IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. NEWSOME, JR., Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83475

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This is an appeal of a denial of a Petition for Writ of Habeas Corpus (Post-Conviction) concerning a Category A Felony, Second -Degree Murder With Use of a Deadly Weapon. Pursuant to NRAP 17(b) the Nevada Supreme Court should retain jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the district court properly found Appellant failed to overcome the procedural bars to his untimely and successive Petition.

    a. Whether the district court properly found Appellant failed to demonstrate good cause and prejudice to overcome the procedural bars.
    b. Whether the district court properly found Appellant failed to demonstrate a fundamental miscarriage of justice.

2. Whether the district court properly found Appellant was not entitled to relief in his claim that he was represented by conflicted counsel.

3. Whether the district court properly found counsel was not ineffective for failing to conduct sufficient investigation and preparation prior to Appellant's guilty plea.

4. Whether the district court properly found Appellant's guilty plea was freely, voluntarily, and knowingly entered.

5. Whether the district court properly denied Appellant's request for an evidentiary hearing when Appellant failed to plead specific facts that would overcome the procedural bars.

6. Whether Appellant's cumulative error claim is barred from consideration on appeal when it was not raised before the district court.

STATEMENT OF THE CASE

On February 2, 2017, Richard Newsome, Jr. ("Appellant") was charged with the following: Count 1 – Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165); Count 2 – Assault With Use of a Deadly Weapon (Category B Felony – NRS 200.471). Appellant's Appendix ("AA") at 001-003, 004.

On December 14, 2017, Appellant pled guilty to one count of Second-Degree Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030.2, 193.165). AA 025-.032. Pursuant to the negotiations as contained in the Guilty Plea Agreement ("GPA"), the State retained the right to argue at sentencing. AA 025.

On February 8, 2018, Appellant received a sentence of 10 years to life in the Nevada Department of Corrections. AA 100-101; 126-128. The Judgment of Conviction was filed on March 5, 2018. AA 100-101. Appellant did not file a direct appeal.

On February 1, 2019, Appellant filed a Petition for Writ of Habeas Corpus ("First Petition"), Supplemental Petition for Writ of Habeas Corpus ("Supplement"), Motion for Appointment of Counsel ("Motion"), and Request for an Evidentiary Hearing ("Request"). 1 Respondent's Appendix ("RA") 157-190. On May 1, 2019, the State filed a response to Appellant's First Petition, Supplement, Motion, and Request. 1 RA 191-200. On May 28, 2019, the district court denied Appellant's First Petition, Supplement, Motion, and Request. 1 RA 201. The Findings of Fact, Conclusions of Law were filed on June 26, 2019. 1 RA 202-211. On July 13, 2020, the Nevada Court of Appeals affirmed the district court's denial of Appellant's First Petition, Newsome v. State, No. 79044-COA (Order of Affirmance, Jul. 13, 2020). AA 145-48. Remittitur issued on August 10, 2020. AA 149.

On October 9, 2020, Appellant filed another Petition for Writ of Habeas Corpus ("Second Petition"). 1 RA 212-229. On November 23, 2020, the State filed its Response. 1 RA 230-247. On December 17, 2020, this Court denied Appellant's Second Petition. 1 RA 248. The Findings of Fact, Conclusions of Law and Order were filed on April 5, 2021. 2 RA 249-268.

On March 9, 2021, Appellant filed a Motion to Correct Illegal Sentence. AA 150-56. On March 31, 2021, Terrence Jackson, Esq. confirmed as counsel. AA 157. On April 20, 2021, the State filed its Opposition to Appellant's Motion to Correct Illegal Sentence. AA 158-63.

On June 2, 2021, Appellant filed a Supplemental Points and Authorities in Support of Writ of Habeas Corpus for Post Conviction Relief ("Third Petition"). AA 164-81. On July 7, 2021, the State filed its Response to Defendant's Supplemental Points and Authorities in Support of Writ of Habeas Corpus for Post Conviction Relief. AA 182-205. On July 23, 2021, Appellant filed a Reply. AA 206-210. The district court denied Appellant's Third Petition on August 4, 2021. AA 212. The Findings of Fact, Conclusions of Law and Order were filed on August 20, 2021. AA 211-24. On September 2, 2021, Appellant filed a Notice of Appeal. AA 226-27.

STATEMENT OF THE FACTS

On January 14, 2017, Alicia Agudo (hereafter "Alicia") and her friends Imunique Newsome (hereafter "Imunique") and Carlos Hernandez (hereafter "Carlos") were on a bus en route to Oniesha Coleman's (hereafter "Oneisha") residence, at 4804 Sacks Drive, Las Vegas, Nevada 89108. 1 RA at 32, 81-82. Alicia and Oniesha had been in a dating relationship for approximately six (6) months. 1 RA at 21. During this trip, Imunique showed Alicia several screen shots of conversations and social media post between Oniesha and another mutual

acquaintance indicating that Oneisha was flirting with said mutual acquaintance. 1 RA 22.

Alicia called and texted Oneisha to question Oneisha about her conversations with said acquaintance. 1 RA 22-23. A verbal argument ensued between Alicia and Oniesha. 1 RA 22-23, 25. Upset over the allegations, Oniesha uninvited Alicia and Imunique to Oneisha's house. 1 RA at 25-26, 102. At one point during the conversation Imunique overheard Oneisha call Imunique a "bitch." 1 RA at 84, 102. Imunique angrily exited the bus while Alicia and Carlos continued on the bus to Oniesha's residence. 1 RA at 73-74, 85.

Imunique called her mother, Tianna Douglas (hereafter "Tianna"), to ask Tianna to pick her up. 1 RA at 74. Imunique explained Oniesha disrespected Imunique by calling Imunique a bitch. 1 RA at 74. Tianna, along with Appellant – Imunique's brother and Tianna's son – Imunique's younger brother and Appellant's best friend (collectively hereafter "family") picked up Imunique, together they drove to Oneisha's house to confront Oneisha for insulting Imunique. 1 RA at 49, 61-62, 74.

Meanwhile, Alicia relentlessly called and texted Oneisha. 1 RA at 86-87. To avoid Alicia, Oneisha left with her friend, Brooke, to run an errand and called her mom, Roxanne Bruce (hereafter "Roxanne"), and told her to tell Alicia that Oneisha was not home. 1 RA 29. After Roxanne told Alicia and Carlos that Oneisha was not

home, Alicia waited for her ride while Carlos received a text from Oneisha telling him to meet her at Albertsons. 1 RA at 88-89. Carlos and Alicia split up. 1 RA at 48.

Shortly thereafter, and when Alicia and Carlos had left Oneisha's house, Appellant and his family arrived at Oneisha's house. 1 RA at 61-63. They pounded on the door resulting in both Roxanne and her husband, Wade Keenan Bruce (hereafter "Bruce") coming to the door. 1 RA at 49, 61-63. Roxanne told them that Oneisha was not home and directed Appellant and his family to leave. 1 RA at 61-63. Although they left the residence, they remained in a nearby apartment complex. 1 RA 94.

Alicia was picked up by her brother and as they were leaving the area, Alicia saw Carlos, she exited her brother's car and asked Carlos about Oneisha's whereabouts. 1 RA 104. Carlos responded he did not know where Oneisha was. 1 RA 105. While speaking with Carlos, Alicia received numerous calls from Imunique. 1 RA 106. When Alicia finally answered, Imunique asked Alicia where she was and if Carlos was with her. 1 RA 106. After giving Iminuqie her location and affirming Carlos was with her, Imunique hung up. 1 RA 106.

Less than a minute later, Imunique, Appellant and family arrived. 1 RA 106. Upon arrival, Appellant confronted Carlos with a firearm. 1 RA at 95. Appellant cocked the firearm and began waving and pointing the firearm at Carlos's chest. 1 RA at 95, 108. Appellant was upset at Carlos for letting Imunique get off the bus by

herself. 1 RA at 73-74; 108-109. While pointing the firearm at Carlos, Appellant stated, "Give me two reasons why I shouldn't put two holes in you, nigger." 1 RA at 96. The confrontation only ended because Imunique began running to Oneisha's house, Alicia walked after her and Appellant and family got back into their car and followed Imunique. 1 RA at 97-98.

As Alicia approached Oneisha's house, she observed Oniesha and Brooke in a vehicle parked in front of the Oniesha's residence. 1 RA at 110-111. Enraged, Alicia cussed Oneisha out and attempted to remove Oniesha from the vehicle by grabbing Oniesha by the hair. 1 RA at 34, 43, 111. Alicia and Oniesha tripped over a curb causing Oniesha to fall on the ground on top of Alicia. 1 RA at 34, 111. Appellant and family responded. RA at 34-35. Tianna yelled at Oniesha to get off Alicia and punched Oniesha on the jaw. 1 RA at 35, 39. Simultaneously, Appellant began attacking Oneisha: Appellant punched and kicked Oniesha while yelling at Oniesha to not to call his sister (Imunique) a bitch. 1 RA at 35-36, 111.

Appellant and the two males of his family continued to kick and punch Oneisha as she was on the floor covering her face. 1 RA at 51, 76. Meanwhile, Tianna and Imunique were on the side laughing and Alicia stood watching. 1 RA at 51, 52. Roxanne, victim-Richard Nelson (hereafter "Richard") and Richard's girlfriend ran out of the house to help Oneisha. 1 RA at 36, 51-52. Richard pulled two guys, including Appellant, off Oneisha – his sister when Appellant abruptly

pulled out a firearm and started shooting Richard. 1 RA at 51, 53, 55, 58, 61, 66. Appellant continued to shoot at Richard as Richard ran away. 1 RA at 53, 61. Richard ran to his mom and died in front of her. 1 RA at 53-54, 61. After the shooting, Appellant and family fled in their car driven by Tianna. 1 RA at 113-114.

Oneisha, and Roxanne witnessed and identified Appellant as the shooter. 1 RA at 38, 53, 55.

SUMMARY OF THE ARGUMENT

Appellant's Third Petition is procedurally barred as it is untimely, successive, and an abuse of the writ. Given that the application of the procedural bars is mandatory, the district court properly deemed the Petition as time-barred. Appellant failed to overcome the procedural defaults because he failed to establish good cause and prejudice. Appellant attempted to demonstrate good cause and prejudice by claiming his lack of knowledge and inability to obtain post-conviction counsel. These claims do not constitute good cause as a matter of law.

Because Appellant cannot establish good cause and prejudice, his time-barred Petition must be dismissed without consideration of its claims, including his allegation that a fundamental miscarriage of justice would result if his claims are not heard. Appellant also fails to substantiate this. Accordingly, his claims are barred from consideration.

Even if Appellant's substantive claims were to be heard, they would still fail. Appellant asserts several ineffective assistance of counsel claims. First, Appellant alleges he received ineffective assistance of counsel because his counsel represented both him and his codefendant. Appellant wrongly assumes that the mere fact that his counsel represented both defendants establishes an actual conflict of interest. Appellant signed a waiver and acknowledged he did so voluntarily, knowingly and understandingly waive, any potential and/or actual conflict, which may arise out of our joint and simultaneous representation by counsel.

Second, Appellant asserts counsel performed insufficient investigation, did not hire experts, and spent insufficient time with him. This claim fails procedurally and on the merits. Because Appellant's convictions are the result of a guilty plea, he is only permitted to raise allegations of ineffective assistance of counsel that challenge the validity of his guilty plea. NRS 34.810(1)(a). Appellant has failed to cogently argue that the alleged errors of his counsel invalidated his guilty plea. Further, Appellant asserted in his executed GPA and at the plea canvass that he discussed his case, including defenses and possible strategies with counsel. Appellant failed to meet the Strickland prongs.

Appellant again claims his plea was invalid. This claim has already been decided on the merits and thus this claim is barred under the law of the case doctrine. Appellant's also raises a claim regarding a denial of an evidentiary hearing. This

claim also fails on the merits because Appellant fails to specify facts establishing good cause and prejudice or fundamental miscarriage of justice. His substantive claims are similarly plead in a vague and conclusive manner insufficient to warrant post-conviction relief. Lastly, Appellant's claim of cumulative error fails as it is barred from consideration as Appellant raises this claim for the first time on appeal. Further, the claims he attempts to cumulate are ineffective assistance of counsel claims, which cannot be cumulated. Even if they could, there are no error to cumulate. Thus, this Court should affirm the district court's denial of Appellant's Third Petition.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S THIRD PETITION AS PROCEDURALLY BARRED

The Third Petition is untimely under NRS 34.726, and therefore its claims cannot be considered in the absence of a showing of good cause and prejudice. NRS 34.726(1) requires a petitioner to challenge the validity of his judgment or sentence within one year from the entry of judgment of conviction or the issuance of remittitur from his direct appeal.

This one-year time limit is strictly applied and begins to run from the date the judgment of conviction is filed or remittitur issues from a timely filed direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). "Application of the

statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored [by the district court] when properly raised by the State." State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002) the Nevada Supreme Court rejected a habeas petition filed two days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit. Absent a showing of good cause and prejudice, courts have no discretion regarding whether to apply the statutory procedural bars.

Here, Appellant's Judgment of Conviction was filed on March 5, 2018, and Appellant did not file a direct appeal. Appellant then had until March 5, 2019 to timely file a petition for writ of habeas corpus. However, he filed the underlying Third Petition on June 2, 2021, more than two years after the one-year deadline of NRS 34.726. Accordingly, absent a showing of good cause and prejudice, that will be discussed below, the Third Petition was properly and mandatorily denied as untimely.

Petition is Successive

Appellant has twice previously sought post-conviction relief, and therefore the Third Petition is successive. NRS 34.810(1)(b)(2); NRS 34.810(2). "Successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden,

111 Nev. 872, 882, 901 P.2d 123, 129 (1995). Courts are required to dismiss successive post-conviction petitions if a prior petition was decided on the merits and a petitioner fails to raise new grounds for relief, or if a petitioner does raise new grounds for relief but failure to assert those grounds in any prior petition was an abuse of the writ. NRS 34.810(2); See Riker, 121 Nev. at 231, 112 P.3d at 1074. Successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice for failing to raise the new grounds in their first petition. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). If a claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991).

The Third Petition must be denied as successive. Appellant raises three substantive claims: (1) that his plea counsel was conflicted; (2) that his plea counsel rendered ineffective assistance through insufficient investigation and preparation; (3) and that his guilty plea was not entered voluntarily. The first two claims were previously available to Appellant to raise in his previous petitions, and therefore his failure to assert these claims previously is an abuse of the writ. NRS 34.810(2). Because these claims could have been raised in either of his previous petitions, the district court properly found these claims were summarily dismissed in the absence of good cause and prejudice. NRS 34.810(b)(1)(2). Further, Appellant's claim that

his guilty plea was not voluntarily entered was also raised in his First Petition, and this claim was denied on its merits. Findings of Fact, Conclusions of Law and Order, filed June 26, 2019, 1 RA at 205-208. Accordingly, this claim was properly found summarily dismissed. NRS 34.810(2).

Application of Procedural Bars are Mandatory

The Nevada Supreme Court has specifically found that the district court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily disregard them. In Riker, the Court held that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored when properly raised by the State." 121 Nev. at 231–33, 112 P.3d at 1074–75. Ignoring these procedural bars is considered an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. Riker justified this holding by noting that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003) (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural default rules nor can they empower a court to disregard them). In State v. Greene, 129 Nev. 559, 566, 307 P.3d 322, 326 (2013) the Nevada Supreme Court reaffirmed its prior holdings that the procedural default rules are mandatory when it reversed the district court's grant of a postconviction petition for

writ of habeas corpus. There, the Court ruled that the defendant's petition was untimely and successive, and that the defendant failed to show good cause and actual prejudice. Id. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327.

Being that Appellant's Petition is untimely, successive, and an abuse of the writ and the procedural bars are mandatory, the district court properly found the Petition procedurally barred.

a. The district court properly found Appellant failed to show good cause to overcome the procedural bars

Appellant failed to demonstrate the requisite good cause and prejudice to overcome the procedural bars to his Petition. This Court may only consider the merits of the Third Petition if Appellant establishes both good cause and prejudice for the delay in filing and the successive nature of his claims. NRS 34.726(1)(a)-(b); NRS 34.810(3). Accordingly, the Third Petition was properly summarily denied.

Simply put, good cause is a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Appellant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden,

109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

To show good cause, a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726. To meet the first requirement, "a petitioner *must* show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available *at the time of default*." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 252, 71 P.3d at 506 (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

As the Third Petition is both untimely and successive, Appellant must overcome the procedural bars under both NRS 34.726 and NRS 34.810. "In terms of a procedural time-bar, an adequate allegation of good cause would sufficiently explain why a petition was filed beyond the statutory time period." Harris v. State, 133 Nev. 683, 687, 407 P.3d 348, 352 (Nev. App. 2017) (quoting Hathaway v. State, 119 Nev. 248, 252-5371 P.3d 503, 506 (2003). To overcome the procedural bars against successive petitions, "NRS 34.810(3) requires the petitioner to plead and prove specific facts demonstrating good cause for a "failure to present the claim or for presenting the claim again" and actual prejudice." Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show "not merely that the

errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). As discussed more fully below, Appellant's claims are without merit. Accordingly, he has failed entirely to establish prejudice.

A petitioner "cannot rely on conclusory claims for relief but must plead and prove specific facts demonstrating good cause and actual prejudice." State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 684 (2003), as modified (June 9, 2003). See also NRS 34.810(3); Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001); Bejarano v. Warden, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996).

Here, Appellant fails to meet his burden to plead and prove specific facts that would establish good cause. Appellant attempts to establish good cause by claiming his delay in filing was caused by "his lack of legal sophistication and his inability to obtain counsel immediately after conviction." Appellant's Opening Brief ("AOB") at 12. Appellant's attempt fails as the Nevada courts have repeatedly rejected such good cause claims.

A lack of legal training does not constitute good cause for filing a procedurally defaulted petition. Such a claim does not demonstrate an impediment external to the defense that prevented Appellant from complying with the procedural

bars. See Phelps v. Dir., Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988) (holding that petitioner's claim of organic brain damage, borderline mental retardation and poor legal assistance from inmate law clerks did not constitute good cause for the filing of a successive post-conviction petition). See also State v. Williams, 120 Nev. 473, 478, 93 P.3d 1258, 1261 (2004) (finding no good cause where petitioner claimed she could not have raised a post-conviction claim previously due to "its highly complex, esoteric, and scientific nature"). Further, Appellant's lack of legal sophistication did not prevent him from filing a timely First Petition, and thus Appellant's claim that his ignorance of the law caused the delay in filing is highly suspect.

Similarly, Appellant's lack of post-conviction counsel does not constitute good cause for filing an untimely and successive petition because he had no statutory right to post-conviction counsel. NRS 34.750(1). As such, the absence of post-conviction counsel cannot provide good cause for filing an untimely and successive petition. See Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (concluding that claims of ineffective assistance of postconviction counsel in noncapital cases do not constitute good cause for a successive petition because there is no statutory entitlement to postconviction counsel).[1]

[1]Although Appellant does not raise the issue here, in his Petition Appellant claimed good cause was created by the inadequacy of the prison law library. AA at 178. The alleged inadequacy does not establish good cause. See Monroe v. State, 422 P.3d

Appellant ignores the fact that it is his burden to plead specific factual allegations that would amount to good cause if they were established as true. In his Third Petition, he assured that if an evidentiary hearing was held, he will be able to establish "numerous impediments" that prevented him from filing a timely petition. AA at 177-78. "[A petitioner] must plead and prove specific facts that demonstrate good cause for his failure to present claims before or for presenting claims again and actual prejudice." State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005). See also Berry v. State, 131 Nev. 957, 967, 363 P.3d 1148, 1154 (2015). Additionally, "a party cannot force the district court to hold an evidentiary hearing by withholding information about a claim." Moore v. State, 134 Nev. 262, 264, 417 P.3d 356, 359 (2018). See also Means v. State, 120 Nev. 1001, 1016, 103 P.3d 25, 35 (2004) ("A post-conviction habeas petitioner is entitled to an evidentiary hearing "only if he supports his claims

711, No. 72944, 2018 WL 3545167, at *1 (Nev. 2018) (unpublished disposition) (finding inaccessibility to the law library did not constitute good cause). Further, the allegedly inadequate library did not prevent Appellant from filing two previous petitions, and one of the claims he raises in the instant Third Petition (the voluntariness of his guilty plea) was previously raised in his untimely First Petition. Appellant also fails to explain how the alleged limitations of the prison law library prevented him from raising his claims in his First Petition, or why it necessitates re-raising already litigated claims. He merely makes a general claim that the prison's law library is inadequate. "[A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Lewis v. Casey, 518 U.S. 343, 351, 116 S. Ct. 2174, 2180 (1996).

with specific factual allegations that if true would entitle him to relief."); Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984) (recognizing that a petitioner is entitled to an evidentiary hearing regarding his claim if it is not belied by the record and, if true, would warrant relief).

In a feeble attempt to demonstrate good cause, Appellant claims only that he lacks legal sophistication and that he did not have post-conviction counsel initially. AOB at 12. These claims are not impediments external to the defense, and the courts have repeatedly rejected them as good cause claims. The good cause reasons Appellant presented to the district court, as a matter of law, are insufficient to establish good cause. Therefore, the district court properly found Appellant failed to establish good cause.

In in his AOB, Appellant expands his arguments for good cause to include Appellant's factual innocence and his plea counsel's conflict of interest. AOB at 12-13. He further states that he "established numerous impediments" and "enough equitable factors also existed which precluded his Petition in this case from being time barred." AOB at 12-13. Appellant's claims still fail.

As a matter of clarification, despite Appellant referencing an evidentiary hearing where he "established enough equitable factors," no evidentiary hearing has been held in this case. Nonetheless, Appellant's claims fail because his claims of factual innocence and conflict of interest are conclusory as he does not support these

claims with any citation to the record. Similarly, his "numerous impediments" and "equitable factors" fail because he does not specify what these were or support these claims with any citation to the record. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court)."

Therefore, the district court properly found that Appellant did not establish good cause and prejudice to overcome the procedural default.

b. The district court properly found Appellant failed to demonstrate a fundamental miscarriage of justice

In his Third Petition, Appellant attempted to circumvent the procedural bars to his Petition by referencing "factual innocence" and alleging that the procedural defects should be excused to prevent a fundamental miscarriage of justice. AA 178-79. This is a bare and naked claim entirely devoid of factual specificity, and thus was properly summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Appellant failed to explain precisely what fundamental miscarriage of justice would result—he simply cited some of the law pertaining to fundamental miscarriage of justice claims, then concluded with the entirely unsupported assertion that "any procedural default should be excused in this case." AA 179.

It is true that even when a petitioner cannot demonstrate good cause, the court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure

to consider the petition would result in a fundamental miscarriage of justice. Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001). "The conviction of a petitioner who was actually innocent would be a fundamental miscarriage of justice sufficient to overcome the procedural bars to an untimely or successive petition." Mitchell v. State, 122 Nev. 1269, 1273, 149 P.3d 33, 36 (2006). A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

To be entitled to a hearing on a fundamental miscarriage of justice claim, a petitioner must plead "specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence." Berry, 131 Nev. at 968, 363 P.3d at 1155. Appellant has not remotely met this burden. It is not entirely clear if he is even raising an actual innocence claim, as he merely states that "factual innocence is an exception to the procedural bar of NRS 34.726.1." AA 177. He made no factual allegations of any kind. Accordingly, he did not made specific factual allegations that, if true, would establish a fundamental miscarriage of justice to overcome the procedural bars to his Petition. He did not plead a fundamental miscarriage of justice claim that warrants relief, and therefore he is not entitled to an evidentiary hearing on this issue. While Appellant used the terms of factual

innocence and fundamental miscarriage of justice in his Petition in the district court, Appellant failed to specifically plead a claim of factual innocence. Thus the district court appropriately denied this claim.

In his instant Appeal, Appellant raises for the time that conflicted counsel amounts to a fundamental miscarriage of justice; thus, this claim should not be considered by the Court. McNelton v. State, 115 Nev. 396, 416 900 P.2d 1263, 1276 (1999). Further the only type of fundamental miscarriage of justice the Nevada Supreme Court has recognized in this context is a claim of factual innocence.

Thus, this Court should affirm the district court denial of Appellant's Petition as time barred.

II. APPELLANT WAS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT HE WAS REPRESENTED BY CONFLICTED COUNSEL

Appellant alleges he received ineffective assistance of counsel because his counsel represented both him and his codefendant. AOB at 15-18.

A conflict-of-interest claim is derived from a claim of ineffective assistance—it is counsel's breach of the duty of loyalty that gives rise to a claim that counsel was ineffective due to a conflict of interest. Glasser v. United States, 315 U.S. 60, 70, 75–76, 62 S.Ct. 457 (1942) (framing a conflict-of-interest claim as a claim that the defendant was denied the effective assistance of counsel). An actual conflict of interest exists "when an attorney is placed in a situation conducive to divided loyalties. Id. (quoting Smith v. Lockhart, 923 F.2d 1314, 1320 (8th Cir.

1991)). "An actual conflict of interest which adversely affects a lawyer's performance will result in a presumption of prejudice to the defendant." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). See also Mickens v. Taylor, 535 U.S. 162, 173, 122 S. Ct. 1237, 1244 (2002) ("prejudice will be presumed only if the conflict has significantly affected counsel's performance").

Appellant wrongly assumes that the mere fact that his counsel represented both defendants establishes an actual conflict of interest. To the contrary, as the Nevada Supreme Court has stated, "[b]ecause there can be a benefit in a joint defense against common criminal charges, there is no per se rule against dual representation." Ryan v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (*citing* Holloway v. Arkansas, 435 U.S. 475, 482-83, 98 S.Ct. 1173 (1978)). While the dual representation of codefendants may create the potential for divided loyalties, such a conflict is not automatically presumed. This is largely because non-indigent criminal defendants have Sixth Amendment rights to counsel of their choosing, and there is a presumption against the government interfering with that choice. Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697 (1988) ("the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment…"); Ryan, 123 Nev. at 428, 168 P.3d at 709 ("…there is a strong presumption in favor of a non-indigent criminal defendant's

right to counsel of her own choosing. This presumption should rarely yield to the imposition of involuntary conflict-free representation.").

Due to this presumption in favor of allowing a non-indigent defendant to select his own attorney, the Nevada Courts have long-recognized that "when a non-indigent criminal defendant's choice of counsel results in dual or multiple representation of clients with potentially conflicting interests, the defendant may waive the right to conflict-free counsel." Ryan v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 123 Nev. 419, 430–31, 168 P.3d 703, 711 (2007). See also Harvey v. State, 96 Nev. 850, 853, 619 P.2d 1214, 1216 (1980) ("a defendant may waive the right to conflict-free representation"). Importantly, once a defendant knowingly, intelligently, and voluntarily waives this right, "the conflict of interest is forever waived." Ryan, 123 Nev. at 428, 168 P.3d at 709. This means a defendant who waives the right to conflict-free counsel may not subsequently raise claims of ineffective assistance of counsel based on the conflict. Id.; see also Gomez v. Ahitow, 29 F.3d 1128, 1135-36 (1994) (finding the defendant was barred from "complain[ing] that the conflict he waived resulted in ineffective assistance of counsel.").

Here, Appellant signed just such a waiver. On February 16, 2017, a Waiver of Potential And/Or Actual Conflict, signed by Appellant and his codefendant, was filed in the district court. The Waiver states that both Appellant and his codefendant

"voluntarily, knowingly and understandingly waive, any potential and/or actual conflict, which may arise out of our joint and simultaneous representation by THE LAW OFFICES OF MOMOT & ZHENG." Thus, Appellant cannot now complain that the conflict he waived resulted in ineffective assistance of counsel. Appellant attempts to circumvent this hurdle by claiming this waiver was "not a knowing, voluntary, or intelligent waiver of the conflict of interest." AOB at 16. He offers little factual detail to support this bare and naked claim. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Instead, he presents rhetorical argument questioning how an attorney can effectively represent both a mother and a son in the same criminal case, and fails to provide any details as to how, in this specific case, the situation resulted in an actual conflict, and how this situation invalidated the waiver signed by Appellant. He points out that the codefendant was his mother, and claims she wanted him to plead guilty. AOB at 16-17. Obviously, the codefendant would still be his mother whether or not they shared the same attorney. Nor does Appellant explain how his mother's desire for him to plead guilty would not have been a factor had they not shared an attorney. His claim that at the time of the waiver he was under extreme pressure to plead guilty is suspect, as the waiver was filed on February 16, 2017, yet Defendant did not enter his guilty plea until December 14, 2017—nearly ten months later.

Additionally, Appellant's claim that the State bears the burden to demonstrate the validity of the defendant's waiver is patently untrue. In Nevada, the petitioner bears the burden of proving the facts underlying his postconviction claims by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Therefore, it is Appellant's burden to demonstrate that his waiver of conflict was invalid. Appellant attempts to overcome this requirement through a blatant misrepresentation. In an attempt to support this claim, Appellant cites People v. Castro, 657 P.2d 932 (1983), which does in fact state that the burden of demonstrating a waiver rests upon the prosecution. AOB at 17. However, Appellant omits the fact that this is not a Nevada case—it is from the Supreme Court of Colorado. Not only is this case from outside the jurisdiction, it is not even good law in Colorado, because it was overruled in 2015. West v. People, 2015 CO 5, 29, 341 P.3d 520, 528.[2] The burden of showing the invalidity of the conflict waiver Appellant signed rests with Appellant alone.

Appellant has failed to present any factual support for his conflict of interest claim, as he fails to present any cogent explanation as to how the joint representation

[2]The Court overruled Castro because it conflicted with the United States Supreme Court's holding in Mickens. See Mickens v. Taylor, 535 U.S. 162, 171, 122 S.Ct. 1237, 1243 (2002) (finding that a defendant alleging a Sixth Amendment violation must demonstrate that the conflict of interest adversely affected his counsel's performance).

adversely affected his counsel's performance. He has also failed to demonstrate the invalidity of the conflict of interest waiver he signed. Instead, in an attempt to relieve himself of his burden of proof, he attempts to deceive this Court as to the applicable law. This unsupported claim was properly denied.

III. APPELLANT WAS NOT ENTITLED TO RELIEF ON HIS CLAIM THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT SUFFICIENT INVESTIGATION AND PREPARATION PRIOR TO HIS GUILTY PLEA

Appellant claims he received ineffective assistance of counsel because counsel performed insufficient investigation, did not hire experts, and spent insufficient time with him. AOB 18-27. Because Appellant's convictions are the result of a guilty plea, he is only permitted to raise allegations of ineffective assistance of counsel that challenge the validity of his guilty plea. NRS 34.810(1)(a). "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. . . ." Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973)). Appellant has failed to cogently argue that the alleged errors of his counsel invalidated his guilty plea.

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 v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). 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). Both components of the inquiry must be shown. 466 U.S. at 697, 104 S.Ct. at 2069. The defendant must raise claims supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. Hargrove, 100 Nev. at 502-03, 686 P.2d at 225.

To prove ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a plea of guilty, a defendant must demonstrate his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and that such deficiency prejudiced him such that there is a reasonable probability, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). "[A] petitioner must allege specific facts demonstrating both that counsel's advice (or failure to give advice) regarding the guilty plea was objectively unreasonable and that the deficiency affected the outcome of the plea negotiation

process. Any claim that does not satisfy this standard is outside the scope of permitted claims and must be dismissed." Gonzales, 136 Nev. at __, 476 P.3d at 90.

Appellant has failed to present cogent argument that the errors he alleges counsel committed affected the result of plea negotiation. As to his allegation of inadequate investigation, Appellant fails to specify how further investigation would have prevented him from entering a guilty plea. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (finding that a defendant must show how a more thorough investigation would have rendered a more favorable outcome probable). Though Appellant cites Strickland and Sanborn, Appellant provides no analysis or argument comparing those cases to this one. Most concerningly, Appellant purports to be citing Strickland when he claims the Court stated that counsel must do "a minimal investigation preplea." AOB at 27. This phrase appears nowhere in Strickland. The Court in Strickland did discuss counsel's duty to investigate, stating "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691, 104 S. Ct. at 2066. The Strickland Court never set forth a specific amount of investigation that was necessary prior to a defendant entering a plea.

Appellant fails to provide much detail as to what matters should have been investigated. He claims an expert psychologist should have been retained to testify regarding Appellant's ability to form criminal intent. AOB at 22. It is unlikely such

testimony would have been allowed, given that witnesses are prohibited from testifying regarding ultimate issues. NRS 50.295. There is also nothing in the record to indicate Appellant lacked the ability to form such intent. Similarly, Appellant fails to explain why further investigation into the victim's background or an expert review of the forensic evidence was needed. AOB at 24.

Importantly, Appellant fails to explain how the alleged lack of investigation into these matters, or the little time counsel spent with him, invalidated his guilty plea. He claims his plea was "premature" but the record reveals he entered his plea ten months after his arraignment, when his counsel confirmed. It is Appellant's burden to present specific factual allegations as to how his counsel's alleged errors invalidated his plea. He has failed to meet this burden.

IV. THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT'S CLAIM THAT HIS GUILTY PLEA WAS INVALID WAS BARRED UNDER THE LAW OF THE CASE DOCTRINE

The doctrine of the law of the case bars relitigation of this issue. "[T]he law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same; this doctrine cannot be avoided by more detailed and precisely focused argument." State v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark (Riker), 121 Nev. 225, 232–33, 112 P.3d 1070, 1075 (2005) (*citing* Hall v. State, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975)). Furthermore, this Court cannot overrule either of Nevada's appellate courts. NEV. CONST. Art. VI § 6. "The law of

the case doctrine holds that the law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same." Clem v. State, 119 Nev. 615, 620, 81 P.3d 521, 525 (2003) (*citing* Hall, 91 Nev. at 315, 535 P.2d at 798).

In his First Petition, Appellant claimed his guilty plea was not entered knowingly and voluntarily. 1 RA at 172-178. The district court considered this claim, reviewed the record, and found that Appellant's guilty plea was entered freely and voluntarily. 1 RA at 205-208. This conclusion was affirmed on appeal. Newsome v. State, No. 79044-COA (Order of Affirmance, Jul. 13, 2020). AA at 145-149. This conclusion is now law of the case. The facts considered by the district court and the Nevada Court of Appeals in considering this claim consisted of the Guilty Plea Agreement signed by Appellant and the plea canvass. Thus, the relevant facts remain the same. Accordingly, Appellant's attempt to resuscitate his claim that his guilty plea was not voluntary is barred from consideration under the law of the case doctrine.

Even if Appellant's claim were not barred under the law of the case doctrine, he would still not be entitled to habeas relief because his claim is belied by the record, and he has failed to present a legal basis for invalidation of his guilty plea. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be withdrawn to correct "manifest

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

A court shall look to the totality of the circumstances to determine whether the plea was made freely, knowingly and voluntarily, and whether the defendant understood the nature of the offense and the consequences of the plea. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The "totality of the circumstances" test includes a review of the plea agreement, the canvass conducted by the district court, and the record as a whole. Id.; Woods, 114 Nev. at 475, 958 P.2d at 95. Further, there is "[n]o specific formula for making this determination," thus each case is evaluated on a case-by-case basis. Freese, 116 Nev. at 1106, 13 P.3d at 448. Even though there is no specific formula, the Nevada Supreme Court has concluded that "[a] thorough plea canvass coupled with a detailed, consistent, written plea agreement supports a finding that the defendant entered the plea voluntarily, knowingly, and intelligently." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537-38 (2004).

Appellant attests that his plea canvass was insufficient because the canvass did not ask:

> whether counsel specifically discussed whether Defendant was under any duress or felt any familial pressure, nor was there any indication of whether defense counsel had discussed specific intent as a possible defense. Defendant was never on the record questioned directly about any influence his mother may have had upon his plea.

AOB at 30. However, Appellant provides no legal support for his conclusion that the omission of such topics renders his plea involuntary. Appellant completely ignores the above-stated law specific to the validity of guilty pleas in Nevada. His plea is presumed valid, and it is his responsibility to demonstrate otherwise. His attempt to dismiss Appellant's responses during the plea canvass as "conclusory" is essentially an attempt to redefine the standards for evaluating the validity of a guilty plea.

The record reveals that Appellant attested that his plea was voluntarily entered:

VOLUNTARINESS OF PLEA

> I have discussed the elements of all of the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me.
>
> I understand that the State would have to prove each element of the charge(s) against me at trial.
>
> *I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor*.
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
>
> *I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement*.
>
> I am not now under the influence of any intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.
>
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

AA at 28 (emphasis added). Additionally, when Appellant entered his guilty plea, the court engaged in the following colloquy with Appellant:

> THE COURT: Mr. Newsome, the Court is in possession of a written plea of guilty which was signed by you. Is this your signature on page 5 of the written plea of guilty?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. Before I accept your written plea of guilty, I must be satisfied that your plea is freely and voluntarily given. Are you making this plea freely and voluntarily?
>
> DEFENDANT: Yes.
>
> THE COURT: Okay. Other than what's contained in the written plea of guilty, have any promises or threats been made to induce you or get you to enter your plea?
>
> DEFENDANT: Just a little bit of time.
>
> THE COURT: I'm sorry.
>
> DEFENDANT: Just some time.

THE COURT: What do you mean some time?

DEFENDANT: Like my sentence, if I'm just gonna get from 12 to 35.

THE COURT: Okay, but what I'm saying—well you can't get that.
COUNSEL: It's 45.

DEFENDANT: For 45.

THE COURT: What I'm saying is did anyone other than what's in the guilty plea, did anyone promise you anything else?

DEFENDANT: No.

THE COURT: Okay. And did anyone make any threats to you or to your family to try to get you to plead guilty in this case?

DEFENDANT: No.

THE COURT: Okay. And are you pleading guilty to second degree murder with use of a deadly weapon because in truth and in fact you are guilty?

DEFENDANT: Yes.

THE COURT: Okay. Before you signed to written plea of guilty, did you read it?

DEFENDANT: Yeah.

THE COURT: Okay. And did you understand everything contained in the written plea of guilty?

DEFENDANT: Yeah.

THE COURT: Okay. Did you also read the second amended superseding indictment charging you with the

felony crime of second degree murder with use of a deadly weapon?

DEFENDANT: Yes.

THE COURT: It's the exhibit here. And did you understand everything contained in that-

DEFENDANT: Yes.

THE COURT: -what you'll be pleading to?

DEFENDANT: Yes.

THE COURT: Okay. And did you have a full and sufficient opportunity to discuss your plea of guilty as well as the charge to which you're pleading guilty with your lawyer, Ms. Zheng?

DEFENDANT: Yes.

THE COURT: *Okay. And did Ms. Zheng answer all your questions and concerns to your satisfaction?*

DEFENDANT: *Yes.*

THE COURT: Do you feel like your lawyer has spent enough time with you explaining everything to you?

DEFENDANT: Yes.

THE COURT: *Okay. And do you feel like she spent enough time with you going over all of the discovery and the evidence and everything in this case?*

DEFENDANT: *Yes.*

THE COURT: Okay. Before you proceed with your plea of guilty, do you have any questions you would like to ask me?

DEFENDANT: No.

THE COURT: Okay. Let's turn to the charging document. All right. And you understand that the range of punishment on the murder is life without the possibility of parole—I'm sorry—the possibility of—a definite terms, in term of years, of 10 to 25 years with your possibility of parole, beginning after 10 years has been served.

DEFENDANT: Yes.

THE COURT: Or with the weapons enhancement of a minimum of 12 to 30 months, but it can run all the way to 20 years with a minimum of 96 months or 8 years.

DEFENDANT: Yes.

THE COURT: Consecutively. Do you understand all that?

DEFENDANT: Yes.

THE COURT: Okay. Let's—any questions about that?

DEFENDANT: No.

THE COURT: Did I cover that correctly, Mr. Pesci?

THE STATE: I think just so it's clear, it's either a 10 to life or a 10 to 25.

THE COURT: Right.

THE COURT: Do you understand that?

DEFENDANT: Yeah.

THE COURT: Either way, your minimum parole eligibility under either scenario is 11 years; correct, Mr. Pesci?

THE STATE: Yes, Your Honor.

THE COURT: And that's under either scenario.

DEFENDANT: Okay.

THE COURT: All right. Let's turn to the charging document. Tell me In your own words what you did, on or about January 14th, 2017, here in Clark County Nevada, that causes you to plead guilty to second degree murder with use of a deadly weapon.

DEFENDANT: Yeah, I had a gun and I shot Richard Nelson.

THE COURT: All right. And you shot into his body; is that correct?

DEFENDANT: Yes.

THE COURT: And you acknowledge that as a result of you shooting Mr. Nelson, he died as a result of those—that gunshot injury; is that true?

DEFENDANT: Yes.

THE COURT: All right. And you acknowledge that you did this willfully, unlawfully, feloniously, and without malice aforethought?

DEFENDANT: Yes.

THE COURT: All right. Is that acceptable, Mr. Pesci?

THE STATE: Yes, Your Honor.

THE COURT: All right. Mr. Newsome, the Court finds that your plea of guilty has been freely and voluntarily given.

AA 131-135.

In light of the information contained in the Guilty Plea Agreement, and the extensive plea canvass conducted by the court, Appellant has failed to demonstrate that his guilty plea was not voluntarily entered. The court extensively canvassed Appellant on his understanding of the guilty plea, the nature of the charges, and the possible penalties. Notably, when the court asked Appellant if any additional promises had been made to induce him to plead guilty, Appellant indicated the reason he was pleading guilty was to receive a reduced sentence. AA at 131. Though given the opportunity, Appellant did not indicate to the court that he was pleading guilty due to familial pressure. Thus, the record contradicts Appellant's claim that his plea was involuntary due to pressure from his mother/codefendant. Additionally, Appellant affirmed in both the executed GPA and plea canvass that he discussed the case with his counsel, including defenses and possible strategies, and that he spent sufficient time with counsel to cover discovery and everything in his case. AA 132-133. Thereby refuting Appellant's claim that the court did not ask about "whether defense counsel had discussed specific intent as a possible defense." Furthermore, Appellant affirmatively admitted his guilt in connection with the charge, admitting "Yeah, I had a gun and I shot Richard Nelson." AA at 134.

Appellant would have this Court dismiss the plea canvass because Appellant simply offered yes or no responses in answer to leading questions by the Court. It is unsurprising that Appellant gave yes or no responses, as these were yes or no

questions. Appellant offers no legal support for his proposition that yes or no responses are indicative of an involuntary plea. To the contrary, regardless of the simplicity of a defendant's responses during a canvass, a thorough plea canvass combined with a detailed plea agreement signed by the Appellant supports a finding that the plea was voluntarily entered. Molina, 120 Nev. at 191, 87 P.3d at 537-38. It is Appellant's burden to overcome this presumption and demonstrate that his plea was not voluntarily entered. He has not done so. He does not even directly allege that his guilty plea was not voluntary; instead, he simply claims that the plea canvass was inadequate to determine if the plea was voluntarily entered. He presents a speculative claim that his mother "may" have had influence on his plea. AOB at 30. This is legally insufficient, as Appellant is required to present specific factual allegations that, if true, would entitle him to relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, the district court properly found Appellant's plea was knowingly, voluntarily, and intelligently entered.

V. THE DISTRICT COURT PROPERLY DENIED AN EVIDENTIARY HEARING AS APPELLANT FAILED TO PLEAD SPECIFIC FACTS ESTABLISHING GOOD CAUSE AND PREJUDICE OR FUNDAMENTAL MISCARRIAGE OF JUSTICE

Appellant is not entitled to an evidentiary hearing on his claims because no expansion of the record is necessary to resolve his claims. He failed to plead specific facts that, if true, would establish good cause and prejudice to overcome the

procedural bars to the Petition. His substantive claims are similarly plead in a vague and conclusive manner insufficient to warrant post-conviction relief.

NRS 34.770 provides the manner in which the district court decides whether an evidentiary hearing is required. It reads:

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

(Emphasis added).

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). 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; Hargrove, 100 Nev. at 502, 686 P.2d at 225 ("[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).

In this instance, Appellant is not entitled to an evidentiary hearing because there is no need to expand the record. All of the law and facts necessary to dispose of Appellant's claims are already available. Appellant is not entitled to an evidentiary hearing because he failed to plead specific facts that would overcome the procedural bars to the Petition even if they were true. "[T]he petitioner has the burden of pleading and proving specific facts that demonstrate good cause and prejudice to overcome the procedural bars." State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). A petitioner is only entitled to an evidentiary hearing on a fundamental miscarriage of justice claim if the petitioner pleads "specific factual allegations that, if true, and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the new evidence." Berry v. State, 131 Nev. 957, 968, 363 P.3d 1148, 1155 (2015). Therefore, the district court properly denied Appellant's request for an evidentiary hearing.

VI. APPELLANT'S CLAIM OF CUMULATIVE ERROR WAS NOT RAISED BEFORE THE DISTRICT COURT AND THUS IS BARRED FROM CONSIDERATION ON APPEAL

Appellant claims cumulative error based on counsel's non-vigorous advocacy preplea and conflicted counsel. AOB at 35.

Appellant's cumulative error claim fails because he raises it for the first time in the instant appeal; thus, this claim is barred from consideration on appeal. McNelton v. State, 115 Nev. 396, 415-16, 990 P.2d 1263, 1275-76 (1999); Hewitt v. State, 113 Nev. 387, 392, 936 P.2d 330, 333 (1997) ("appellant's failure to raise these issues below precludes appellate review"), *overruled on other grounds by* Martinez v. State, 115 Nev. 9, 974 P.2d 133 (1999).

Appellant's claim still fails on the merits even if he had raised this claim before the district court. Appellant asserts a claim of cumulative error in the context of ineffective assistance of counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Appellant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Appellant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity

and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Here, Appellant claims cumulative error based on ineffective assistance of counsel: counsel did not prepare and was conflicted. AOB 35. Because ineffective assistance of counsel claims cannot be basis for cumulative error, Appellant's claim must be denied.

Further, even if ineffective assistance of counsel claims could be cumulated, here there are no errors to cumulate. Although the gravity of the crime charged is serious the rest of the Mulder factors weigh against Appellant. The issue of guilt is not close. Appellant himself admitted to killing Richard Nelson through his GPA, at his plea canvass, at sentencing. Additionally, three individuals identified Appellant as the killer: Oneisha and Roxanne. 1 RA at 38, 53, 55. This is further corroborated by Appellant's mother in Appellant's Sentencing Memorandum wherein she states Appellant had a gun. "I never knew Richard [Appellant] had a gun I would never ride around with a gun I hate guns terrified of them. This is something that should have never happened and my heart hurts every single day that it did." AA 70. There are no errors to quantify or characterize as Appellant's claims are vague or belied by the record as discussed above.

Accordingly, this Court should deny this claim.

/ / /

CONCLUSION

This Court should affirm the district court's denial of Appellant's third, untimely, successive, Petition with vague and or meritless claims.

Dated this 22nd day of February, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 10,536 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of February, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

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

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