

Steven D. Grierson

DISTRICT COURT

CLERK COUNTY, NEVADA

GARY CHAMBERS,

PETITIONER,

CASE NO. A21 831669-W

VS

DEPT NO. 2

THE STATE OF NEVADA,

RESPONDENT,

NOTICE OF APPEAL

PLEASE TAKE NOTICE, THAT PETITIONER, GARY CHAMBERS, THE PETITIONER, DO
HEREBY FILE THIS NOTICE OF APPEAL FROM THE DENIAL OF EIGHTH JUDICIAL
DISTRICT COURT, DEPT NO. 2, ON JUNE 23, 2021.

PURSUANT TO NRS 34.140 PROCEDURE IN NEW TRIALS AND APPEALS FROM, THE
DISTRICT COURT, EXCEPT SO FAR AS THEY ARE INCONSISTENT WITH THE PROVISIONS OF
NRS 34.010 TO 34.120, SEE HABEAS CORPUS WRIT

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

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

1.

Electronically Filed
Jul 21 2021 08:57 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CLERK OF THE COURT

JUL 15 2021

RECEIVED

1 ALSO, A JUDGE ADVISES THEIR DISCRETION BY DENIAL OF COUNSEL TO BE PRESENT
2 TO REPRESENT THE WRIT ON THE MERITS OF A HABEAS CORPUS. PREJUDICE INTENT SHOWN
3 BY THE EIGHTH DISTRICT COURTS ORDER, AND A ESSENTIALLY HEARING SHOULD OF BEEN HELD
4 BY THE COURTS SHOWING OF A 22 PAGE (FACT FINDING AND CONCLUSION OF LAW ORDER)
5 DISPLAYING THE PRESENTATION ON RECORD ABOUT THE WRIT OF HABEAS CORPUS THAT WAS
6 NOT DEFENDED BY PETITIONER NOR COUNSEL, GOOD CAUSE DO SHOW BY THE ORDER.

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

9 DATED THIS 11TH DAY OF JULY 2021.

10 RESPECTFULLY

11
12 BY: Gary Chambers #76089

13 GARY CHAMBERS # 76089

14 ELY STATE PRISON (ESP)

15 POST OFFICE BOX 1989

16 ELY, NEVADA 89301

17
18 PETITIONER IN PRO SE...

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

LAS VEGAS NV 890

13 JUL 2021 PM 3 L

EIGHTH DISTRICT COURT
200 Lewis Ave
Las Vegas, Nevada

89101-830000

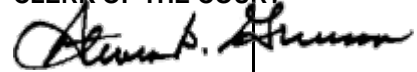
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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 GARY CHAMBERS,

11 Plaintiff(s),

12 vs.

13 STATE OF NEVADA,

14 Defendant(s),
15

Case No: A-21-831669-W

Dept No: II

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Gary Chambers

20 2. Judge: Carli Kierny

21 3. Appellant(s): Gary Chambers

22 Counsel:

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

25 4. Respondent (s): State of Nevad

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

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

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

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

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

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

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

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

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

14 11. Previous Appeal: No

15 Supreme Court Docket Number(s): N/A

16 12. Child Custody or Visitation: N/A

17 13. Possibility of Settlement: Unknown

18 Dated This 16 day of July 2021.

19 Steven D. Grierson, Clerk of the Court

20
21 /s/ Amanda Hampton

22 Amanda Hampton, Deputy Clerk
23 200 Lewis Ave
24 PO Box 551601
25 Las Vegas, Nevada 89155-1601
26 (702) 671-0512

27 cc: Gary Chambers
28

CASE SUMMARY

CASE NO. A-21-831669-W

Gary Chambers, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

§
§
§
§
§

Location: **Department 2**
 Judicial Officer: **Kierny, Carli**
 Filed on: **03/24/2021**
 Cross-Reference Case Number: **A831669**

CASE INFORMATION

Related Cases

C-13-292987-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus****Statistical Closures**

06/23/2021 Other Manner of Disposition







Case Status: **06/23/2021 Closed****DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number	A-21-831669-W
Court	Department 2
Date Assigned	03/24/2021
Judicial Officer	Kierny, Carli

PARTY INFORMATION


Plaintiff	Chambers, Gary	<i>Lead Attorneys</i>
		Pro Se
Defendant	State of Nevada	Wolfson, Steven B
		<i>Retained</i>
		702-671-2700(W)


DATE**EVENTS & ORDERS OF THE COURT****INDEX****EVENTS**

03/24/2021	 Inmate Filed - Petition for Writ of Habeas Corpus Party: Plaintiff Chambers, Gary <i>Post Conviction</i>
03/24/2021	 Memorandum of Points and Authorities Filed By: Plaintiff Chambers, Gary <i>Memorandum of Points and Authorities In Support of Writ of Habeas Corpus</i>
03/24/2021	 Motion for Appointment of Attorney Filed By: Plaintiff Chambers, Gary <i>Motion for Appointment of Attorney and Request for Evidentiary Hearing</i>
03/24/2021	 Order for Petition for Writ of Habeas Corpus <i>Order for Petition for Writ of Habeas Corpus</i>
03/29/2021	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
05/10/2021	 Response Filed by: Defendant State of Nevada <i>State's Response to Petitioner's Petition for Writ of Habeas Corpus (Post -Conviction),</i>


CASE SUMMARY
CASE NO. A-21-831669-W

Memorandum of Points and Authorities, and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing

06/23/2021  Finding of Fact and Conclusions of Law
Filed By: Defendant State of Nevada
Findings of Fact, Conclusions of Law and Order

07/02/2021  Notice of Entry of Findings of Fact, Conclusions of Law
Filed By: Defendant State of Nevada
Notice of Entry of Findings of Fact, Conclusions of Law and Order


07/15/2021  Notice of Appeal
Notice of Appeal

07/16/2021  Case Appeal Statement
Filed By: Plaintiff Chambers, Gary
Case Appeal Statement

HEARINGS

06/03/2021 **Petition for Writ of Habeas Corpus (11:00 AM)** (Judicial Officer: Kierny, Carli)
Denied;

06/03/2021 **Motion for Appointment of Attorney (11:00 AM)** (Judicial Officer: Kierny, Carli)
Plaintiff's Motion for Appointment of Attorney and Request for Evidentiary Hearing
Denied;

06/03/2021  **All Pending Motions (11:00 AM)** (Judicial Officer: Kierny, Carli)
Decision Made;
Journal Entry Details:
Petition for Writ of Habeas Corpus ... Petitioner's Motion for Appointment of Attorney and Request for Evidentiary Hearing Matter submitted on the pleadings. Court Denies the petition as, Petitioner's petition is untimely. The Supreme Court remittitur was returned on November 21, 2019 and the instant petition was filed on March 24, 2021; further, Petitioner failed to make a showing of ineffective assistance of counsel under the two prong test in Strickland, The NV Supreme Court adopted the two prong test in Strickland in Warden v. Lyons. The two prong test provides: "A defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different." The grounds for dismissal applies uniformly to all claims. Petitioner argues his trial counsel was ineffective for a number of reasons listed supra in relief requested. While Petitioner may meet the first prong of Strickland as his counsel should have been diligent in the trial preparedness. More importantly, Petitioner fails to meet the second prong of Strickland as Petitioner received the benefit of the corrected sentence following the State's motion to correct. Further, Petitioner has not established that the proceedings would have been different as he is still serving his sentence. Petitioner has failed to show good cause to overcome common, mandatory procedural bars for post-conviction relief. Pellegrini v. State, 117 Nev. 860, 870 (2001); Rippo v. State, 132 Nev. Adv. Op. 11 (2016). The petition requests that Petitioner be appointed counsel, but Petitioner has failed to demonstrate that he is entitled to counsel. NRS 34.750 empowers the court to appoint counsel for any petition that is not summarily dismissed, provided that (a) the issues presented are difficult, (b), the Petitioner is unable to comprehend the proceedings, and (c) counsel is necessary to proceed with discovery. COURT ORDERS, Petition DENIED, WRIT DISCHARGED. FURTHER ORDERED, Petitioner's Motion for Appointment of Attorney and Request for Evidentiary Hearing is DENIED. State to prepare the order and serve interested parties.;

DISTRICT COURT CIVIL COVER SHEET

A-21-831669-W

Dept. 2

County, Nevada

Case No.

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

Gary Chambers

Defendant(s) (name/address/phone):

State of Nevada

Attorney (name/address/phone):

Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

Real Property Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	Negligence <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Torts Other Torts <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate Probate (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ Civil Writ <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		Other Civil Filing Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

March 24, 2021

Date

PREPARED BY CLERK

Signature of initiating party or representative

See other side for family-related case filings.

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GARY LAMAR CHAMBERS,
#0877763

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-831669-W

DEPT NO: II

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

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

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

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

2 **PROCEDURAL HISTORY**

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

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

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

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

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

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

10 After the State and Petitioner filed sentencing memoranda, Petitioner was sentenced on
11 May 23, 2017. The Court sentenced Petitioner to the Nevada Department of Corrections
12 (hereinafter "NDOC") as follows: Count 2– life without the possibility of parole; Count 4– life
13 without the possibility of parole, concurrent with Count 1; Count 5– life without the possibility
14 of parole, concurrent with Count 2; Count 6– life without the possibility of parole, concurrent
15 with Count 2. Petitioner was sentenced under NRS 207.012 for Counts 2 and 4 as well as NRS
16 207.010 for Counts 5 and 6. Petitioner was awarded zero (0) days credit for time served. The
17 Judgment of Conviction was filed on June 5, 2017.

18 On July 2, 2017, Petitioner filed a Notice of Appeal. On July 24, 2019, the Nevada
19 Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on April 17,
20 2020.

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

25 On March 24, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus
26 (Post-Conviction) (hereinafter "Petition"), Memorandum of Points and Authorities
27 (hereinafter "Memorandum"), a Motion for Appointment of Attorney and a Request for
28

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

3 **FACTS**

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

18 After Petitioner’s comment, Lisa feared Petitioner was there to rob her so she called out
19 for Gary. JT Day 3 at 111-12. Gary emerged from the back of the trailer and verbally
20 confronted Petitioner. JT Day 3 at 113. Although Gary never touched Petitioner, Lisa testified
21 Petitioner suddenly shot Gary in front of her. JT Day 3 at 113-14. As Gary fell, Lisa reached
22 for her cellphone, but when she turned back to Petitioner he had his gun pointed at her torso.
23 JT Day 3 at 114-15. Lisa “smacked” Petitioner’s gun with her left hand. JT Day 3 at 114-15.
24 The gun fired and the bullet struck Lisa’s hand. JT Day 3 at 115-16. Petitioner then escaped
25 by running out the front door while Lisa ran out the back door as she sought help. JT Day 3 at
26 116-17. Lisa noticed some of the maintenance men outside. JT Day 3 at 117.

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

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

13 On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance
14 worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he
15 heard screaming and gunshots. JT Day 3 at 68. As Charles looked up, he noticed Bradley
16 Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. JT Day
17 3 at 69. Both Charles and Bradley entered Lisa's yard. JT Day 3 at 69. Both Charles and
18 Bradley observed Petitioner exiting the front door of Lisa's trailer while holding a gun in his
19 right hand. JT Day 3 at 70, 83, 89, 91. Charles and Bradley testified that when they noticed
20 Petitioner's gun, Petitioner had tucked part of the gun into his pocket. JT Day 3 at 72, 91. Both
21 Charles and Bradley observed Petitioner enter a vehicle that was parked nearby Lisa's trailer.
22 JT Day 3 at 72, 93. Before Petitioner escaped, Bradley noticed a woman sitting in the passenger
23 side of the getaway vehicle. JT Day 3 at 93.

24 Earlier that morning, Petitioner picked up his daughter and her friend Bridgett from an
25 apartment on Craig and Nellis. Preliminary Hearing Transcript (hereinafter "PHT"), filed July
26 23, 2014, at 68-69. Bridgett thought Petitioner was giving her a ride to her house. PHT at 68-
27 69. However, Petitioner told the women he needed to retrieve a package and drop some keys
28 off; Petitioner then stopped at Van's. PHT at 69-70. Once he arrived, Petitioner parked his car

1 in front of a trailer. PHT at 69-70. Bridgett saw Petitioner enter a gate and after a few minutes
2 the women heard gunshots. PHT at 71-72. Bridgett then observed Petitioner walking back
3 towards the car and she asked him what had happened. PHT at 73. Petitioner initially said,
4 “Nothing.” PHT at 73. As Petitioner fled the scene in the car Bridgett heard him say, “He
5 shouldn’t have wrestled me.” PHT at 73-74. Bridgett further testified that a few days prior to
6 July 9, 2013, she heard Petitioner say that he was going “to come up” and “hit a lick.” PHT at
7 78-79, 80. Bridgett believed the former meant Petitioner was going to commit a crime while
8 the latter meant he was going to commit a robbery. PHT at 79-81.

9 Officer Brett Brosnahan (“Officer Brosnahan”) of the Las Vegas Metropolitan Police
10 Department (“Metro”) responded to a shooting call at Van’s. JT Day 4 at 26-27. On arrival,
11 Officer Brosnahan made contact with Daniel. JT Day 4 at 28-29. Daniel explained to the
12 officer that a shooting occurred and Petitioner fled in a gray vehicle. JT Day 4 at 28-30. Most
13 importantly, Daniel relayed the vehicle’s license plate number to Officer Brosnahan. JT Day
14 4 at 28-30. Officer Brosnahan quickly broadcasted the number over his radio and entered
15 Lisa’s trailer. JT Day 4 at 28-30, 32. Inside, he observed a man lying in a semi-fetal position
16 with an apparent gunshot wound to the head. JT Day 4 at 32. Officer Brosnahan also observed
17 a “hysterical” woman with an apparent gunshot wound to her left hand.¹ JT Day 4 at 34. After
18 a backup officer arrived, the officers swept the trailer and did not find any other persons within
19 the trailer. JT Day 4 at 35.

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

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

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

10 ANALYSIS

11 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

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

24 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
25 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
26 defense.” The United States Supreme Court has long recognized that “the right to counsel is
27 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
28

1 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
2 (1993).

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

14 The court begins with the presumption of effectiveness and then must determine
15 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
16 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
17 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
18 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
19 537 P.2d 473, 474 (1975).

20 Counsel cannot be ineffective for failing to make futile objections or arguments. See
21 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
22 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
23 any, to call, and what defenses to develop.” Rhyme v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
24 (2002).

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

1 (1978). This analysis does not mean that the court should “second guess reasoned choices
2 between trial tactics nor does it mean that defense counsel, to protect himself against
3 allegations of inadequacy, must make every conceivable motion no matter how remote the
4 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
5 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
6 cannot create one and may disserve the interests of his client by attempting a useless charade.”
7 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

8 “There are countless ways to provide effective assistance in any given case. Even the
9 best criminal defense attorneys would not defend a particular client in the same way.”
10 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
11 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
12 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
13 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's
14 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
15 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

16 Even if a defendant can demonstrate that his counsel's representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel's errors, the result of the trial would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
20 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
21 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
22 694, 104 S. Ct. at 2064–65, 2068).

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

1 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
2 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
3 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
4 petition to be dismissed.” (emphasis added).

5 The decision not to call witnesses is within the discretion of trial counsel, and will not
6 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,
7 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland
8 does not enact Newton's third law for the presentation of evidence, requiring for every
9 prosecution expert an equal and opposite expert from the defense. In many instances cross-
10 examination will be sufficient to expose defects in an expert's presentation. When defense
11 counsel does not have a solid case, the best strategy can be to say that there is too much doubt
12 about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578
13 F.3d. 944 (2011). “Strategic choices made by counsel after thoroughly investigating the
14 plausible options are almost unchallengeable.” Dawson v. State, 108 Nev. 112, 117, 825 P.2d
15 593, 596 (1992).

16 Additionally, there is a strong presumption that appellate counsel's performance was
17 reasonable and fell within “the wide range of reasonable professional assistance.” See United
18 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104
19 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-
20 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114
21 (1996). In order to satisfy Strickland’s second prong, the defendant must show that the omitted
22 issue would have had a reasonable probability of success on appeal. Id.

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

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

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

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

1. Failure to consult and communicate

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

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

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

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

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

2. Victim's Propensity for Violence

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

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

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

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

3 Thus, the speculative belief that Gary had a propensity for violence or was under the
4 influence of a substance that would have made him violent, would have only aided Petitioner's
5 defense if he "*was aware*" that Gary had a propensity for violence. Daniel, 119 Nev. at 515,
6 78 P.3d at 902. Petitioner has failed to allege, let alone demonstrate that he was aware of such
7 facts. Thus, even if counsel had not conducted an independent investigation into the victim's
8 background, doing so would have been of little use if Petitioner was unaware of such facts.
9 Therefore, counsel's performance was not deficient and Petitioner cannot demonstrate that the
10 outcome of the trial would have been different if an independent investigation had been
11 conducted. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same
12 reasons, to the extent Petitioner argues that appellate counsel was ineffective for failing to raise
13 this issue on appeal, he has not demonstrated that the claim would have been successful
14 because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner
15 cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his
16 corrected sentence and the proceedings would not have been different as he is still serving his
17 sentence. Therefore, Petitioner's claim is denied.

18 **3. Failure to Interview Witnesses**

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

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

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

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

21 **4. Prejudice**

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

28 ///

1 A self-defense claim generally requires that the proponent of the defense to testify that
2 he acted in self-defense in order to satisfy what is required for a showing of self-defense. See
3 NRS 200.120; NRS 200.160; NRS 200.200. The killing of another human being is considered
4 “justifiable homicide” when the killing is done in necessary self-defense. NRS 200.120. When
5 pleading self-defense, a defendant must establish that he reasonably believed there was imminent
6 danger that the assailant would either kill him or cause serious injury, and that it was absolutely
7 necessary to use force that resulted in death to save the defendant’s life. NRS 200.120; NRS
8 200.200. To justify a killing in self-defense, the circumstances must be “sufficient to excite
9 the fears of a reasonable person placed in a similar situation.” Runion v. State, 1051, 59. “An
10 honest but reasonable belief in the necessity for self-defense does not negate malice and does
11 not reduce the offense from murder to manslaughter.” Id. Importantly, a person cannot claim
12 self-defense when they were the first person to engage in the use of force. Johnson v. State,
13 Nev. 405, 407, 551 P.2d 241, 241 (1976).

14 In this case, Petitioner exercised his right not to testify, and thus it is doubtful he would
15 have been able to raise such a defense regardless of counsel’s actions. For instance, only
16 Petitioner could establish that the danger he faced “was so urgent and pressing that” in order
17 to save his own life or to prevent “great bodily harm,” he had to shoot the victims. NRS
18 200.200. Therefore, in addition to the reasons stated above, Petitioner cannot demonstrate that
19 the outcome of his trial would have been different, but for counsel’s actions. Strickland, 466
20 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, Petitioner cannot
21 demonstrate that had these claims been raised, he would have had a reasonable probability of
22 success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Moreover, Petitioner cannot
23 demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected
24 sentence and the proceedings would not have been different as he is still serving his sentence.
25 Therefore, Petitioner’s claim is denied.

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

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

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

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

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

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

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

25 As a preliminary matter, Petitioner has misrepresented Crowe v. State, 84 Nev. 358,
26 441 P.2d 90 (1968), and Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), in order to
27 support his argument. Specifically, Crowe discussed police informant testimony, not “drug
28 addict” testimony. Id. at 367, 441 P.2d at 95. Interestingly, Petitioner has attempted to apply

1 Crowe to his argument by omitting the term “police” and inputting the term “addicts” to alter
2 a direct quote from the decision wherein the Court explained that a special cautionary
3 instruction was required for uncorroborated police informant testimony. Id.; Memorandum at
4 36.

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

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

1 **II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL**

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

6 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
7 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
8 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
9 Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right
10 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution’s right to
11 counsel provision as being coextensive with the Sixth Amendment to the United States
12 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)
13 (entitling appointed counsel when petitioner is under a sentence of death), one does not have
14 “any constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at
15 164, 912 P.2d at 258.

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

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

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

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

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

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

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

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

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

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

8 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

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

19 The Nevada Supreme Court has held that if a petition can be resolved without
20 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
21 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
22 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
23 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
24 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
25 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction
26 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
27 record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it
28 existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court

1 considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as
2 complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

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

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ORDER

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

DATED this _____ day of June, 2021.

Dated this 23rd day of June, 2021


DISTRICT JUDGE

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

E2A D2F 48E9 CA57
Carli Kierny
District Court Judge

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

jm/L2

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Gary Chambers, Plaintiff(s)

CASE NO: A-21-831669-W

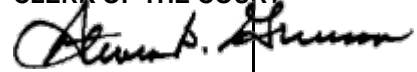
7 vs.

DEPT. NO. Department 2

8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

GARY CHAMBERS,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-21-831669-W

Dept. No: II

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

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

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

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☒ By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

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

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

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

**DISTRICT COURT
CLARK COUNTY, NEVADA**

GARY LAMAR CHAMBERS,
#0877763

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-831669-W

DEPT NO: II

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

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

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

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

2 **PROCEDURAL HISTORY**

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

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

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

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

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

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

10 After the State and Petitioner filed sentencing memoranda, Petitioner was sentenced on
11 May 23, 2017. The Court sentenced Petitioner to the Nevada Department of Corrections
12 (hereinafter "NDOC") as follows: Count 2– life without the possibility of parole; Count 4– life
13 without the possibility of parole, concurrent with Count 1; Count 5– life without the possibility
14 of parole, concurrent with Count 2; Count 6– life without the possibility of parole, concurrent
15 with Count 2. Petitioner was sentenced under NRS 207.012 for Counts 2 and 4 as well as NRS
16 207.010 for Counts 5 and 6. Petitioner was awarded zero (0) days credit for time served. The
17 Judgment of Conviction was filed on June 5, 2017.

18 On July 2, 2017, Petitioner filed a Notice of Appeal. On July 24, 2019, the Nevada
19 Court of Appeals affirmed Petitioner's Judgment of Conviction. Remittitur issued on April 17,
20 2020.

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

25 On March 24, 2021, Petitioner filed the instant Petition for Writ of Habeas Corpus
26 (Post-Conviction) (hereinafter "Petition"), Memorandum of Points and Authorities
27 (hereinafter "Memorandum"), a Motion for Appointment of Attorney and a Request for
28

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

3 **FACTS**

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

18 After Petitioner’s comment, Lisa feared Petitioner was there to rob her so she called out
19 for Gary. JT Day 3 at 111-12. Gary emerged from the back of the trailer and verbally
20 confronted Petitioner. JT Day 3 at 113. Although Gary never touched Petitioner, Lisa testified
21 Petitioner suddenly shot Gary in front of her. JT Day 3 at 113-14. As Gary fell, Lisa reached
22 for her cellphone, but when she turned back to Petitioner he had his gun pointed at her torso.
23 JT Day 3 at 114-15. Lisa “smacked” Petitioner’s gun with her left hand. JT Day 3 at 114-15.
24 The gun fired and the bullet struck Lisa’s hand. JT Day 3 at 115-16. Petitioner then escaped
25 by running out the front door while Lisa ran out the back door as she sought help. JT Day 3 at
26 116-17. Lisa noticed some of the maintenance men outside. JT Day 3 at 117.

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

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

13 On the morning of July 9, 2013, Charles Braham ("Charles"), another maintenance
14 worker at Van's, was loading his vehicle a couple of trailers away from Lisa's trailer when he
15 heard screaming and gunshots. JT Day 3 at 68. As Charles looked up, he noticed Bradley
16 Greive ("Bradley"), the manager of Van's, pull up in a truck outside of Lisa's trailer. JT Day
17 3 at 69. Both Charles and Bradley entered Lisa's yard. JT Day 3 at 69. Both Charles and
18 Bradley observed Petitioner exiting the front door of Lisa's trailer while holding a gun in his
19 right hand. JT Day 3 at 70, 83, 89, 91. Charles and Bradley testified that when they noticed
20 Petitioner's gun, Petitioner had tucked part of the gun into his pocket. JT Day 3 at 72, 91. Both
21 Charles and Bradley observed Petitioner enter a vehicle that was parked nearby Lisa's trailer.
22 JT Day 3 at 72, 93. Before Petitioner escaped, Bradley noticed a woman sitting in the passenger
23 side of the getaway vehicle. JT Day 3 at 93.

24 Earlier that morning, Petitioner picked up his daughter and her friend Bridgett from an
25 apartment on Craig and Nellis. Preliminary Hearing Transcript (hereinafter "PHT"), filed July
26 23, 2014, at 68-69. Bridgett thought Petitioner was giving her a ride to her house. PHT at 68-
27 69. However, Petitioner told the women he needed to retrieve a package and drop some keys
28 off; Petitioner then stopped at Van's. PHT at 69-70. Once he arrived, Petitioner parked his car

1 in front of a trailer. PHT at 69-70. Bridgett saw Petitioner enter a gate and after a few minutes
2 the women heard gunshots. PHT at 71-72. Bridgett then observed Petitioner walking back
3 towards the car and she asked him what had happened. PHT at 73. Petitioner initially said,
4 “Nothing.” PHT at 73. As Petitioner fled the scene in the car Bridgett heard him say, “He
5 shouldn’t have wrestled me.” PHT at 73-74. Bridgett further testified that a few days prior to
6 July 9, 2013, she heard Petitioner say that he was going “to come up” and “hit a lick.” PHT at
7 78-79, 80. Bridgett believed the former meant Petitioner was going to commit a crime while
8 the latter meant he was going to commit a robbery. PHT at 79-81.

9 Officer Brett Brosnahan (“Officer Brosnahan”) of the Las Vegas Metropolitan Police
10 Department (“Metro”) responded to a shooting call at Van’s. JT Day 4 at 26-27. On arrival,
11 Officer Brosnahan made contact with Daniel. JT Day 4 at 28-29. Daniel explained to the
12 officer that a shooting occurred and Petitioner fled in a gray vehicle. JT Day 4 at 28-30. Most
13 importantly, Daniel relayed the vehicle’s license plate number to Officer Brosnahan. JT Day
14 4 at 28-30. Officer Brosnahan quickly broadcasted the number over his radio and entered
15 Lisa’s trailer. JT Day 4 at 28-30, 32. Inside, he observed a man lying in a semi-fetal position
16 with an apparent gunshot wound to the head. JT Day 4 at 32. Officer Brosnahan also observed
17 a “hysterical” woman with an apparent gunshot wound to her left hand.¹ JT Day 4 at 34. After
18 a backup officer arrived, the officers swept the trailer and did not find any other persons within
19 the trailer. JT Day 4 at 35.

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

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

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

10 ANALYSIS

11 **I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL**

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

24 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal
25 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his
26 defense.” The United States Supreme Court has long recognized that “the right to counsel is
27 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
28

1 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
2 (1993).

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

14 The court begins with the presumption of effectiveness and then must determine
15 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
16 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
17 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
18 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
19 537 P.2d 473, 474 (1975).

20 Counsel cannot be ineffective for failing to make futile objections or arguments. See
21 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
22 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
23 any, to call, and what defenses to develop.” Rhyme v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
24 (2002).

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

1 (1978). This analysis does not mean that the court should “second guess reasoned choices
2 between trial tactics nor does it mean that defense counsel, to protect himself against
3 allegations of inadequacy, must make every conceivable motion no matter how remote the
4 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
5 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
6 cannot create one and may disserve the interests of his client by attempting a useless charade.”
7 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

8 “There are countless ways to provide effective assistance in any given case. Even the
9 best criminal defense attorneys would not defend a particular client in the same way.”
10 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
11 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
12 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
13 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel's
14 challenged conduct on the facts of the particular case, viewed as of the time of counsel's
15 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

16 Even if a defendant can demonstrate that his counsel's representation fell below an
17 objective standard of reasonableness, he must still demonstrate prejudice and show a
18 reasonable probability that, but for counsel's errors, the result of the trial would have been
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
20 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
21 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
22 694, 104 S. Ct. at 2064–65, 2068).

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

1 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
2 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
3 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
4 petition to be dismissed.” (emphasis added).

5 The decision not to call witnesses is within the discretion of trial counsel, and will not
6 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,
7 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland
8 does not enact Newton's third law for the presentation of evidence, requiring for every
9 prosecution expert an equal and opposite expert from the defense. In many instances cross-
10 examination will be sufficient to expose defects in an expert's presentation. When defense
11 counsel does not have a solid case, the best strategy can be to say that there is too much doubt
12 about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578
13 F.3d. 944 (2011). “Strategic choices made by counsel after thoroughly investigating the
14 plausible options are almost unchallengeable.” Dawson v. State, 108 Nev. 112, 117, 825 P.2d
15 593, 596 (1992).

16 Additionally, there is a strong presumption that appellate counsel's performance was
17 reasonable and fell within “the wide range of reasonable professional assistance.” See United
18 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104
19 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-
20 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114
21 (1996). In order to satisfy Strickland’s second prong, the defendant must show that the omitted
22 issue would have had a reasonable probability of success on appeal. Id.

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

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

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

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

1. Failure to consult and communicate

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

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

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

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

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

8 **2. Victim's Propensity for Violence**

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

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

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

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

3 Thus, the speculative belief that Gary had a propensity for violence or was under the
4 influence of a substance that would have made him violent, would have only aided Petitioner's
5 defense if he "*was aware*" that Gary had a propensity for violence. Daniel, 119 Nev. at 515,
6 78 P.3d at 902. Petitioner has failed to allege, let alone demonstrate that he was aware of such
7 facts. Thus, even if counsel had not conducted an independent investigation into the victim's
8 background, doing so would have been of little use if Petitioner was unaware of such facts.
9 Therefore, counsel's performance was not deficient and Petitioner cannot demonstrate that the
10 outcome of the trial would have been different if an independent investigation had been
11 conducted. Strickland, 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same
12 reasons, to the extent Petitioner argues that appellate counsel was ineffective for failing to raise
13 this issue on appeal, he has not demonstrated that the claim would have been successful
14 because it is meritless. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner
15 cannot demonstrate prejudice because, as mentioned supra, he received the benefit of his
16 corrected sentence and the proceedings would not have been different as he is still serving his
17 sentence. Therefore, Petitioner's claim is denied.

18 **3. Failure to Interview Witnesses**

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

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

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

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

21 **4. Prejudice**

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

28 ///

1 A self-defense claim generally requires that the proponent of the defense to testify that
2 he acted in self-defense in order to satisfy what is required for a showing of self-defense. See
3 NRS 200.120; NRS 200.160; NRS 200.200. The killing of another human being is considered
4 “justifiable homicide” when the killing is done in necessary self-defense. NRS 200.120. When
5 pleading self-defense, a defendant must establish that he reasonably believed there was imminent
6 danger that the assailant would either kill him or cause serious injury, and that it was absolutely
7 necessary to use force that resulted in death to save the defendant’s life. NRS 200.120; NRS
8 200.200. To justify a killing in self-defense, the circumstances must be “sufficient to excite
9 the fears of a reasonable person placed in a similar situation.” Runion v. State, 1051, 59. “An
10 honest but reasonable belief in the necessity for self-defense does not negate malice and does
11 not reduce the offense from murder to manslaughter.” Id. Importantly, a person cannot claim
12 self-defense when they were the first person to engage in the use of force. Johnson v. State,
13 Nev. 405, 407, 551 P.2d 241, 241 (1976).

14 In this case, Petitioner exercised his right not to testify, and thus it is doubtful he would
15 have been able to raise such a defense regardless of counsel’s actions. For instance, only
16 Petitioner could establish that the danger he faced “was so urgent and pressing that” in order
17 to save his own life or to prevent “great bodily harm,” he had to shoot the victims. NRS
18 200.200. Therefore, in addition to the reasons stated above, Petitioner cannot demonstrate that
19 the outcome of his trial would have been different, but for counsel’s actions. Strickland, 466
20 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068. For these same reasons, Petitioner cannot
21 demonstrate that had these claims been raised, he would have had a reasonable probability of
22 success on appeal. Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Moreover, Petitioner cannot
23 demonstrate prejudice because, as mentioned supra, he received the benefit of his corrected
24 sentence and the proceedings would not have been different as he is still serving his sentence.
25 Therefore, Petitioner’s claim is denied.

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

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

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

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

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

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

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

25 As a preliminary matter, Petitioner has misrepresented Crowe v. State, 84 Nev. 358,
26 441 P.2d 90 (1968), and Champion v. State, 87 Nev. 542, 490 P.2d 1056 (1971), in order to
27 support his argument. Specifically, Crowe discussed police informant testimony, not “drug
28 addict” testimony. Id. at 367, 441 P.2d at 95. Interestingly, Petitioner has attempted to apply

1 Crowe to his argument by omitting the term “police” and inputting the term “addicts” to alter
2 a direct quote from the decision wherein the Court explained that a special cautionary
3 instruction was required for uncorroborated police informant testimony. Id.; Memorandum at
4 36.

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

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

1 **II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL**

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

6 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
7 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
8 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada
9 Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right
10 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution’s right to
11 counsel provision as being coextensive with the Sixth Amendment to the United States
12 Constitution.” McKague specifically held that with the exception of NRS 34.820(1)(a)
13 (entitling appointed counsel when petitioner is under a sentence of death), one does not have
14 “any constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at
15 164, 912 P.2d at 258.

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

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

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

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

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

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

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

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

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

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

8 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

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

19 The Nevada Supreme Court has held that if a petition can be resolved without
20 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
21 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
22 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
23 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
24 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100
25 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction
26 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
27 record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it
28 existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court

1 considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as
2 complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

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

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ORDER

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

DATED this ____ day of June, 2021.

Dated this 23rd day of June, 2021


DISTRICT JUDGE

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

E2A D2F 48E9 CA57
Carli Kierny
District Court Judge

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

jm/L2

1 **CSERV**

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3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 Gary Chambers, Plaintiff(s)

CASE NO: A-21-831669-W

7 vs.

DEPT. NO. Department 2

8 State of Nevada, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

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

Writ of Habeas Corpus

COURT MINUTES

June 03, 2021

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

June 03, 2021 11:00 AM All Pending Motions

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

COURT CLERK: Alan Castle

RECORDER: Jessica Kirkpatrick

REPORTER:

**PARTIES
PRESENT:**

JOURNAL ENTRIES

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

Matter submitted on the pleadings. Court Denies the petition as, Petitioner's petition is untimely. The Supreme Court remittitur was returned on November 21, 2019 and the instant petition was filed on March 24, 2021; further, Petitioner failed to make a showing of ineffective assistance of counsel under the two prong test in Strickland,

The NV Supreme Court adopted the two prong test in *Strickland* in *Warden v. Lyons*. The two prong test provides: "A defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different." The grounds for dismissal applies uniformly to all claims.

Petitioner argues his trial counsel was ineffective for a number of reasons listed supra in relief requested. While Petitioner may meet the first prong of Strickland as his counsel should have been diligent in the trial preparedness. More importantly, Petitioner fails to meet the second prong of

Strickland as Petitioner received the benefit of the corrected sentence following the State's motion to correct. Further, Petitioner has not established that the proceedings would have been different as he is still serving his sentence.

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

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

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

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER;
DISTRICT COURT MINUTES

GARY CHAMBERS,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-21-831669-W

Dept No: II

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 16 day of July 2021.

Steven D. Grierson, Clerk of the Court



Amanda Hampton, Deputy Clerk

