the evidence was against him, I thought that this deal, probably would have given him my opinion that this deal was better than a jury coming back and, you know, convicting him on all the charges.

Q Okay.

MS. MCNEILL: No further questions, Judge.

THE COURT: Cross. State.

MR. GIORDANI: Thank you.

CROSS-EXAMINATION

BY MR. GIORDANI:

Q Mr. Kane, do you recall first of your preparation for the trial that there was both [audio cut out] evidence between Mr. Powell and Mr. Pinkney to the robberies that were [audio cut out] of the trial?

A I'm sorry. You broke up.

Q Do you recall in your preparation for trial, that there was DNA and fingerprint evidence linking Mr. Powell and Mr. Pinkney to the charges for which they were going to trial?

A Yes.

Q You indicated on direct examination that you took issue with the claim part of the leverage was that the State was going to file additional charges for ten prior incidents. Do you recall that?

A Yes.

Q Can you explain why you took issue with that, a little more depth?

A Because it wasn't -- it was, it wasn't like that those, it was

never presented that had we not had these ten other alleged cases where we believe that Mr. Powell was a part of, that the deal was going to get any better. Because it was just, listen, we're going to -- we'll just close these other ten files. Wasn't like had these not been there, you know, this is a whole different -- whole different offer.

Q Okay. Ultimately, we were all sitting in trial having already completed the State's portion of jury selection when we first conveyed an offer to you. Is that right?

A Yes, the second day.

Q Okay, correct. And prior to that, you had prepared and reviewed the evidence on the trial [audio cut out] for trial, correct?

A Correct.

Q And you enlisted the assistance of Mr. Roy Nelson, attorney.

A Yes.

Q And you previously mentioned Rob. Who is that?

A You broke up. Did you say Rob Lawson?

Q Yes.

A He's a private investigator that we hired on this case as well.

MR. GIORDANI: Okay. And, Your Honor, may I just request that the prison mute their microphone until Mr. Powell has something to say because I'm getting a lot of feedback.

THE COURT: Okay. But I'm not getting it here unless.

MS. MCNEILL: I think that may be what's cutting him out.

THE COURT: But, yeah, go ahead and mute him. If --

THE CLERK: I get it too.

THE COURT: We will take a break before so you can -- if there was, if you want to talk to them. If he wants to talk to you.

So okay. Go ahead.

MR. GIORDANI: Thank you, Your Honor.

BY MR. GIORDANI:

Q Mr. Kane, you indicated that Robert Lawson was an investigator enlisted by you and that he visited Mr. Powell or billed for business eight difference times? Is that correct?

A Yeah, from what I could tell by looking at his billing today.

Q And you also indicated he and his family had my cell phone number. You're referring to Mr. Powell himself, correct?

A Correct.

Q And you had multiple conversations with Mr. Powell leading up to trial. Is that right?

A That's correct.

Q I'm not sure if you're familiar with Mr. Powell's affidavit, but I want to ask you a couple of questions about allegations he made in the affidavit.

A Sure.

Q Paragraph 1 says: Prior to trial, my attorney had only visited me twice at the Clark County Detention Center and only spoke to me on the phone a few times.

Is that true or false?

A False.

Q He also indicated: My attorney did not go through the

discovery with me.

Is that true or false?

A That is also false and I can expand on that, if you'd like me to.

Q Please, go.

A He was very, I mean, he was obviously very active in this case and so he would, when we would go see him, either Rob or I, he would have notes for us. And even underline certain things and he'd want us to either look at or discuss in which we did. When we brought to his attention the DNA evidence, he said, I don't have it. And this is well before the start of trial. We called Rob and like, hey, could you drop him off the DNA evidence, which he did. He would have -- he wanted to talk to us about alibi witnesses, you know, that we checked out. He wanted, whenever we would -- whenever I would explain something to him, he would then request that I call his mom or call his, I think it was his fiancée, I don't -- his fiancée, girlfriend, or wife. Call them and explain it to them. So there was always tell him, and then tell the family members. And so.

Q So the claim that you did not go through the discovery with him is false?

A Correct.

Q He also claims: My attorney did not show me the results from the DNA processing until we had already started jury selection.

True or false?

A False.

Q He also claims: At no point did my attorney discuss the

discovery with me or discuss the theory of defense at trial.

Is that true or false?

A That is false.

Q And if any point you want to expound, please -- please do. There's also a --

A Yeah --

Q Oh, go ahead.

A It goes back to what I was talking about with the alibi. You know, part of the issue when we were talking about defenses was this case, it was a tough case for him. And so, you know, going through the evidence and talking to him, I would and then I know I did, and then I'm almost a hundred percent sure Rob Lawson did as well, but if you asked him, well, listen, what's missing? What should we look for? Your alibi witness, you know, whatever. And so, we did discuss the defenses leading up to trial. We discussed the defenses for -- not the defenses specifically, but the facts of the case and the evidence in the back room right there where they, where they keep the defendants for, had it was well over 30 minutes from what I recall. And I want to be conservative on that and it could have been even longer going through the evidence, the date, yeah, before he took it. I don't, yeah, that's all I got on that.

Q He also claimed in his affidavit: My attorney told me that regardless of what the guilty plea agreement said, I was going to get a sentence of 6 to 15 years.

Is that true or false?

A No, and that's, you know, when I was reading that today,

that's the one I took the most offense of, out of all of them. And that's because very early on in my career, I forgot how it came about, but one of my mentors, Josh Tomshek, he says, listen, you can never promise a sentence. Just like in civil cases, you can never promise a client that they're going to get X amount of money out of a settlement. Never have done it on any of my cases, either criminal or civil. And so, yeah, that absolutely did not take place. I've never promised a sentence. And going further, you go -- I went over the Guilty Plea Agreement with him as well as the sentencing memo multiple times. He -- we cannot guarantee you a sentence. You cannot be guaranteed a sentence. This is the sentencing range that you're looking at. The discretion's up to the Judge. We'll do our best. We're going to get a sentencing memo for you which we did. And we'll argue like hell for you, but, no, did not tell him that.

Q Okay. There's one more claim: The advice my attorney gave me about taking the plea involved the uncharged cases listed on Guilty Plea Agreement. However, he misled me about the strength of the evidence in those cases.

Is that true or false?

A That's false.

Q And you had said previously that not -- the State not filing those additional charges was a benefit, for lack of a better term. Did you want to expound on that?

A So he -- it never really, those cases never really mattered with Mr. Powell anyway because just adamantly denied, laughs to whatever. So it was never -- it was never, I guess, he never made it appear that he

was worried about those, even if they charged him in fact, he probably. But the fact of the matter is, based on the prior offers or his lack thereof and the way that it was presented by yourself and co-counsel at the time of trial, that this is the offer and you know what, we'll throw in, we got these ten other cases we think he's involved in. We'll just throw those in. And so it wasn't like, yeah, so.

Q Understood. The evidence in the case we actually went to trial on or began to go to trial on, would you agree that it was really strong, for lack of a better term?

A Yeah, it was, I mean, yes, it was going to be a tough case from the defense in the sense that, you know, there really weren't a lot of defenses. I mean, Roy -- Roy and I, well a couple of weeks at least before the trial, and this is not the first time I reviewed the file, I viewed it multiple times over the course, you know, discussed a lot of, you know, what are we going to do because Mr. Powell didn't, he made it clear that he wasn't going to take anything unless it was really, really low. So, you know, we went through it. What can we attack? What are the defenses? And there was a lot -- there really wasn't a lot there, so.

Q With regard to the claim in the motion that neither counsel nor Powell fully understood the nature of those uncharged crimes, with regard to that claim, did you think according to your interactions with Mr. Powell that those uncharged acts or the dismissal of those uncharged acts are the thing that caused him to take this deal? Or was it the strength of the evidence in the case we're going to trial on?

MS. MCNEILL: Well, Judge, --

THE WITNESS: No, I --

MS. MCNEILL: -- I'm going to object to speculation unless it's actually something that was discussed.

THE COURT: Well, I'll sustain the objection as if -- unless it was discussed. But if it was discussed, it's, I guess, overruled. So let's ask him.

MS. MCNEILL: Okay, foundation was my objection too.

MR. GIORDANI: Yeah, that was a poor question. I'm sorry.

THE COURT: All right.

BY MR. GIORDANI:

Q Based on your discussions with Mr. Powell, was the main thrust of the deal the fact that the State was taking life off the table? Or was the main thrust of the deal that these uncharged acts would not be filed?

A That life was coming off the table.

Q Okay. And you previously indicated you didn't believe that seeing the full discovery file on the uncharged acts was necessary in your calculus. Why is that?

A Well, in my opinion, when I -- because that was the deal that we were going to get. In fact, I believe there was discussion that, you know, it just wasn't going to get any better. You made -- you guys made it very clear that, you know, based on the evidence that you had that there, that's the only deal you're going get is life off the table. And we'll sweeten it by throwing these other cases out that we think we have him in. So, and that's how we presented it. Roy and I presented it to him is

like, I'm saying it, almost every case. The deals, they're willing to do X. We're fully prepared to go to trial. This is what you could be looking at should you lose and should you be convicted on all accounts. And let us know what you want to do.

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 Pikney, 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.

MR. GIORDANI: All right. Thank you, Mr. Kane.

And, Judge, I will pass the witness.

MS. MCNEILL: Thank you, Judge. Just briefly.

REDIRECT EXAMINATION

BY MS. MCNEILL:

Q Mr. Kane, how many criminal jury trials have you done? At the time --

A That would have been my --

Q I'm sorry.

A That would have been my first criminal jury trial.

Q Okay. What was your theory of defense?

A Our theory of defense was to, if I remember correctly, was to -- we thought our best shot was to see what we could go as far as getting some of them kicked out. Tried to attack, I don't know, like witness credibility on the IDs. Look at see if the State, you know, didn't set the right foundation on the videos oo the surveillance videos. I didn't go back and look at my trial binder, but, I mean, what we were planning

on doing, I had, you know, the case law printed out, the statutes, anything that we're yeah.

Q And so you said you brought Roy Nelson on. Was Roy going to be considered first chair or second chair?

A He was going to be considered first chair, I believe. I was planning on doing the voir dire. I was going to do at least one witness. But.

Q And what made you pick Roy Nelson to be -- to assist you with the case?

A Well he's an ex, I believe, Chief Deputy District Attorney. He's been doing criminal work as, I don't know how many trials he's done, but it's got to be more than 20 or 30, if not a hundred jury trials. During that time, I actually, I called my buddy, Josh Tomsheck, first. He was in a murder trial at the time so he could not do it. So I called Roy and Roy agreed to it, to assist.

Q Did Roy have any contact with Mr. Powell prior to the start of the trial?

A He did.

Q He did. Okay. So when you said you visited two or three times, how many of those meetings was Roy in?

A One.

Q Okay. And so you indicated that you believed you visited him two to three times and that would have been in the months between November 2017 and July of 2018, correct?

A Yes.

Q Okay, and so it sounds like you had --

A I believe that's correct.

Q Sorry I may have cut you off. Sounds like you had your investigator do the bulk of the client contact. What kinds of -- did, did Mr. Lawson provide any type of advice about the discovery?

A No. So, no I didn't have him do the bulk of the client contact. What had happened, and Mr. Powell knew this because I discussed this with him, is I had twins that were born in March -- March 1st, and then subsequently died three weeks later. And so I was working from home for a period of two months and that's when we were discussing things over the phone. It wasn't a matter of Mr. Lawson doing the heavy work.

Q Okay. You indicated that this was going to be your first criminal jury trial. Would you say that you sort of deferred to Mr. Nelson since he was more seasoned?

A No. I've conducted, at that time, at least 20 civil jury trials myself. Well recognized by most of the District Court judges here in town and have been for many years. Very good at cross-examination, every aspect of trial really. And so it was more of having his experience with, you know, if a specific issue would come up with let's say a little nuance or of criminal law and so that he would be -- just to make sure if I didn't know something that he was there. I mean, Roy's also very, very, very, good criminal defense attorney and so I wanted somebody there just like I did my first civil trial with somebody else, so.

Q Mr. Kane, were you aware that during this time period Mr. Nelson was suffering from some serious substance abuse problems?

A I was not aware of that.

MR. GIORDANI: And, Judge, I would just object and ask to strike that from the record unless there's some evidence of that or foundation laid.

THE COURT: Counsel, --

MS. MCNEILL: Judge, I'll withdraw the question. I think it'll --

THE COURT: All right. I'm sustaining the --

MS. MCNEILL: Kind of germane on post-conviction.

THE COURT: -- objection. I mean, that's -- unless there's clear evidence of that.

MS. MCNEILL: Well, they can leave that to post-conviction, Judge. I'll withdraw it.

BY MS. MCNEILL:

Q Mr. Kane, you indicated that part of your discussion with Mr. Powell in discussing the deal was to talk about the sentencing range that he was facing by entering his plea, correct?

A That's correct.

Q What sentencing range did you tell him you believed might be likely, based on the charges to which he was pleading?

A You know I don't remember what charges he pled to. I'm --

Q Well, to refresh your recollection, --

A -- sorry I don't remember, but.

Q -- it was two counts of conspiracy to commit robbery, two counts of burglary with a firearm, two counts of first-degree kidnapping with a deadly weapon, seven counts of robbery with use of a deadly

weapon.

A Yeah, I don't remember the range that I would have given him.

Q Okay. No more question --

A I would have told him the specific ranges on each. I don't know if I did that specifically or if Roy did. Or we both did.

Q Okay.

MS. MCNEILL: Northing further, Judge.

THE COURT: Okay, I've got to ask and both of you can address this. On the remand, you talked about, on page 2, the first sentence. But the second one: Powell further claimed that because he has since learned there was no evidence linking him to the new charges, he would not have pleaded guilty but would have insisted on going to trial.

There was a little bit of testimony about these other charges and the evidence, but I think certainly the Supreme Court is relying on, I guess, the affidavit. So what's that about? Do you see where the --

MS. MCNEILL: Well, Judge, I think that that is Mr. Powell's contentions and then certainly the State can argue that now --

THE COURT: Well, all right, but --

MS. MCNEILL: -- they think the record belies that.

THE COURT: -- shouldn't somebody inquire as to whether or not that's -- I mean, that's --

MS. MCNEILL: Well, I guess --

THE COURT: -- supposedly the substance of this hearing is whether or not his claim would affect going to trial. And so, I --

MS. MCNEILL: Well, I mean, I don't know that he can answer that unless Mr. Powell told him that. That's --

THE COURT: Well, right. Did they discuss it, I guess is my question.

MS. MCNEILL: Mr. Kane, did you hear the Judge's question? Did you discuss, but for those uncharged cases being filed, Mr. Powell would have gone to trial?

MR. KANE: No.

MS. MCNEILL: Okay.

THE COURT: Does that bring up any questions for the State?

MR. GIORDANI: Yes, Your Honor, briefly.

THE COURT: Go ahead.

MR. GIORDANI: Mister --

Thank you.

RECROSS EXAMINATION

BY MR. GIORDANI:

Q Mr. Kane, I previously asked you about where the unfiled charges kind of came in to your calculus? And I believe that your response was something to the effect it was a minor kind of an added bonus to the deal. Is that an accurate statement or can you expound a little bit?

A The -- listen, the deal, it just, we told them we don't know if they're going to charge you with these. They've been, would they have been talking about it for a while. They -- we don't know what evidence, but this is the deal and they're going to throw that in. And so it was just

a -- it was a bonus. It wasn't like the deciding factor, okay, now I'm going to take it. And because -- yeah.

Q And based upon your conversations with Mr. Powell, did he enter this deal where he basically pled to the sheet, but got the benefit of life being taken off the table because it was essentially a foregone conclusion that he was going to be found guilty at trial? Or --

MS. MCNEILL: Well, objection --

MR. GIORDANI: -- likely found guilty?

MS. MCNEILL: -- you don't know what a jury's going to do.

THE COURT: Well, I think he's only asking for the discussions. Is that -- if you limit it to the discussions, I'll allow it. Obviously --

MR. GIORDANI: Yes.

THE COURT: -- it would be a speculation, but on the other hand, the discussions regarding that are relevant.

THE WITNESS: Right. So when we went back there, obviously I don't remember specifics of what, but I do remember that we're in there, Mr. Powell and Mr. Pinkney are, you know, they're upset with the deal. We're explaining it to them. They had a lot of questions about it that we answered. And most specifically what they were. You wanted, like I said, it was like 30 minutes, but it could have well been an hour and a half that we discussed the deal. And it wasn't a lot of time spent on those ten other cases. Most of it was spent on, you know, just not a lot there for him. Didn't look good that, you know, yeah. I mean, I don't remember exactly what we talked about, but we spoke, Roy and I,

and Ben, at one point, for a very long time.

MS. MCNEILL: And, Judge, if I --

MR. GIORDANI: And if you recall --

MS. MCNEILL: Oh, sorry, John. I forgot it was --

MR. GIORDANI: Oh, I'm sorry.

MS. MCNEILL: -- your turn. Sorry.

MR. GIORDANI: All right.

BY MR. GIORDANI:

Q And if you recall, Mr. Kane, at the time of trial, Mr. Powell had previously been convicted of a robbery and an attempted robbery in a prior felony case, correct?

A Yes, in California, if I remember right.

Q And, therefore, it would have been, I guess, admissible as impeachment had he taken the stand at trial.

A Yeah.

MR. GIORDANI: Okay, I have no further questions, Judge.

THE COURT: Defense.

MS. MCNEILL: Just -- just briefly.

REDIRECT EXAMINATION

BY MS. MCNEILL:

Q As Mr. Giordani said, Mr. Powell basically pled to the sheet, including the two first-degree kidnapping counts. Are you familiar with the Supreme Court case law on first-degree kidnapping as being incidental to the robbery and did you think that perhaps you could get those counts kicked by the jury or later on an appeal?

A Yeah, so you're talking about the *Wright* case, I believe, and that was -- we did discuss it and that was one of the things that we discussed with Ben and Roy beforehand. And, you know, understand that this was kind of unusual, I guess, the not have an offer from the District Attorney's office before -- before voir dire. And so it was unusual that we, listen, once we get -- when we got the offer too, Roy and I discussed, and Ben, we were all, you know, kind of confused and pissed for like, what he, it's not an offer. So this was explained to them, but it was prefaced with the understanding that the evidence is so bad against them and their defenses were, if they had minimal, if anything, that they weren't, it wasn't going -- we didn't believe it was going to get any better for them even with what you described the Supreme Court, their opinion in the *Wright* case. So.

Q Okay.

A They weren't made -- the offer was not going to get better. And they made that clear that the offer was going away at the jury selection. So.

Q So it sounds like you had some time pressure on the offer?

A No, it wasn't time pressure in the sense that, I mean, Judge Israel was very patient with us and we had -- they said, it was our turn, we were just going to start jury selection so I'm sure we could have continued it, but. Or told the Judge, I guess, we could have requested, hey, he wants to think about it. Let the jury go for the day.

Q Okay, did -- did you ask for more time to talk about the offer because previously when you testified, you made it sound like you just

had this 30-minute time period that you were talking in the back of the room while the jury's waiting. Do you think that's the best setting to talk to a client about an offer?

A No, no. I guess you misunderstood what I was getting at when I said conservatively 30 minutes. I think it was more -- it was more like hours. And getting to the point where we were just going -- we talked about just sending the jury home, if I remember correctly, with the DA's office. They -- so it wasn't the, when I said 30 minutes it was not, I did not want it to be intended that, hey, this was a quick conversation in the back. It was more to show -- we were back there for a while. And we were back and forth talking to Ben, you know, and then going back in. They wanted to talk together, the co-defendants, they wanted to talk with all the attorneys. So, I mean, it was, it was some time. And understand, throughout the course of the case and we -- he discussed the sentences, the charges, so he knew what he was looking at. This wasn't like it was the first time that he understood. So.

MS. MCNEILL: All right. Judge, I have nothing further.

THE COURT: All right. Thank you. Any other witnesses?

MS. MCNEILL: No, Your Honor.

THE COURT: I'm going to -- did you want to talk to your client because I want to pull *Strickland*. I have one marked up with lots of good quotes so I need to review it.

MS. MCNEILL: Sure, Judge. If you want to take a break, I can --

THE COURT: And did you want --

MS. MCNEILL: -- see if he has any questions.

THE COURT: -- to talk with him? So.

MS. MCNEILL: Sure.

THE COURT: All right. We'll do that again.

MR. KANE: Your Honor, am I dismissed?

THE COURT: Yes, sorry.

MR. KANE: Thank you.

[Hearing trailed at 2:24 p.m.]

[Hearing resumed at 2:42 p.m.]

THE COURT: You may be seated.

Are we on?

THE COURT RECORDER: Uh-huh.

THE COURT: Okay. Argument. Defense.

MS. MCNEILL: Judge, I think I'm just going to submit. I know Your Honor watched the hearing, you listened to it, I know you're well briefed. Mr. Kane's testimony was what it was. Your Honor was able to observe him, his demeanor. You can evaluate his credibility. And so I'm going to submit, Judge.

THE COURT: State.

MR. GIORDANI: I will submit as well, Your Honor.

THE COURT: Wow.

MS. MCNEILL: Easier than you thought.

THE COURT: Thank you.

All right, first of all, I did find Mr. Kane's testimony to be credible. And certainly his testimony is in direct conflict with Mr. Powell's

affidavit, specifically regarding the points that are important to this hearing. The easiest one is, and I don't know if I quoted, yeah, here: I never told Mr. Powell he would receive 6 to 15.

That is on page 2, the second part of the remand. And Mr. Kane specifically, well, I'm not a -- I can't write as fast so I, but I wrote never told Mr. Powell he would receive 6 to 15. Mr. Kane's testimony, as I said, was credible. I did -- I do acknowledge that this was his first jury trial, excuse me, criminal jury trial, however, my recollection from the very, from the beginnings of it was that he was certainly a competent trial lawyer.

In any event, some of the other points -- oh, Mr. Kane testified that he did, in fact, go over the discovery. And when I say discovery about this case, with the defendant. And he went over the Guilty Plea Agreement several times with the defendant and his testimony was that the ten additional, the ten uncharged cases, and again I think it's a quote, but: those cases never mattered in this case.

We will -- the State, apparently: we will throw in those other cases.

The discussions were, the main thrust was taking life off the table. As far as, as I said, the second part of the remand, the 6 to 15, Mr. Kane was clear that he learned early in his career, notwithstanding that there was or he does significant civil and I think now, although I don't know, more criminal. In any event that he would not tell a client that whether, again, whether it's civil where getting a million dollars or in this case, I can get you 6 to 15. In fact, he specifically refuted that statement.

And so regarding the first part, and so therefore, again, if in fact that was never stated to the defendant, there certainly can't be any ineffective assistance of counsel on that point. So let's go to the first paragraph, and I'm reading from the remand: As Powell points out on appeal, he claimed counsel was ineffective for advising him to enter into a guilty plea when part of the purported benefit was the State foregoing filing new charges, but neither counsel nor Powell fully understood the nature of the new charges.

I think what that may be saying is understood the evidence of the new charges because the next line: Powell further claimed that because he has since learned, there was no evidence linking him to the new charges, he would not have pleaded guilty but would have assisted on going to trial.

Once again, that appears to be belied by Mr. Kane's testimony when he, although it is clear he didn't have all of the discovery on those additional uncharged ten cases, that it was Mr. Kane's motive or his objective to get life, the possibility of -- a sentence of life off the table. They did discuss, according to Mr. Kane, the possibility of these ten charges and apparently some of the, some of the evidence that existed or allegedly tied Mr. Powell to those additional uncharged crimes. We have nothing in the record or today regarding whether or not, as in Mr. Powell's affidavit, that there's no evidence, and again that's what they said, there's no evidence linking Mr. Powell to the new charges. And I believe the questioning and/or there was something about similar shoes and yes, the individuals, and I did review the original motion, which I'm

sure you have, to withdraw the guilty plea.

And the affidavit, the argument in the opposition was made that certainly Mr. Powell would know whether or not any of those uncharged cases had anything to do with him. And apparently Mr. Kane didn't feel that that was, and again I can't remember his, let me see if I have his -- I believe he said I don't believe it mattered. But that's in the transcript, so.

So once again at the third sentence: Powell's claim, if true, and not belied by the record, entitled him to relief.

And given the testimony today and the almost, well, several contradictory -- contradicted points by Mr. Kane of Mr. Powell's affidavit, it certainly appears that there was no ineffective assistance of counsel. The *Strickland* and the subsequent cases talk about the fact that it isn't the perfect lawyer and I'm just kind of summing it up, They don't use that wording. But it isn't, a perfect lawyer that the standard is held to, but -- and, I'm trying to get the exact quote from the case, but in any event, the lawyer has to do an adequate job -- okay, the proper standard, the attorney performance is that of a reasonably effective assistance considering all the circumstances.

With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.

Now that tangentially applies because here we have just an issue of Mr. Powell requesting to withdraw his plea and that is a different

standard for his being able to do that. But the reason for him claiming to be doing that is the ineffective assistance. Ineffective assistance of counsel could be a fair and just reason for withdrawing a guilty plea. I do not find ineffective assistance of counsel. The fact that the defendant basically pled to the charges is one factor to be considered, but the advantage that the reason for the plea was, pursuant to Mr. Kane, to take life off the table. Mr. Kane, and just to make sure I got all of these in my notes, went over the Guilty Plea Agreement several times and he stated those cases never mattered in this case. We will throw in the other cases and that was speaking of what the, I guess, the District Attorney in his mind that I think he said something that he only considered it, well you'll get these cases thrown in.

So, again, in the remand, Powell's claim of true and not belied by the record entitled him to relief. But now with the evidentiary hearing and again the fact that I do not see any ineffective assistance of counsel and, I guess, certainly the Appeals Court had the record. I thought I said, the -- at the time, it wouldn't be fair or that I base my decision on the standard. But I certainly acknowledge that the standard is permitting withdrawal would be fair and just. And in this case, this hearing, I don't see any grounds to permit, if you will, or refute that -- no, not refute, to, that there was no reason under the fair and just standard to allow the withdrawal of the plea.

So I think I covered everything. So that is for the remand and the State needs to get a copy of all this and present the order. They can -- I like it when they pass it by you and I may edit it or change it or

whatever, just like we do in civil cases. I may not have addressed everything given the time and given the fact that I don't have all of the cases in front of me, but I think that covers it.

MR. GIORDANI: Thank you, Your Honor.

MS. MCNEILL: Thank you, Judge.

So Mr. Giordani, just email me that order when it's done and I'll say okay or not and then we'll get it to the Judge.

MR. GIORDANI: Will do.

MS. MCNEILL: Thank you.

THE COURT: All right.

MS. MCNEILL: Thank you, Judge.

THE COURT: Thank you.

MR. GIORDANI: Thank you.

MS. MCNEILL: Be safe everybody.

THE COURT: Yes, you too.

[Hearing concluded at 2:59 p.m.]

* * * * * * *

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

Judy Chappell

Judy Chappell
Court Recorder/Transcriber

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Steven D. Grierson
CLERK OF THE COURT

RPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

LARENZO PINKNEY, Petitioner, vs. JAMES DZURENDA, Director of the DOC for the State of Nevada Respondent.	CASE NO.: A-19-806862-W (C-17-327767-1) DEPT. NO. XXVIII

REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORTIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

COMES NOW, Petitioner, LARENZO PINKNEY, by and through his attorney, Betsy Allen, Esq., and files his REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION). This Reply is made and based on the following points and authorities, the papers and pleadings on file herein, together with oral argument at the time of hearing.

Dated this __20th__ Day of May, 2021

___/s/ Betsy Allen_____
Betsy Allen, Esq.
Nevada Bar No. 6878

POINTS AND AUTHORITIES

I.
Procedural Background

Procedural background was previously briefed in Petitioner's Supplement.

II.
Testimonial Statement of Facts

The Statement of Facts was previously briefed in Petitioner's Supplement.

ARGUMENT

A. THE PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL STAGE.

To state a claim for ineffective assistance of counsel that is sufficient to invalidate a judgment of conviction, petitioner must demonstrate that:

1. counsel's performance fell below an objective standard of reasonableness;

2. counsel's errors were so server that they rendered the verdict unreliable.

Lozada v. State, 110 Nev. 349, 353, 871 P.2d 944, 946 (1994). (Citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984)). Once the defendant establishes that counsel's performance was deficient, the defendant must next show that, but for counsel's error the result of the trial would probably have been different. Strickland, 466 U.S. at 694, 104 S. Ct. 2068; Davis v. State, 107 Nev. 600, 601-602, 817 P.2d 1169, 1170 (1991). The defendant must also demonstrate errors were so egregious as to render the result of the trial unreliable or the proceeding fundamentally unfair. State v. Love, 109 Nev. 1136, 1145, 865 P.2d 322, 328 (1993), citing Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838 (1993); Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052 (1984), established the standards for a court to determine when counsel's assistance is so ineffective that it violates the Sixth Amendment of the U.S. Constitution. Strickland laid out a two-pronged test to determine the merits of a petitioner's claim of ineffective assistance of counsel.

First, the petitioner must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. Second, the petitioner must show that the deficient performance prejudiced the petitioner. This requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial whose result is reliable. Unless both showings can be made, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable.

The Nevada Supreme Court has held, "claims of ineffective assistance of counsel must be reviewed under the reasonably effective assistance standard articulated by the U.S. Supreme Court in Strickland, thus requiring the petitioner to show that counsel's assistance was deficient and that the deficiency prejudiced the defense." *See*, Bennet v. State, 111 Nev. 1099, 1108, 901 P.2d 676, 682 (1995); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996).

"The defendant carries the affirmative burden of establishing prejudice." Riley v. State, 110 Nev, 638, 646, 878 P.2d 272, 278 (1994). In meeting the prejudice requirement of an ineffective assistance of counsel claim, a petitioner must show a reasonable probability that, but for counsel's error, the result of the trial would have been different.

Reasonable probability is probability sufficient to undermine the confidence in the outcome. *See*, Kirksey, 112 Nev. at 980, 923 P.2d at 1102. "Strategy or decisions regarding the conduct of a defendant's case are virtually unchallengeable, absent extraordinary circumstances." Mazzan v. State, 105 Nev. 745, 783 P.2d 430 (1989); Olausen v. State, 105 Nev. 110, 771 P.2d 583 (1989).

B. Trial

In the instant case, two of the most important facts for this Court to take into consideration are this: one, the Petitioner pled guilty on the verge of trial, meaning he was intent on having a jury trial and two, he pled straight up to every charge. The State makes lengthy arguments that Petitioner entered this plea voluntarily. Citing to the plea canvas as evidence of voluntariness. This was someone accused of a crime who went to the brink of a jury trial and then pled guilty to every charge levied against him. The only "new" factor in all this was the additional "charges" the state agreed not to file. However, if Petitioner was not versed in exactly what the state was "agreeing" not to file, how, exactly can this plea be anything but involuntary? The police reports[1], which set forth the alleged crimes the State agreed not to file, clearly cannot be connected to Mr. Pinkney. Or anyone, for that matter. To suggest a client plead guilty to every count, or plead to the sheet, is simply put: ludicrous.

A plea agreement is construed according to what the defendant reasonably understood when he entered the plea. Statz v. State, 113 Nev. 987, 993, 994 P.2d 813, 817 (1997); Sullivan v. State, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). The defendant's reasonable understanding is distinguishable from the mere subjective belief of defendant as to any potential sentence, or hope of leniency, unsupported by a promise

[1] Attached as Exhibit "A"

from the State or an indication by the court. See Rouse v. State, 91 Nev. 677, 541 P.2d 643 (1975) The Nevada Supreme Court, in Rubio v. State, 124 Nev. 1032, 1038 (2008), held that "[t]o determine the validity of the guilty plea, we require the district court to look beyond the plea canvas to the entire record and the totality of the circumstances." In other words, a district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what he was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea. Mitchell v. State, 109 Nev. 137, 141, 848 P.2d 1060, 1062 (1993).

A defendant who enters into a guilty plea based upon advice of counsel may refute the plea by demonstrating the ineffectiveness of counsel's performance violated his right to counsel guaranteed under the 6th Amendment to the United States Constitution. Nollette v. State, 118 Nev. 341, 348-349, 46 P.3d 87, 92 (2002); Strickland v. Washington, 466 U.S. 668, 687-88 (1984). A defendant must substantiate their claim of ineffective assistance of counsel by showing counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's erroneous advice, the defendant would not have pled guilty. Id; Warden v. Lyons, 110 Nev. 430, 432, 683 P.2d 504, 505 (1984); Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

This case was going to trial. However, at the last minute, due to the uncharged crimes referenced by the State, Mr. Pinkney accepted a plea "deal" that was NOT a deal at all. Further, upon review of the charges that the State was willing to not file, there was zero way Mr. Pinkney was going to be linked to these charges. 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. 82,59, 106 S.Ct.366, 370 (1985). Again, this case was not months away from trial and Mr. Pinkney pled guilty….it was literally the first day of trial. It was abundantly clear he intended to have a trial. But for the representations of counsel to plead guilty, Mr. Pinkney would have proceeded with his jury trial. There is no refuting this fact.

Further, this Court must look at what the Petitioner eventually pled to in this case….which was EVERYTHING. The State claims throughout its response that this is a bare and naked claim….but this is wholly untrue. Petitioner has alleged specific facts with which this Court can reach a conclusion that counsel for Petitioner was ineffective. The faulty advice, coupled with the Petitioner's clear mental deficits, make for a wholly inappropriate plea, that was neither voluntary or knowing.

Finally, the State actually points to portions of the plea which make it clear that the uncharged events were part and parcel of WHY he decided to make the horrible decision to plead guilty to all the charges. Counsel would note that this is unusual, as a plea canvas is usually the same for all defendants. This one ACTUALLY mentions the issue laid out in this Petition, by the Petitioner. He actually alluded to the fact that he was doing this because of the "uncharged crimes" the State was holding over his head. You cannot make a knowing and voluntary waiver of a trial if you do not know the circumstances surrounding the inducement to pled guilty. This is simply contrary to case law and frankly, logic.

C. APPELLATE PHASE

The Nevada Supreme Court has held a defendant has a right to effective assistance of appellate counsel on direct appeal. Kirksey v. Nevada, 112 Nev. 980, 923 P.2d 1102 (1996).

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed under the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, (1984). Effective assistance of appellate counsel does not mean that appellate counsel must raise every non-frivolous issue. See, Jones v. Barnes, 463 U.S. 745, 751-54, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983). An attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel. Daniel v. Overton, 845 F. Supp. 1170, 1176 (E.D. Mich. 1994); Leaks v. United States, 841 F. Supp. 536, 541 (S.D.N.Y., 1994), aff'd 47 F. 3d 1157 (2nd Cir.) To establish prejudice, based on the deficient assistance of appellate counsel, the defendant must show that the omitted issue would have a reasonable probability of success on appeal. Duhamel v. Collins, 955 F. 2d 962, 967 (5th Cir., 1992); Heath, 941 F.2d at 1132. In making this determination, a court must review the merits of the omitted claim. Heath, 941 F. 2d at 1132.

In the instant case, Petitioner was on the verge of trial and opted to enter a plea based upon incorrect or unverified evidence. Then, prior to sentencing, he requested his plea be withdrawn and was appointed counsel to do so. He further requested an evidentiary hearing on the merits of his withdrawal motion, which was conducted prior to sentencing.

The United States Supreme Court requires courts to review three factors when determining whether a defendant was deprived of his right to an appeal: 1) whether the defendant asked counsel to file an appeal; 2) whether the conviction was the result of a trial or a guilty plea; and 3) whether the defendant had any non-frivolous issues to raise on appeal. Roe v. Ortega, U.S. 470, 480, 120 S. Ct. 1029, 1036 (2000). The Nevada

Supreme Court has held that the court can assess the credibility of witnesses when conducting an evidentiary hearing to determine whether a defendant was deprived of an appeal. Barnhart v. State, 122 Nev. 301, 130 P.3d 650, 652 (2006).

This Court must consider the facts surrounding the history in this case in order to rationally consider the question of whether or not Petitioner desired an appeal. Petitioner had every intention of having a trial, as was clear from actually beginning the trial but subsequently pleading guilty on the first day. Then, he filed a motion to withdraw the plea and had an evidentiary hearing, raising valid issues surrounding his plea.

For these reasons, the Court must grant Mr. Pinkney a hearing on these issues.

D. CUMULATIVE ERROR

Petitioner Pinkney claims that the ineffective assistance that his counsel gave him during trial, post-trial and on appeal amounts to cumulative error. The relevant factors to consider in determining whether error is harmless or prejudicial include whether (1) the issue of innocence or guilt is close, (2) the quantity and character of the error (3) and the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

Therefore, the Mulder factors weigh in favor of finding there is cumulative error warranting reversal of Petitioner Pinkney's conviction.

E. THE PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS PETITION.

In Nevada, a post-conviction habeas petitioner is entitled to a post-conviction evidentiary hearing when she asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief. *McConnell v. State*, 212 P.3d 307, 313, 125 Nev. Adv. Rep. 24 (2009); See also *Byford v. State*, 123 Nev. 67, 68-69,

156 P.3d 691, 692 (2007); *Nika v. State*, 198 P.3d 839, 124 Nev. Adv. Rep. 103 (2008); Nev. Rev. Stat. Ann. § 34.770.

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing, and states:

> 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.

There is no question that Mr. Pinkney has raised valid questions of fact in his Petition. Counsel's failures have left Mr. Pinkney with claims of ineffective assistance of counsel which have prejudiced him in these proceedings and require reversal and a new trial.

CONCLUSION

For the foregoing reasons, the accused herein respectfully request that this Court grant appropriate relief requested in the Petition for Writ of Habeas Corpus (Post-Conviction).

DATED this _20th day of May, 2021

By: /s/ Betsy Allen

Betsy Allen, Esq.
Nevada Bar No. 6878
Law Office of Betsy Allen
PO Box 46991
Las Vegas, Nevada 89114
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CERTIFICATE OF SERVICE

I hereby certify that I provided the Clark County District Attorney a true and correct copy of the foregoing Reply on the 20th day of May, 2021 via email to:

Taleen.pandukht@clarkcountyda.com

DATED this 20th day of May, 2021

___/s/Betsy Allen_____
Betsy Allen, Esq.

FCL
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

LARENSO PINKEY,
#895438

Defendant.

CASE NO: A-19-806862-W

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JULY 12, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable RONALD ISRAEL, District Judge, on the 12 day of July, 2021, the Petitioner being present, being represented by Betsy Allen, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On November 8, 2017, an Indictment was filed charging Petitioner Larenzo Pinkey aka, Larenzo Pinkney (hereinafter "Petitioner"), and Co-Defendant Adrian Powell ("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). 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.

The case ultimately proceeded to jury trial on July 30, 2018. Voir Dire commenced on July 30, 2018. The Court concluded for the day, and the parties returned the following day to resume jury selection. On July 31, 2018, the parties negotiated for hours, and the State ultimately agreed to allow both Petitioner and his Co-Defendant to plead guilty. Petitioner 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). 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.

On January 30, 2019, Petitioner filed a Motion to Withdraw Guilty Plea through newly appointed counsel Lucas Gaffney, Esq. The State filed an Opposition on February 12, 2019. On April 24, 2019, an evidentiary hearing was held, and Petitioner's plea counsel, Ben Durham, Esq., and Petitioner testified. At the conclusion of the evidentiary hearing, the Court made verbal findings that Mr. Durham's testimony was credible, he knew Petitioner'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 Petitioner stated he understood everything. The Court further found Petitioner was examined and found competent and he knowingly and voluntarily entered his plea. The Court also found no evidence under Strickland that Mr. Durham failed to render reasonable effective assistance. The Court then denied Petitioner's Motion to Withdraw Guilty Plea.

On May 20, 2019, Mr. Gaffney filed a Sentencing Memorandum. On May 22, 2019, Petitioner was ordered to pay Restitution in the total amount of $3,942.00, jointly and severally

with the Co-Defendant ($1,100.00 to Pepe's Tacos; $2,342.00 to Rebel Oil Co; and $500.00 to Roberto's on Rainbow). Petitioner 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. Petitioner's aggregate total sentence was one hundred thirty-two (132) to six hundred (600) months in the NDC.

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

On November 21, 2019, Petitioner filed a Pro Per Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). On January 6, 2020, the Court appointed Betsy Allen, Esq. On January 18, 2021, Petitioner filed a Supplemental Memorandum of Points and Authorities in Support of Petitioner's Writ of Habeas Corpus (Post-Conviction) ("Supplemental Petition"). On March 24, 2021, the State filed a Response to Petitioner's Petition and Supplemental Petition. On May 20, 2021, Petitioner filed a Reply to the State's Response. On July 12, 2021, the district court heard arguments from Petitioner and counsel.

STATEMENT OF FACTS

A. Testimony of Jose Chavarria

Jose Alfredo Chavarria Valenzuela was working as a cook at Pepe's Tacos located at 2490 Fremont Street, Las Vegas, Nevada on September 28, 2017. Reporter's Transcript of Proceedings, October 17, 2017, ("RT1") at 32-33. At approximately 2:40 AM, Chavarria was in the kitchen area when two (2) gunmen entered the restaurant. RT1 at 35. 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. RT1 at 35. The gunman told Chavarria to get on the ground and that he "wanted the money." Id. The gunman then forced Chavarria at gunpoint from the back of the store to the front cash registers. RT1 35-36.

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. RT1 at 36. 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. RT1 at 37. 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. Id. The gunmen took the money from the cash registers but did not take any property from Chavarria. RT1 at 37-38.

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B. Testimony of Yenir Hessing

Yenir Hessing works as the shift lead at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada. RT1 at 7. 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. RT1 at 8-10.

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. RT1 at 10. The food aisle is located near the store's photo section, away from the registers and store entrance. RT1 at 14. 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. RT1 at 14. As the gunman pushed Hessing, he told her this is "not a game and I'm going to kill you." RT1 at 10.

At the front of the store, the gunman told her to open the three (3) cash registers, which Hessing did. Id. At that moment, another Walgreens employee, Tifnie Bobbitt, was returning from lunch and, upon seeing Bobbitt, the gunman ordered her to the front of the store too. Id. 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." RT1. The gunman then used the gun to again push Hessing, this time toward the office located at the back of the store. RT1 at 10 .

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. RT1 at 9, 12. As the gunman pushed Hessing toward the back office at gunpoint, he told Hessing "I'm going to kill you." RT1 at 14:15. Hessing responded to the gunman, telling him "please don't hurt me, I'm nine weeks pregnant, don't do anything to me." RT1 at 15-17. 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]." RT1 at 14:17-19.

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.

RT1 at 15-16. The door to the office closed behind them, leaving Hessing, Bobbitt and the gunman isolated from the rest of the store. RT1 at 17-18. In the office, the gunman began hitting Hessing in the ribs with the gun and demanding that she open the safe. RT1 at 17. Hessing opened the first of two safes and the gunman grabbed everything. Id. The gunman then demanded Hessing open the second safe, which she did. The gunman grabbed the contents from the second safe and fled from the office. Id.

C. Testimony of Tifnie Bobbitt.

Tifnie Bobbitt was working as a cashier at the Walgreens located at 4470 East Bonanza, Las Vegas, Nevada, on September 28, 2017. Reporter's Transcript of Proceedings, November 7, 2017, ("RT2") 8. Around 4:00 AM, Bobbitt was headed to breakroom to take her lunch break when she heard a man "say the F word." RT2 9-10:1. Bobbitt looked over to see the man crouching and walking behind Yenir Hessing. RT2 at 1. 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. RT2 at 10-11. 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. RT2 at 11. At that moment, the gunman saw her and yelled at her "Where the fuck do you think you're going, bitch?" RT2 at 11.

The gunman then ordered Bobbitt to the front of the store where Hessing was opening the cash registers for the gunman. RT2 at 13. 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. RT2 at 13-14. At the breakroom door, they entered the code and entered the breakroom. RT2 at 14. From there, Hessing entered the code to the office door and the gunman forced the women into the office. RT2 at 14-15. In the office, the gunman "kept jabbing the gun" into Hessing's side as he was forcing her to open the safes. RT2 at 15. Once the safes were open, the gunman took the money from the safes and fled. Id.

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ANALYSIS

NRS 34.810(1) reads:

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

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

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).

In his Petition, Petitioner claims that "counsel failed to show muster in his duty" and that the prosecution did not serve a proper Marcum notice. Petition at 5-6. In his Supplemental Petition, Petitioner raises four (4) other claims: (1) that trial counsel was ineffective when moving to withdraw Petitioner's guilty plea because counsel did not argue that Petitioner was induced to plead guilty by the State's agreement not to seek criminal charges against Petitioner for crimes they never could have tied to Petitioner; (2) that counsel was ineffective for failing to appeal the district court's denial of his Motion to Withdraw Guilty Plea; (3) that cumulative error warrants reversing Petitioner's conviction; and (4) that Petitioner is entitled to an evidentiary hearing. Supplemental Petition at 14-17. All of Petitioner's claims fail.

I. PETITIONER'S PETITION IS DENIED

Petitioner raises two (2) claims within Ground One of his Petition. Specifically, Petitioner claims that "counsel failed to show muster in his duty" and that the prosecution did not serve a proper Marcum notice. Petition at 5-6. Petitioner alleges that the State did not provide him with a notice of his right to testify at Grandy Jury and that the Indictment was void because it was issued the day after the second grand jury hearing. Id. at 6. Petitioner claims that this is what caused him to plead guilty and that counsel was ineffective for not taking notice of this violation. Petitioner's claims fail.

As an initial matter, Petitioner waived these claims when he pled guilty. NRS 34.810(1)(a). Nothing about Petitioner's claim that counsel did not show enough muster alleges that counsel actions rendered his plea invalid or that counsel was ineffective in the plea process. Additionally, Petitioner's claim that the Marcum notice was not timely served is not even a claim of ineffective assistance of counsel and thus should have been raised on direct appeal. Therefore, both claims are beyond the scope of habeas proceedings and therefore denied.

Moreover, Petitioner's claim that counsel did not show "muster" during his representation of Petitioner is nothing but a bare and naked claim suitable only for summary denial. Petitioner does not explain specifically what counsel should have done or how those actions would have caused him to reject any plea deal and proceed to trial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, his claim is denied.

Next, Petitioner's claim that the Marcum notice was not timely served is belied by the record. NRS 172.241(2) provides that a district attorney "shall serve reasonable notice" to a defendant that a grand jury indictment is being sought. The Nevada Supreme Court has held that even five (5) days' notice is reasonable. Sheriff v. Marcum, 105 Nev. 824, 825-269, 783 P.2d 1389, 1390-91 (1989).

In this case, the Marcum notice was served on defense counsel on October 18, 2017. Exhibit A. While the grand jury first convened on October 17, 2017, the grand jury met a second time on November 7, 2017, and subsequently returned a true bill against that same day, twenty (20) days after Petitioner was informed of his right to testify before the grand jury. Twenty (20) days is more than "reasonable notice" for Petitioner to decide whether he wished to testify or present evidence at the hearing. NRS 172.241. Despite Petitioner's belief that his Indictment is invalid because it was issued a day after the grand jury met, that does not change the fact that Marcum was served twenty (20) days before the grand jury met. As such, Petitioner's claim is belied by the record.

Additionally, Petitioner cannot show prejudice. Petitioner does not even that he would have testified at the grand jury, much less what he would have testified to or how that would have impacted the outcome at the grand jury. Despite Petitioner's claim that this is what caused him to plead guilty, Petitioner failed to articulate specific facts or evidence supporting this allegation. As such, this is nothing but a bare and naked allegation suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. For these same reasons, Petitioner's claim that counsel was ineffective for not taking notice of this alleged violation of his rights fails. Petitioner failed to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Molina, 120 Nev. at 190-91, 87

P.3d at 537. Thus, Petitioner cannot show that counsel was ineffective. Accordingly, this Court denies Petitioner's Petition.

II. PETITIONER'S SUPPLEMENTAL PETITION IS DENIED

A. Trial counsel was not ineffective when moving to withdraw Petitioner's guilty plea.

Petitioner argues that trial counsel was ineffective when moving to withdraw Petitioner's guilty plea. Supplemental Petition at 14-16. Specifically, Petitioner 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 Petitioner and his Co-defendant for ten (10) additional armed robberies. Id. Petitioner 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 Petitioner was guilty of the other robberies, counsel was ineffective for telling Petitioner to accept the State's plea offer. Id. Petitioner's claim fails.

As an initial matter, Petitioner'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, Petitioner failed to demonstrate ineffective assistance of counsel. First, Petitioner'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. Supplemental Petition at 15. Not only did the State agree not to seek charges against Petitioner in ten (10), not eight (8), additional robberies, but Petitioner 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. Guilty Plea Agreement, at 1-2 (filed July 31, 2018). Based on this agreement and the evidence against Petitioner, counsel cannot be deemed ineffective for recommending that Petitioner plead guilty. Specifically, during the evidentiary hearing on Petitioner's Motion to Withdraw Guilty Plea, counsel for Petitioner testified that he knew there were several witnesses prepared to testify as well as DNA evidence linking Petitioner 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.

Recorder's Transcript of Hearing Evidentiary Hearing Re: Motion to Withdraw Guilty Plea Deft. Larenzo Pinkey's Motion to Withdraw Guilty Plea, at 15-16 (April 24, 2019).

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

Recorder's Transcript of Jury Trial – Day 2 Guilty Plea Agreements, 5-6 (November 2, 2018).

Next, Petitioner 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. Petitioner 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 Petitioner was so concerned about whether he could really be tied to these ten (10) other robberies, Petitioner could have asked to review that evidence prior to pleading guilty. Petitioner has not alleged that he did so and as that evidence was irrelevant to the weight of evidence in the instant case, Petitioner cannot demonstrate that counsel was ineffective.

Further, Petitioner failed to show prejudice. Despite Petitioner's claim that the State could not have proved that Petitioner was guilty of the ten (10) crimes enumerated in the Guilty Plea Agreement, Petitioner offers no evidence in support of that claim. Petitioner 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." Supplemental Petition at 15. 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 is not a basis to grant this Petition. Petitioner 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").

Moreover, Petitioner's claim that counsel did not review the evidence pertaining to the ten (10) other robberies prior to advising Petitioner to plead guilty fails. While Petitioner'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. State v. Adrian Powell, C-17-327767-2, Motion to Withdraw Guilty Plea, (filed January 4, 2019). Like Petitioner's Motion to Withdraw Guilty Plea, the district court denied Co-defendant Powell's Motion to Withdraw Plea. However, unlike Petitioner, the district court did so without an evidentiary hearing. State v. Adrian Powell, C-17-327767-2, Court Minutes: Hearing: RE: Withdrawal of Plea, February 27, 2019. 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. Order of Reversal and Remand, Docket No. 79037-COA, at 2 (filed May 11, 2020).

On August 13, 2020, the district court held an evidentiary hearing regarding whether counsel for Petitioner or Co-defendant Powell had reviewed any evidence regarding the ten (10) other armed robberies. There, counsel for Co-defendant Powell confirmed that both himself and counsel for Petitioner, 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.

Exhibit B, at 21-22 (August 13, 2020).

Accordingly, Petitioner's claim that his counsel did not review the discovery in the ten (10) other armed robberies fails.

B. Petitioner cannot show that counsel was ineffective for not filing an appeal.

Petitioner 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. Supplemental Petition at 16-17. Petitioner's claim fails.

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, Petitioner has not alleged, and there is no indication in the record, that he reserved his appeal 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, Petitioner simply makes a broad claim that if counsel had appealed the district court's decision, it would have been reversed. However, Petitioner 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 Petitioner is claiming that counsel was ineffective when arguing that Petitioner 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. Accordingly, Petitioner's claim is nothing but a bare and naked assertion and therefore denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. Petitioner's claim of cumulative error fails.

Petitioner argues that the cumulation of all of the above errors warrants relief. Supplemental Petition at 17. However, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the petitioner fails to demonstrate any single violation of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th

Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there are no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either belied by the record or otherwise meritless. As such, Petitioner fails to establish cumulative error.

D. Petitioner is not entitled to 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

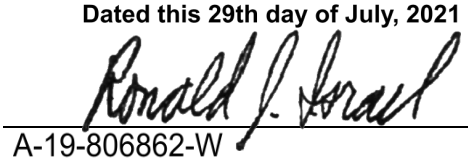
district court considered itself the 'equivalent of . . .the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

At this stage, there is no need for an evidentiary hearing because all of the claims are either waived, without merit, or bare and naked allegations that are belied by the record. Evans, 117 Nev. at 646-47, 29 P.3d at 523. Strickland, 466 U.S. at 686, 104 S. Ct. at 2063. As none of Petitioner's claims would entitle him to relief and there is no need to expand the record, the request for another evidentiary hearing is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction) and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) shall be, and it is, hereby denied.

Dated this 29th day of July, 2021



A-19-806862-W

6AB B59 FD0F BF99
Ronald J. Israel
District Court Judge

SC

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

BY ***/s/ Taleen Pandukht***
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734

CERTIFICATE OF MAILING

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

LARENZO PINKEY, #1217414
HIGH DESERT STATE PRISON
PO BOX 650
INDIAN SPRINGS, NV 89070

BY ***/s/ E. Del Padre***
E. DEL PADRE
Secretary for the District Attorney's Office

ed/jb/GCU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Larenzo Pinkey, Plaintiff(s)	CASE NO: A-19-806862-W
vs.	DEPT. NO. Department 28
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 7/29/2021

Alexander Chen	Alexander.Chen@ClarkCountyDA.com