

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD A. NEWSOME, JR.,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 83475

**RESPONDENT'S APPENDIX
Volume 2**

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,

-vs-

RICHARD NEWSOME, JR., aka
Richard Newsome #5437116
Defendant.

CASE NO: A-19-788618-W
(C-17-321043-1)
DEPT NO: IX

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

DATE OF HEARING: DECEMBER 17, 2020
TIME OF HEARING: 1:45 PM

THIS CAUSE having come on for hearing before the Honorable VALERIE ADAIR, District Judge, on the 17 day of December, 2020, the Petitioner being present, proceeding in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through DENA RINETTI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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

2 **PROCEDURAL HISTORY**

3 On February 2, 2017, Richard Newsome, Jr. (“Petitioner”) was charged with Count 1 –
4 Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030,
5 193.165); and Count 2 – Assault With Use of a Deadly Weapon (Category B Felony – NRS
6 200.471).

7 On December 14, 2017, Petitioner pled guilty to one count of Second-Degree Murder
8 With Use of a Deadly Weapon. Pursuant to the negotiations as contained in the Guilty Plea
9 Agreement (“GPA”), the State would retain the right to argue at sentencing.

10 On February 8, 2018, Petitioner was sentenced to 10 years to life in the Nevada
11 Department of Prisons. Petitioner’s Judgment of Conviction was filed on March 5, 2018.
12 Petitioner did not file a direct appeal.

13 On February 1, 2019, Petitioner filed a Petition for Writ of Habeas Corpus (“First
14 Petition”), Supplemental Petition for Writ of Habeas Corpus (“Supplement”), Motion for
15 Appointment of Counsel (“Motion”), and Request for an Evidentiary Hearing (“Request”). On
16 May 1, 2019, the State filed a response to Petitioner’s First Petition, Supplement, Motion, and
17 Request. On May 28, 2019, the district court denied Petitioner’s First Petition, Supplement,
18 Motion, and Request. Findings of Fact, Conclusions of Law were filed on June 26, 2019. On
19 July 13, 2020, the Nevada Court of Appeals affirmed the district court’s denial of Petitioner’s
20 First Petition. Remittitur issued on August 10, 2020.

21 On October 9, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus
22 (“Second Petition”). On November 23, 2020, the State filed a response to Petitioner’s Second
23 Petition. On December 17, 2020, this Court denied Petitioner’s Second Petition for the
24 following reasons.

25 **ANALYSIS**

26 **I. PETITIONER’S SECOND PETITION IS PROCEDURALLY BARRED**

27 A petitioner must raise all grounds challenging the validity of his guilty plea or claiming
28 ineffective assistance of counsel in a timely filed first post-conviction Petition for Writ of

1 Habeas Corpus. Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Petitioner's
2 Second Petition is procedurally barred, without a showing of good cause and prejudice and is
3 dismissed.

4 **A. Petitioner's challenge to the evidence is waived.**

5 Claims other than challenges to the validity of a guilty plea and ineffective assistance
6 of trial and appellate counsel must be raised on direct appeal "or they will be *considered*
7 *waived in subsequent proceedings.*" Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059
8 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148,
9 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either
10 were or could have been presented in an earlier proceeding, unless the court finds both cause
11 for failing to present the claims earlier or for raising them again and actual prejudice to the
12 petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a petitioner
13 does not show good cause for failure to raise claims of error upon direct appeal, the district
14 court is not obliged to consider their merits in post-conviction proceedings. Jones v. State, 91
15 Nev. 416, 536 P.2d 1025 (1975). Courts must dismiss a petition if a petitioner plead guilty and
16 the petitioner is not alleging "that the plea was involuntarily or unknowingly entered, or that
17 the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Further,
18 substantive claims—even those disguised as ineffective assistance of counsel claims—are
19 beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29
20 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

21 While Petitioner raises eight grounds for relief in the instant Second Petition, all eight
22 claims revolve around one complaint: that the State should have been required to prove that
23 Petitioner was guilty of first-degree murder before Petitioner could have been permitted to
24 plead guilty. This claim is not an allegation of ineffective assistance of counsel or challenges
25 to the voluntariness of Petitioner's plea. Accordingly, any claim challenging the sufficiency of
26 the evidence of Petitioner's plea should have been raised on direct appeal. As Petitioner did
27 not file a direct appeal, he has waived his ability to raise these claims now.

28 ///

1 **B. Petitioner’s Second Petition is time-barred pursuant to NRS 34.726.**

2 A petitioner must challenge the validity of their judgment or sentence within one year
3 from the entry of judgment of conviction or after the Supreme Court issues remittitur pursuant
4 to NRS 34.726(1). NRS 34.726(1). This one-year time limit is strictly applied and begins to
5 run from the date the judgment of conviction is filed or remittitur issues from a timely filed
6 direct appeal. Pellegrini v. State, 117 Nev. 860, 873-74, 34 P.3d 519, 528 (2001); Dickerson
7 v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). “Application of the statutory
8 procedural default rules to post-conviction habeas petitions is mandatory,” and “cannot be
9 ignored [by the district court] when properly raised by the State.” State v. Eighth Judicial Dist.
10 Court (Riker), 121 Nev. 225, 231 & 233, 112 P.3d 1070, 1074–75 (2005). For example, in
11 Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two days late
12 despite evidence presented by the defendant that he purchased postage through the prison and
13 mailed the Notice within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002).
14 Absent a showing of good cause and prejudice, courts have no discretion regarding whether to
15 apply the statutory procedural bars.

16 Here, Petitioner’s Judgment of Conviction was filed on March 5, 2018, and Petitioner
17 did not file a direct appeal. Petitioner then had until March 5, 2019, to timely file a petition for
18 writ of habeas corpus. The instant Second Petition was not filed until October 9, 2020, after
19 the one-year deadline. Absent a showing of good cause and prejudice, Petitioner’s claim is
20 dismissed as untimely.

21 **C. Petitioner’s Second Petition is barred as successive pursuant to NRS 34.810.**

22 The second procedural bar requires courts to dismiss successive post-conviction
23 petitions if a prior petition was decided on the merits and a petitioner fails to raise new grounds
24 for relief, or if a petitioner does raise new grounds for relief but failure to assert those grounds
25 in any prior petition was an abuse of the writ. NRS 34.810(2); See Riker, 121 Nev. at 231, 112
26 P.3d at 1074. In other words, if the claim or allegation was previously available with
27 reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky
28 v. Zant, 499 U.S. 467, 497-98, 111 S.Ct. 1454, 1472 (1991). “Successive petitions may be

1 dismissed based solely on the face of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901
2 P.2d 123, 129 (1995). Successive petitions will only be decided on the merits if the petitioner
3 can show good cause and prejudice for failing to raise the new grounds in their first petition.
4 NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

5 This Second Petition is also be denied as successive. Petitioner raises eight new grounds
6 for relief, none of which were raised in his First Petition, which was decided and denied on
7 the merits on May 28, 2019. Petitioner is abusing the writ by raising new substantive claims
8 here and this Court may only consider their merits if Petitioner can establish good cause and
9 prejudice.

10 **D. Application of the procedural bars is mandatory.**

11 The Nevada Supreme Court has specifically found that the district court has a duty to
12 consider whether the procedural bars apply to a post-conviction petition and not arbitrarily
13 disregard them. In Riker, the Court held that “[a]pplication of the statutory procedural default
14 rules to post-conviction habeas petitions is mandatory,” and “cannot be ignored when properly
15 raised by the State.” 121 Nev. at 231–33, 112 P.3d at 1074–75. Ignoring these procedural bars
16 is considered an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076.
17 Riker justified this holding by noting that “[t]he necessity for a workable system dictates that
18 there must exist a time when a criminal conviction is final.” Id. at 231, 112 P.3d 1074 (citation
19 omitted); see also State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003)
20 (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural
21 default rules nor can they empower a court to disregard them). In State v. Greene, the Nevada
22 Supreme Court reaffirmed its prior holdings that the procedural default rules are mandatory
23 when it reversed the district court’s grant of a postconviction petition for writ of habeas corpus.
24 129 Nev. 559, 566, 307 P.3d 322, 326 (2013). There, the Court ruled that the defendant’s
25 petition was untimely and successive, and that the defendant failed to show good cause and
26 actual prejudice. Id. Accordingly, the Court reversed the district court and ordered the
27 defendant’s petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327.

28 ///

II. PETITIONER HAS NOT SHOWN GOOD CAUSE TO OVERCOME PROCEDURAL BARS

Courts may consider the merits of procedurally barred petitions only when petitioners establish good cause for the delay in filing and prejudice should the courts not consider the merits. NRS 34.726(1)(a)-(b); NRS 34.810(3). 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)). To establish good cause, a petitioner must demonstrate that “an impediment external to the defense prevented their compliance with the applicable procedural rule.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Good cause exists if a Petitioner can establish that the factual or legal basis of a claim was not available to him or his counsel within the statutory time frame. Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07. Once the factual or legal basis becomes known to a petitioner, they must bring the additional claims within a reasonable amount of time after the basis for the 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). 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).

Petitioner has failed to establish good cause. As good cause, Petitioner includes within his Second Petition seven pages explaining that he has spoken to another inmate, specifically Mr. David Hopper, who has been incarcerated since 1990, who allegedly reviewed his case file and helped him file the instant Second Petition. Second Petition at 17(c)-18. According to Petitioner’s advice from Mr. Hopper, his former cellmate helped him file his First Petition but failed to review the indictment for its legal sufficiency. Id. As a result, Petitioner did not raise these claims in his First Petition. Id. Petitioner filed the instant Second Petition based on Mr. Hopper’s belief that the indictment charging Petitioner with murder was legally insufficient because it did not include evidence establishing his guilt. Id. Unfortunately, Petitioner’s reliance on another inmate’s advice is not good cause to overcome the mandatory procedural bars. All these claims were available to Petitioner with a year of his Judgment of Conviction

1 being filed. This failure is fatal. District Court Rules 13; Eighth Judicial District Court Rule
2 13(2). As such, this Court dismissed this Petition as successive.

3 **III. PETITIONER HAS NOT SHOWN PREJUDICE TO OVERCOME THE**
4 **PROCEDURAL BARS**

5 Because there is no good cause, this Court need not even consider prejudice. In the
6 event this Court chooses to examine Petitioner's claims further, Petitioner cannot demonstrate
7 prejudice because his underlying claims are meritless.

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

13 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
14 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
15 defense.” The United States Supreme Court has long recognized that “the right to counsel is
16 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
17 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
18 (1993).

19 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove
20 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of
21 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865
22 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's
23 representation fell below an objective standard of reasonableness, and second, that but for
24 counsel's errors, there is a reasonable probability that the result of the proceedings would have
25 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison
26 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).
27 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the
28 ///

1 inquiry in the same order or even to address both components of the inquiry if the defendant
2 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

3 The court begins with the presumption of effectiveness and then must determine
4 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
5 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
6 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
7 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
8 537 P.2d 473, 474 (1975). Counsel cannot be ineffective for failing to make futile objections
9 or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

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

21 “There are countless ways to provide effective assistance in any given case. Even the
22 best criminal defense attorneys would not defend a particular client in the same way.”
23 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
24 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
25 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
26 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
27 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
28 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

1 Indeed, to establish a claim of ineffective assistance of counsel for advice regarding a
2 guilty plea, a defendant must show “gross error on the part of counsel.” Turner v. Calderon,
3 281 F.3d 851, 880 (9th Cir. 2002). When a conviction is the result of a guilty plea, a defendant
4 must show that there is a “reasonable probability that, but for counsel’s errors, he would not
5 have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52,
6 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988,
7 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).
8 Ultimately, while it is counsel’s duty to candidly advise a defendant regarding a plea offer, the
9 decision of whether or not to accept a plea offer is the defendant’s. Rhyne v. State, 118 Nev.
10 1, 8, 38 P.3d 163, 163 (2002).

11 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
12 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of
13 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
14 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
15 be supported with specific factual allegations, which if true, would entitle the petitioner to
16 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
17 allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled
18 by the record. Id. “A claim is ‘belied’ when it is contradicted or proven to be false by the record
19 as it existed at the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228,
20 1230 (2002). A proper petition for post-conviction relief must set forth specific factual
21 allegations supporting the claims made and cannot rely on conclusory claims for relief. N.R.S.
22 34.735(6). Failure to do so will result in a dismissal of the petition. Id.

23 **A. Petitioner’s Ground One claim fails.**

24 Petitioner complains that a negotiated plea amounts to burden shifting as to proof
25 beyond a reasonable doubt. Second Petition at 5. Petitioner does so without providing any
26 authority supporting his claim that a defendant’s guilty plea is the equivalent of inappropriate
27 burden shifting. As such this is nothing but a bare and naked assertion suitable only for
28 summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984). Given the total absence

1 of legal authority supporting Petitioner's claim, this Court summarily rejects Petitioner's
2 argument. See, Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d
3 1280, 1288 n.38 (2006); see also NRAP 28(a)(10)(A); Dept. of Motor Vehicles and Public
4 Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (unsupported arguments are
5 summarily rejected on appeal); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It
6 is appellant's responsibility to present relevant authority and cogent argument; issues not so
7 presented need not be addressed by this court."); Randall v. Salvation Army, 100 Nev. 466,
8 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation
9 to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d
10 950 (1976) (failure to offer citation to relevant legal precedent justifies affirmation of the
11 judgment below).

12 Petitioner's claim is further belied by United States Supreme Court jurisprudence. A
13 plea of guilty "serves as a conviction and relieves the state of its burden of proof in a criminal
14 case" so long as the plea is validly made. Von Moltke v. Gillies, 332 U.S. 708, 719, 68 S.Ct.
15 316, 321 (1948). Because Petitioner pled guilty to second-degree murder, the State was
16 relieved of the burden of proof as to Petitioner's guilty of first-degree murder so long as his
17 plea was validly entered into. As the Nevada Court of Appeals affirmed the district court's
18 denial of Petitioner's First Petition which challenged the validity of his plea, the issue of
19 whether Petitioner's plea was valid has already been decided. Order of Affirmance, No. 79044-
20 COA (filed July 13, 2020).

21 Accordingly, any claim that Petitioner's plea was in valid is barred by both res judicata
22 and the doctrine of law of the case. "The law of a first appeal is law of the case on all
23 subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314,
24 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38
25 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and
26 precisely focused argument subsequently made after reflection upon the previous
27 proceedings." Id. at 316, 535 P.2d at 799. Furthermore, this Court cannot overrule the Nevada
28 Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark.

1 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State,
2 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file
3 motions with the same arguments, his motion is barred by the doctrines of the law of the case
4 and res judicata. Id.; Hall, 91 Nev. at 316, 535 P.2d at 799. Therefore, Petitioner's claim in
5 Ground One fails.

6 **B. Petitioner's Ground Two claim fails.**

7 Petitioner argues that the State did not provide sufficient evidence of Petitioner's guilt
8 of first-degree murder prior to Petitioner's plea to second-degree murder which amounts to a
9 violation of double jeopardy. Second Petition at 5. Again, Petitioner's failure to provide case
10 authority supporting this claim makes it nothing but a bare and naked claim suitable only for
11 summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984).

12 The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides
13 that no person shall "be subject for the same offense to be twice put in jeopardy of life or
14 limb." Jackson v. State, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (citing Benton v.
15 Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 2062 (1969)). The Double Jeopardy Clause
16 protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2)
17 a second prosecution for the same offense after conviction, and (3) multiple punishments for
18 the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2077 (1969).
19 Here, Petitioner fails to allege or explain how he was sentenced twice for the same offense.
20 While Petitioner was first charged with Murder, he subsequently pled guilty to and was
21 convicted of second-degree murder. His first-degree murder charge did not remain. Therefore,
22 any claim that Petitioner's double jeopardy rights were violated fails.

23 Further, the State did not have to prove that Petitioner was guilty of first-degree murder
24 before Petitioner could plead guilty to second-degree murder and Petitioner plea relieved the
25 State of their burden of proof. Von Moltke, 332 U.S. at 719, 68 S.Ct. at 321

26 **C. Petitioner's Ground Three claim fails.**

27 Petitioner claims that the district court erred in accepting his guilty plea to second-
28 degree murder without first concluding that the State established Petitioner's guilt of first-

1 degree murder. Second Petition at 5. Petitioner also accuses defense counsel of ineffectiveness
2 for obtaining a plea negotiation instead of proceeding to trial. Id. Again, Petitioner's failure to
3 provide case authority supporting this claim makes it nothing but a bare and naked claim
4 suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984).

5 Moreover, as explained *supra* III.A, Petitioner's guilty plea relieved the State of their
6 burden of proof. Von Moltke, 332 U.S. at 719, 68 S.Ct. at 321. Instead, all that mattered when
7 Petitioner pled guilty to second-degree murder was that there were sufficient facts to support
8 the conviction. This occurred when Petitioner admitted that he was guilty of second-degree
9 murder and explained the course of conduct that led to that conviction:

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

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

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

15 DEFENDANT NEWSOME: Yes.

16 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?

17 DEFENDANT NEWSOME: Yes. THE COURT: All right. And you
acknowledge that you did this willfully, unlawfully, feloniously, and with
malice aforethought? DEFENDANT NEWSOME: Yes.

18 Recorder's Transcript of Proceedings: RE: Status Check Trial Readiness, at 6-7 (December
19 14, 2017).

20 Finally, counsel's ability to secure a plea negotiation on behalf of Petitioner does not
21 make counsel ineffective. While counsel may have secured a negotiation, it was Petitioner's
22 decision to accept it and plead guilty in lieu of trial. Rhyne, 118 Nev. at 8, 38 P.3d at 163.
23 Counsel cannot be deemed ineffective simply because Petitioner now regrets pleading guilty.
24 Accordingly, Petitioner's Ground Three claim fails.

25 **D. Petitioner's Ground Four claim fails.**

26 Petitioner complains that counsel's ability to secure a plea negotiation amounted to
27 ineffective assistance of counsel and improper burden shifting which now requires Petitioner
28

1 to be acquitted of all charges. Second Petition at 5. Petitioner is simply re-arguing the claims
2 he made in Grounds One and Three. Therefore, the State incorporates its responses to those
3 claims made *supra* III.A and III.C. Primarily, Petitioner continues to forget that his guilty plea
4 released the State from their burden of proof. Von Moltke, 332 U.S. at 719, 68 S.Ct. at 321.
5 As such, Petitioner's Ground Four claim fails.

6 **E. Petitioner's Ground Five claim fails.**

7 Petitioner argues that counsel was ineffective for failing to challenge the indictment for
8 failure to include the elements required to prove first-degree murder, and for waiving his right
9 to a speedy trial which he believes is an affirmative defense. Second Petition at 6. Specifically,
10 Petitioner claims that because the indictment charging him with murder did not include the
11 element that first-degree murder is a specific intent crime, counsel should have moved to
12 dismiss the indictment and his failure to do so makes him deficient. Id. As an initial matter, as
13 neither of these claims pertain to his plea, Petitioner's plea waived his ability to raise this
14 claim. Woods v. State, 114 Nev. 468, 477, 958 P.2d 91, 97 (1998); Reuben C. v. State, 99 Nev.
15 845, 845-46, 673 P.2d 493, 493 (1983); Powell v. Sheriff, 85 Nev. 684, 687, 462 P.2d 756,
16 758 (1969).

17 Next, counsel cannot be deemed ineffective for failing to challenge the indictment
18 charging Petitioner with murder. On February 2, 2017, Petitioner was charged with:

19 Count 1 – Murder With Use of a Deadly Weapon
20 did willfully, unlawfully, feloniously and with malice aforethought, kill
21 RICHARD NELSON, a human being, with use of a deadly weapon, to wit:
22 a firearm, by shooting into the body of said RICHARD NELSON, the said
killing having been willful, deliberate and premeditated.

23 INDICTMENT, at 1 (filed February 2, 2017).

24 Petitioner was charged with Count 1 pursuant to NRS 200.010 and NRS 200.030. NRS
25 200.010 defines murder as “the unlawful killing of a human being: 1. With malice
26 aforethought, either express or implied” while NRS 200.030 defines the different degrees of
27 murder. As such, Petitioner was not charged specifically with first-degree murder, and the
28

1 State therefore did not have to include in the indictment that Petitioner acted with the specific
2 intent of taking a life. As such, any challenge to the legality of Petitioner's indictment would
3 have failed and counsel cannot be deemed deficient for failing to move to dismiss Petitioner's
4 indictment. Therefore, Petitioner's Ground Five claim fails.

5 **F. Petitioner's Ground Six claim fails.**

6 Petitioner claims that his GPA was breached through counsel's ineffectiveness because
7 counsel acted as a second prosecutor in obtaining a plea negotiation all in an attempt to curry
8 favor with the district court. Second Petition at 6. This is simply a re-argument of Ground
9 Three and the State hereby incorporates its response to Ground Three made *supra* III.C here.
10 Notably, while counsel obtained a plea negotiation, it was Petitioner's decision to accept it and
11 plead guilty in lieu of trial. Rhyne, 118 Nev. at 8, 38 P.3d at 163. Petitioner has not asserted
12 that he told counsel he did not want to entertain any offer of negotiations.

13 Petitioner already claimed in his First Petition that counsel was ineffective in the plea-
14 bargaining process. The district court rejected that claim, and the Nevada Court of Appeals
15 affirmed the court's decision. Therefore, any claim now that counsel was ineffective the plea-
16 bargaining process fails and is barred by res judicata and the law of the case. "The law of a
17 first appeal is law of the case on all subsequent appeals in which the facts are substantially the
18 same." Hall, 91 Nev. at, 315, 535 P.2d at 798. "The doctrine of the law of the case cannot be
19 avoided by a more detailed and precisely focused argument subsequently made after reflection
20 upon the previous proceedings." Id. at 316, 535 P.2d at 799. Accordingly, by simply
21 continuing to file motions with the same arguments, his motion is barred by the doctrines of
22 the law of the case and res judicata. Id.; Hall, 91 Nev. at 316, 535 P.2d at 799.

23 Regardless, the record is clear that Petitioner was aware of the consequences of his plea
24 and that he discussed his plea thoroughly with counsel:

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

27 DEFENDANT NEWSOME: Yeah.

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

1 DEFENDANT NEWSOME: Yeah.

2 THE COURT: Okay. Did you also read the second amended superseding
3 indictment charging you with the felony crime of second degree murder
4 with use of a deadly weapon?

5 DEFENDANT NEWSOME: Yes.

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

8 DEFENDANT NEWSOME: Yes.

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

10 DEFENDANT NEWSOME: Yes.

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

14 DEFENDANT NEWSOME: Yes.

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

17 DEFENDANT NEWSOME: Yes.

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

20 DEFENDANT NEWSOME: Yes.

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

23 DEFENDANT NEWSOME: Yes.

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

26 DEFENDANT NEWSOME: No.

27 THE COURT: Okay. Let's turn to the charging document. All right. And
28 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 NEWSOME: 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 NEWSOME: Yes.

THE COURT: Consecutively. Do you understand all that?

DEFENDANT NEWSOME: Yes.

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

DEFENDANT NEWSOME: No.

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

1 DEFENDANT NEWSOME: Yeah.

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

4 MR. PESCI: Yes, Your Honor.

5 THE COURT: And that's under either scenario.

6 DEFENDANT NEWSOME: Okay.

7 Recorder's Transcript of Proceedings: RE: Status Check Trial Readiness, at 4-6 (December
8 14, 2017).

9 Accordingly, the record is clear that Petitioner understood what he was pleading guilty
10 to and the possible sentence that would be imposed. Therefore, any claim that counsel was
11 ineffective in the plea negotiation process fails.

12 **G. Petitioner's Ground Seven claim fails.**

13 Petitioner complains that post-conviction counsel was ineffective but then appears to
14 reassert his claim that his plea-counsel was ineffective for failing to establish that the State
15 could not prove that Petitioner had the specific intent to kill, which was necessary to sustain a
16 first-degree murder conviction. Second Petition, at 6. Petitioner next complains that counsel
17 was ineffective for failing to appeal his conviction and argue that his plea agreement was
18 breached, and that Petitioner was entitled to an acquittal of his first-degree murder charge. Id.

19 First, Petitioner was not entitled to post-conviction counsel, and he did not have post-
20 conviction counsel. Instead, it appears that Petitioner is attempting to accuse his cell mate who
21 helped him write and file his First Petition of ineffectiveness. However, because Petitioner's
22 cell mate is not an attorney, Petitioner cannot accuse him of violating any duty owed.
23 Moreover, Petitioner did not have the right the effective assistance of counsel during post-
24 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 3546, 2566
(1991); McKague v. Whitley, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996).

25 To the extent Petitioner is again accusing his plea counsel of ineffectiveness, that claim
26 also fails. As explained *supra* III.E, the State had no duty to prove that Petitioner had the
27 specific intent to kill when Petitioner was charged with open murder pursuant to NRS 200.010
28 and 200.030, or when Petitioner pled guilty to second-degree murder.

///

1 Further, Petitioner cannot establish that counsel was ineffective for failing to appeal his
2 conviction. Petitioner has already raised his claim in his First Petition, and both the district
3 court and Nevada Court of Appeals have rejected that claim. In rejecting this claim, the Nevada
4 Court of Appeals specifically noted that there was no evidence that Petitioner asked counsel
5 to appeal his conviction and that Petitioner waived his right to appeal his conviction by
6 pleading guilty. Order of Affirmance, No. 79044-COA, at 2 (filed July 12, 2020). Therefore,
7 any claim now that counsel was ineffective the plea-bargaining process fails and is barred by
8 res judicata and the law of the case. “The law of a first appeal is law of the case on all
9 subsequent appeals in which the facts are substantially the same.” Hall, 91 Nev. at, 315, 535
10 P.2d at 798. “The doctrine of the law of the case cannot be avoided by a more detailed and
11 precisely focused argument subsequently made after reflection upon the previous
12 proceedings.” Id. at 316, 535 P.2d at 799. Accordingly, by simply continuing to file motions
13 with the same arguments, his motion is barred by the doctrines of the law of the case and res
14 judicata. Id.; Hall, 91 Nev. at 316, 535 P.2d at 799. Finally, any belief that these claims entitle
15 Petitioner to an acquittal fails. Even if, this Court or the Nevada Supreme Court concluded that
16 Petitioner’s claim has merit and that his plea should be unwound, that does not preclude the
17 State from refiling charges against Petitioner. Therefore, Petitioner’s Ground Seven claims
18 fail.

19 **H. Petitioner’s Ground Eight claim fails.**

20 Petitioner complains that he was denied his right to appeal his Judgment of Conviction
21 and that counsel was ineffective again for obtaining a plea negotiation, for failing to argue that
22 the State’s indictment lacked sufficient evidence of first-degree murder, for waiving
23 Petitioner’s right to a speedy trial, and for failing to argue on appeal that the district court
24 committed malpractice by adjudicating Petitioner guilty of second-degree murder and for
25 denying his First Petition. Second Petition at 6. Again, this is nothing but a bare and naked
26 claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (1984).
27 Petitioner provides no case law or specific facts establishing that he had any claim that would
28 entitle him to relief on appeal.

Regardless, Petitioner has already alleged that counsel was ineffective for failing to file an appeal in his First Petition. That claim was considered and rejected by this Court and the Nevada Court of Appeals affirms the court's decision. Therefore, this claim is barred by both the law of the case and res judicata. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall, 91 Nev. at, 315, 535 P.2d at 798. "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall, 91 Nev. at 316, 535 P.2d at 799.

Further, as explained *supra* III.A-G, Petitioner cannot establish that counsel was ineffective for failing to challenge the sufficiency of the Indictment because such a claim would have failed and Petitioner's guilty plea waived his ability to raise any claim regarding what happened pre-plea. Therefore, Petitioner's Ground Eight claim fails.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 5th day of April, 2021

Dated this 5th day of April, 2021

EC

588 C95 3544 3FA3
Cristina D. Silva
District Court Judge

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

BY /s/ KAREN MISHLER
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #13730

1 CERTIFICATE OF SERVICE

2 I certify that on the 31st day of March, 2021, I mailed a copy of the foregoing proposed
3 Findings of Fact, Conclusions of Law, and Order to:

4 RICHARD NEWSOME, BAC #1194269
5 HIGH DESERT STATE PRISON
6 P. O. BOX 650
7 INDIAN SPRINGS, NEVADA 89070

8 BY /s/ Janet Hayes
9 Secretary for the District Attorney's Office

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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5
6 Richard Newsome, Jr.,
Plaintiff(s)

CASE NO: A-19-788618-W

7
8 vs.

DEPT. NO. Department 9

9 State of Nevada, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

15 Service Date: 4/5/2021

16 Dept 21 Law Clerk

dept21lc@clarkcountycourts.us

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