IN THE SUPREME COURT OF THE STATE OF NEVADA

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CHRISTOPHER E. PIGEON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83232

RESPONDENT'S ANSWERING BRIEF

Appeal from Order Denying Motion to Vacate or Modify Sentence and Supplemental Points and Authorities to Vacate Habitual Criminal Sentence or Modify Sentence
Eighth Judicial District Court, Clark County

TERRENCE M. JACKSON, ESQ.
Nevada Bar #000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER E. PIGEON, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83232

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JURISDICTIONAL STATEMENT

The district court's denial of a motion to modify a sentence is the "functional equivalent of an order . . . denying a motion for a new trial pursuant to NRS 177.015(1)(b)." Edwards v. State, 112 Nev. 704, 709, 918 P.2d 321, 325 (1996). NRS 177.015(1)(b) provides that an Appellant may file an appeal "from an order of the district court . . . refusing a new trial" "pursuant to Section 4 of Article 6 of the Nevada Constitution." However, the appeal must be made within "30 days after the entry of the judgment or order being appealed." NRAP 4(b)(1)(A).

On July 2, 2021, the district court filed its Order Denying Appellant's Motion to Vacate or Reduce Habitual Sentence. On July 14, 2021, Appellant filed a Notice of Appeal.

ROUTING STATEMENT

This appeal is presumptively assigned to the Nevada Court of Appeals pursuant to NRAP 17(b)(4) because it is an appeal from a denial of a motion to modify a sentence.

STATEMENT OF THE ISSUE(S)

1. Whether the district court abused its discretion in failing to modify Appellant's sentence by failing to weigh all the mitigating facts and circumstances during sentencing properly.

2. Whether the district court erred is allowing Appellant to represent himself.

3. Whether cumulative error applies, warranting reversal.

STATEMENT OF THE CASE

On June 5, 2013, the State charged Christopher Pigeon ("Appellant") by way of Indictment with the following: Counts 1 and 2 – Prohibited Acts by a Sex Offender (Category D Felony – NRS 179D.470; 179D.550; 179D.460); Count 3 – Attempt First Degree Kidnapping (Category B Felony – NRS 193.330; 200.320); Count 4 – Aggravated Stalking (Category B Felony – NRS 200.575); Count 5 – Luring Children with Intent to Engage in Sexual Conduct (Category B Felony – NRS 201.560); Count 6 – Burglary (Category B Felony – NRS 205.060); Count 7 – Open

or Gross Lewdness (Category D Felony – NRS 201.210); and Count 8 – Unlawful Contact with a Child (Gross Misdemeanor – NRS 207.260). Appellant's Appendix ("AA") Vol. 1, at 01-06.

On July 31, 2014, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. AA Vol. 1, at 65. On August 4, 2014, the State filed an Amended Indictment charging Appellant with: Count 1 – Attempt First Degree Kidnapping; Count 2 – Aggravated Stalking; Count 3 – Luring Children with the Intent to Engage in Sexual Conduct; Count 4 – Burglary; Count 5 – Open or Gross Lewdness; Count 6 – Unlawful Conduct with a Child; and Counts 7 and 8 – Prohibited Acts by a Sex Offender. AA Vol. 1, at 67-72.

On August 4, 2014, Appellant's jury trial began. Respondent's Appendix (RA) Vol. 1, at 1. On August 5, 2014, a jury found Appellant guilty of all counts. AA Vol. 1, at 82-83. On December 10, 2014, the district court adjudicated Appellant pursuant to the Large Habitual Criminal statute. AA Vol. 1, at 83. For Counts 1, 2, 3, 4, 5, 7, and 8 and sentenced Appellant to life without the possibility of parole. As for Count 6 the Court sentenced Appellant to 364 days in the Clark County Detention Center. AA Vol. 1, at 82-83. On December 23, 2014, the district court filed the Judgment of Conviction. Id.

On December 1, 2017, the Nevada Supreme Court affirmed in part and reversed in part Appellant's Judgment of Conviction. AA Vol. 1, at 236.

Specifically, the Court concluded there was insufficient evidence for Counts 1 through 5 and 8. AA Vol. 1, at 236-250. On December 29, 2017, the Nevada Supreme Court issued Remittitur. AA Vol. 1, at 252-253.

On March 29, 2018, the State submitted a sentencing memorandum. RA Vol. 2, at 244. On May 9, 2018, the district court held a sentencing hearing wherein the district court resentenced Appellant under the Large Habitual Criminal statute to life without the possibility of parole for Count 7, and to credit for time served for Count 6. AA Vol. 2, at 261-263. On May 29, 2018, the district court filed an Amended Judgment of Conviction. AA Vol. 2, at 261-263.

On May 29, 2018, Appellant filed a Motion to Withdraw Counsel. AA Vol. 2, at 264. On June 20, 2018, the district court denied Appellant's Motion to Withdraw Counsel because Appellant was representing himself, and thus there was no counsel to withdraw. AA Vol. 2, at 266.

On May 27, 2020, Appellant filed a pro per Motion to Vacate or Reduce Habitual Sentence ("Motion"). AA Vol. 2, at 269. On June 17, 2020, the district court appointed counsel. AA Vol. 2, at 273-274. Counsel confirmed on June 24, 2020. AA Vol. 2, at 275.

On November 20, 2020, through counsel, Appellant filed the Motion and Supplemental Points and Authorities to Vacate Habitual Criminal Sentence or Modify Sentence ("Supplement"). AA Vol. 2, at 276. On June 12, 2021, the district

court denied Appellant's Motion and Supplement. AA Vol. 2, at 299. On July 2, 2021, the district court filed its order denying Appellant's Motion and Supplement. AA Vol. 2, at 299-301.

On July 14, 2021, Appellant filed his Notice of Appeal. AA Vol. 2, at 302. On October 19, 2021, Appellant filed his Opening Brief.

STATEMENT OF THE FACTS

In May 2013, C.C.[1] was 12 years old and attended Hyde Park Middle School. Respondent's Appendix ("RA"), at 111-12. C.C. would take the city bus to school in the mornings because she attended Hyde Park, a magnet school. RA Vol. 1, at 112. The bus would pick her up near her home, and she would get off to transfer at the transit center in Downtown Las Vegas. RA Vol. 1, at 114. C.C. would ride the bus alone. Id.

On May 15, 2013, C.C. noticed a man at the transit center who made her uncomfortable because he was looking at her. RA Vol. 1, at 114-15. He got on the same bus that she did, and he got off at the same stop. RA Vol. 1, at 115.

Before school, C.C. stopped at CJ's Mini Mart. RA Vol. 1, at 115-16. C.C. noticed that the man from the bus — later identified by C.C. in court as Appellant — followed her into CJ's Mini Mart that day. RA Vol. 1, at 115-17. C.C. did not

[1]For purposes of protecting C.C.'s identity, the State will refer to C.C. by her initials.

initiate contact or conversation with Appellant that morning. RA Vol. 1, at 117-118. However, Appellant continued to look at her while in the store. RA Vol. 1, at 117-118. C.C. bought a pack of gum and immediately left the store, not noticing if Appellant continued to follow her. RA Vol. 1, at 118.

On May 16, 2013, Appellant again closely observed and followed C.C. while at the transit center. RA Vol. 1, at 119-20. C.C. tried to avoid Appellant because he was making her feel concerned. RA Vol. 1, at 120. However, Appellant got on the same bus as her and exited the same bus stop as her. RA Vol. 1, at 120-21.

After exiting the same stop as C.C., while C.C. was walking to school, Appellant approached C.C. by Sonia's restaurant RA Vol. 1, at 121-22, 125-26, 217-18. Appellant then blocked C.C. on a staircase, grabbed her hand, and told her she looked nice and that she was beautiful, and that he loved her. RA Vol. 1, at 122-123, 217-18. C.C. told Appellant to leave her alone. RA Vol. 1, at 123. C.C. then ran to CJ's. RA Vol. 1, at 123-24. Despite C.C. telling Appellant to leave her alone, Appellant followed her into CJ's and sat at the slot machines. RA Vol. 1, at 124-25.

On May 17, 2013, Appellant again closely observed and followed C.C. while at the transit center. RA Vol. 1, at 126. Appellant again boarded the same bus as C.C. and got off at the same stop C.C. did. RA Vol. 1, at 126-128. Appellant again followed C.C. into CJ's, where he again told her that she looked nice. RA Vol. 1, at

128. C.C. left CJ's, whereupon she quickly walked to school because she was afraid of Appellant. RA Vol. 1, at 129.

On May 17, 2013, Detective Lafreniere — after CJ's store clerk reported the May 17, 2013, interaction between C.C. and Appellant — interviewed the CJ's store clerk and reviewed the video surveillance. RA Vol. 1, at 152-53. After reviewing the surveillance footage, Detective Lafreniere identified the man following C.C. into CJ's as Appellant. RA Vol. 1, at 153-57.

Additionally, Detective Lafreniere reviewed surveillance footage from May 15, 2013. RA Vol. 1, at 157. Surveillance footage depicts Appellant "pull[ing] at his genitals and his groin area while he was staring in the direction of C.C." RA Vol. 1, at 157-58. Surveillance footage from May 16, 2013, depicted similar interactions between Appellant and C.C. RA Vol. 1, at 158-59. Lastly, surveillance footage from May 17, 2013, shows Appellant running after C.C. in the parking lot after C.C. left. RA Vol. 1, at 159.

This prompted Detective Lafreniere to go to Hyde Park. RA Vol. 1, at 159. When he arrived, he saw Appellant sitting on a bench at a park across from the school, "affixed" on the school and rocking back and forth while shaking his legs. RA Vol. 1, at 160-61. Appellant then got off the bench and walked into the gated area of the school. RA Vol. 1, at 161. A school employee stopped Appellant,

whereupon Detective Lafreniere contacted Appellant and escorted him to the police station. RA Vol. 1, at 161-162.

At the police station, Detective Lafreniere interviewed Appellant. RA Vol. 1, 161-63. Appellant provided a voluntary statement. RA Vol. 1, 162-63. The State provided a redacted version of the statement to the jury at trial. RA Vol. 1, at 149, 162.

C.C.'s grandmother — C.C's legal guardian — testified that C.C. took the city bus to school in the mornings. RA Vol. 1, at 107-108. She testified that she did not know Appellant and that she never gave Appellant permission to speak, touch, spend time with, or take C.C. anywhere. RA Vol. 1, at 110. She testified that C.C. was upset by the incidents with Appellant, and C.C. was scared. RA Vol. 1, at 111-12.

Also, Appellant testified at trial. RA Vol. 1, at 205. Appellant specifically testified that:

> With respect to this crime, I will say this. She claims that -- in her interview that -- and her written statement, [C.C.], the victim -- or -- well, I guess *she is the victim for one of the crimes only*. *Well, plus the -- some of Class B felonies*, but those are only alleged. She claims that she only saw me for three days, but I think I actually saw her for longer than that.
> . . .
> I just was very enamored with a young girl, who was probably 12 and a half back then. She's now 13.
> I don't often talk to young girls, but I find this particular girl very nice, bright, interesting. *I thought she was a nice specimen.* I like her being slimmer. I just sort of fell in the first stages of love with her and was trying to

> get to know her over the summer. There were only two weeks before school was out so I was really trying to get to – get her to let me meet her mom or her dad or maybe I could have come over for dinner or something over the summer. It would have been nice.
>
> My intention was to marry her if I could have met her mom and she would have agreed. So, I really had good intentions, I'd say. *I mean, obviously I was somewhat sexually attracted to her*.

RA Vol. 1, at 209-211 (emphasis added).

Also, Appellant testified that on May 17, 2013, he was at the park after school waiting to see C.C. RA Vol. 1, at 215. Appellant eventually entered the school because he "was going to look in the hallway[s]" for C.C. Id. Appellant admitted never meeting her family, but he did want to marry and have sex with C.C. RA Vol. 1, at 39. Lastly, in response to the court's questioning, Appellant testified that:

> Q Why did you take the bus route from central station to Charleston and Valley View?
> A Well, I always -- I rode the bus with her on purpose. It was to be with her.
> Q Where were you going?
> A I walked her to school.
> Q Were you only following [C.C]?
> A Yes.
> Q Do you still love [C.C.]?
> A Yes, I do.
> Q Were you happy to see her again in Court?
> A Yes, I was.
> Q Do you hope to see [C.C.] again someday?
> A Well, I think it's difficult at that moment because unlawful contact, although it's a misdemeanor right now -- a second crime of that would be a felony of one to six years. I'd like to see her again. I mean, I would really -- I

> really do hope to see her again. However, I'd have to have permission for that.
> Q Do you want to pursue a relationship with [C.C.] or another teenager in the future?
> A Only with [C.C.]. Otherwise I don't want to chase any more teenagers. Except for maybe an 18 or 19 year old. Perhaps a student at UNLV.
> . . .
> Q [] what would you think of a man that would approve of a 50 year old following a teenager?
> A Well, ideally you talk to them and not follow them. Or walk with them instead. *I'd say it's okay some of the time as long as she doesn't say anything about it.*

RA Vol. 1, at 218-219 (emphasis added).

SUMMARY OF THE ARGUMENT

The district court properly denied Appellant's Motion and Supplement. First, Appellate is not entitled to a modification of sentence, as the district court did not rely on any mistaken assumptions of facts when sentencing Appellant. Additionally, Appellant's claim of cruel and unusual punishment is beyond the scope for a motion to modify sentence.

Second, the district court correctly denied Appellant Motion, as Appellant's claim that the district court improperly canvassed Appellant pursuant to Faretta v. California, 422 U.S. 806 (1975), is beyond the scope for a motion to modify sentence and is precluded from being relitigated.

Lastly, Appellant is failed to show cumulative error, as there is no error. Moreover, Appellant's claim of cumulative error is new before this Court and should not be heard.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S MOTION AND SUPPLEMENT BECAUSE APPELLANT FAILED TO DEMONSTRATE HE WAS ENTITLED TO A MODIFICATION OF SENTENCE

Appellant fails to address the standard of review for a denial of a motion to modify sentence, as required by NRAP 28(a)(10)(B). Instead, Appellant repeats the same arguments made in Appellant's Motion and Supplement while not addressing that Appellant's claims did not fall within the narrow scope of a motion to modify sentence. Moreover, Appellant contextualizes his appeal so that it appears he is requesting this Court to directly review the district court's sentence instead of reviewing the district court's discretion in denying his Motion and Supplement. If Appellant wished to challenge the validity of his sentence, then he could have filed a direct appeal of the Amended Judgment of Conviction filed on May 29, 2018. It is an abuse of the appellate process for Appellant to notice the instant appeal as a denial of a motion for modification of sentence, and then frame the subsequent brief as a direct appeal of his sentence.

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/ / /

A. STANDARD OF REVIEW

The district court's denial of a motion to modify a sentence is the "functional equivalent of an order . . . denying a motion for a new trial pursuant to NRS 177.015(1)(b)." Edwards v. State, 112 Nev. 704, 709, 918 P.2d 321, 325 (1996) (*citing* Passanisi v. State, 108 Nev. 318, 321–22, 831 P.2d 1371, 1373 (1992))

This Court reviews a district court's decision to deny a motion for a new trial for an abuse of discretion. *See* Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). A district court properly exercises its discretion where it gives appropriate, careful, correct, and express consideration of the factual and legal circumstances before it. *See* Young. V. Jonny Ribeiro Bldg., Inc., 106 Nev. 88, 93-94 ,787 P.2d 777, 780 (1990). When reviewing a district court decision for abuse of discretion, the appellate court does not substitute its judgement for that of the district court. Id. at 92, 787 P.2d at 779.

B. THE DISTRICT COURT COULD NOT HAVE GRANTED APPELLANT'S MOTION AND SUPPLEMENT BECAUSE THE CLAIMS HE RAISED WERE NOT COGNIZABLE IN A MOTION FOR SENTENCE MODIFICATION

Here, Appellant claims the district court failed to properly weigh all the mitigating facts and circumstances when the court sentenced Appellant. Opening Brief, at 11, 13; *See* AA Vol. 2, at 269, 276. However, Appellant blatantly ignores the fact that the claims he raised in his Motion and Supplement were inappropriately

raised in a motion for modification of sentence, and therefore could not be granted. *See* AA Vol. 2, at 269, 276; RA Vol. 2, at 243.

A motion for modification of sentence is very "limited in scope to sentences based on mistaken assumptions about a defendant's criminal record." Edwards v. State, 112 Nev. 704, 708, 918 P. 2d 321, 324 (1996). When the appellant raises issues outside of this scope, "the motion should be summarily denied." Edwards, 112 Nev. at 708, 918 P. 2d at 324 n. 2.

Additionally, the district court lacks jurisdiction to modify or vacate a sentence once the defendant has started serving it. *See* Passanisi v. State, 108 Nev. 318,322,831 P.2d 1371, 1373 (1992) (overruled on other grounds, Harris v. State, 130 Nev. 435, 446, 329 P.3d 619, 627 (2014)). However, a district court does have inherent authority to correct, vacate, or modify a sentence where the defendant can demonstrate the sentence is based on a materially untrue assumption or mistake of fact that has worked to the defendant's extreme detriment in violation of due process. *See* Edwards, 112 Nev. at 707, 918 P.2d at 324.

However, not every mistake or error during sentencing gives rise to a due process violation. *See* State v. Dist. Ct. (Husney), 100 Nev. 90, 97,677 P.2d 1044, 1048 (1984). Such material mistakes surrounding a defendant's criminal record can arise "either as a result of a sentencing judge's correct perception of inaccurate or

false information, or a sentencing judge's incorrect perception or misapprehension of otherwise accurate or true information." Id., 100 Nev. at 97, 677 P.2d at 1048.

Additionally, an appellant must support his or her claims with specific factual allegations, which would entitle the appellant to relief if true. *See* Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover, bare and naked allegations are insufficient, as are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Here, Appellant completely failed to allege that the district court's sentence is based upon a materially untrue assumption or mistake of fact about his criminal record. Instead, in his Motion and Supplement, Appellant alleged that the district court failed to properly weigh all the mitigating facts and circumstances when the court sentenced Appellant, that his sentence was cruel and unusual, and that the district court erred by allowing Appellant to represent himself. AA Vol. 2, at 269, 276.

However, none of these claims were properly raised in a motion to modify sentence. These are substantive claims of error, all of which would be more appropriately raised in a direct appeal of his sentence. His claim regarding self-representation does not even remotely concern the sentence he received.

Additionally, Appellant's claim that the district court failed to consider mental health information as mitigation is belied by the record. *See* RA Vol. 2, at 244. 283-286. As Appellant admits, at the time of sentencing, the district court was in possession of Appellant's mental health history. *See* Opening Brief, at 12-13. Moreover, the State provided the district court with a detailed sentencing memorandum on March 29, 2018. RA Vol. 2, at 244-282. Additionally, the memorandum indicated that a prior psychosexual evaluation had been submitted to the court. RA Vol. 2, at 256. Moreover, several psychological reports detailing Appellant's mental health history had been submitted and reviewed by the court, detailing Appellant's mental health issues. AA Vol. 1, at 22-49; AA Vol. 2, at 285.

In resentencing Appellant, the district court filed a special finding, detailing the court's reasoning as to why a sentence of life is appropriate to protect the citizens and children of Nevada. AA Vol. 2, at 257-260; RA Vol. 2, at 285-286. In part, the district court justified the imposition of a life sentence due to Appellant's interactions with C.C. and Appellant's prior felony convictions — most of which involved sexually gratifying himself in front of young children. The district court specifically relied on:

> (1) Defendant said, "I don't often talk to young girls, but I find this particular girl [12 years of age] very nice, bright, interesting. I thought she was a 'nice specimen.' I just sort of fell in the first stages of love with her and was trying to get to know her over the summer. There were only two

> weeks before school was out, so I was really trying to get to -get her to let me meet her mom or dad"
> (2) Pigeon further said, "My intention was to marry her ... I mean, obviously I was somewhat sexually attracted to her."
> (3) Pigeon said on May 17 , 2013 , he was at the park across from C.C's school because he "was going to look in the hallway briefly to see if [C.C.] might not be there."
> (4) Pigeon admitted that he never met her family, but he did want to marry and have sex with C.C. with parental permission.
> (5) Pigeon testified he found C.C. sexually attractive.
> (6) At trial, Pigeon testified that he still loved C.C., he was happy to see her again in court, he would like to see her again, he would like to have a relationship with her.

AA Vol. 2, at 257-260; RA Vol. 2, at 283-284.

As indicated above, the district court did not rely on materially untrue assumptions or mistakes of fact about Appellant's criminal record. It is clear from the record that the district court was seriously concerned about Appellant's likelihood of reoffending, his risk to the community, and how Appellant referred to C.C. in this case. In any event, at sentencing, Defendant did not claim that any of the facts argued by the State and contained in the Pre-Sentencing Investigation Report ("PSI") were incorrect. AA Vol. 1, at 255-56

Appellant failed to raise a single claim that could be considered in a motion for modification of sentence. Therefore, the district court did not err in denying Appellant's Motion to Vacate or Reduce Habitual Sentence and Appellant's Supplemental Point and authorities to Vacate Habitual Criminal sentence or Modify

Sentence as the district court did not rely upon any materially untrue assumptions or mistakes of fact when sentencing Appellant.

II. APPELLANT'S CLAIM THAT THE DISTRICT COURT ERRED IN ALLOWING APPELLANT TO REPRESENT HIMSELF WAS BARRED FROM CONSIDERATION UNDER THE LAW OF THE CASE DOCTRINE

In his Motion and Supplement, Appellant alleged that the district court erred by allowing him to represent himself at trial. *See* AA Vol. 2, at 269, 276. In addition to being inappropriately raised in a motion for modification of sentence, as detailed above, the district court was barred from considering this claim because the Nevada Supreme Court already ruled on said issue in Appellant's direct appeal (No. 67083). *See* AA Vol. 2, at 236, 238-240. Thus, the district court could not possibly have erred by denying Appellant relief on this claim.

The doctrine of the law of the case or "the law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued. *See* Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Appellant cannot avoid "the doctrine of the law of the case" by raising "a more detailed and precisely focused argument . . . after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799.

Moreover, parties are precluded "from relitigating a cause of action or an issue which has been finally determined by a court of competent jurisdiction." Horvath v. Gladstone, 97 Nev. 594, 597, 637 P.2d 531, 533 (1981); *See* University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) (The Court distinguishes between issue preclusion and claim preclusion, although they are both under the doctrine of res judicate). For issue preclusion to apply, there must be:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; … (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation and (4) the issue was actually and necessarily litigated

Five Star Capital Corp. v. Rudy, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008)[2] (*citing* University of Nevada v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)); *See also* Gonzales v. Dist. Ct., 129 Nev. 215, 218, 298 P.3d 448, 450 (2013) (The Court suggesting that the issue-preclusion analysis is applicable in the criminal context.); *See also* Bradley v. State, 494 P.3d 907 (Table), 2021 WL 4167112 (Nev. Crt. of App. 2021) (unpublished) (The Court cites to Five Star Capital Corp's, four-factor test for issue preclusion in a criminal context).

[2] In Five Star Capital Corp. v. Rudy, 124 Nev. 1048, 194 P.3d 709 (2008), the Court adopted "the terms of claim preclusion and issue preclusion as the proper terminology in referring to these doctrines."

Here, Appellant's claim is precluded. On direct appeal, Appellant claimed the district court erred in allowing Appellant to represent himself. RA Vol. 2, at 312-314. Specifically, Appellant argues in relevant part that:

> [W]hile PIGEON understood the court process, he did not understand that what he had done was wrong, and had no idea how to competently represent himself without self-incrimination . . . He was unable to present a viable defense.
>
> This unmedicated man suffering from paranoid schizophrenia should never have been permitted to try to defend himself without assistance of counsel, especially given the seriousness of the charges and potential sentence.
>
> . . .
>
> he was not competent to stand trial without being on his anti-psychotic medication, but even if he was competent to stand trial within the meaning of Dusky, he was certainly not competent to represent himself.

RA Vol. 2, at 312-314.

In the instant appeal, Appellant again argues that the district court erred in allowing him to represent himself. Opening Brief, at 20-21. Specifically, Appellant argues that,

> Court wrongly granted Defendant's *Faretta* request and he was unable to adequately present mitigating evidence of his mental problems . . .
>
> . . .
>
> [T]he [d]istrict [c]ourt in this case did not adequately consider the Defendant's intelligence, capacity, or ability to fully comprehend the totality of facts necessary for his defense. This was error.
>
> . . .

> [T]he [d]istrict [c]ourt was too quick to allow Pigeon to represent himself. The [d]istrict [c]ourt knew, or should have known, that Defendant Christopher Edward Pigeon was at best marginally competent and that the failure to provide him with alternate counsel would gravely prejudice him.

Opening Brief, at 20-26. As shown above, Appellant is raising the same issue he raised in his direct appeal. However, Appellant does word his argument differently, but the issue remains the same.

The Nevada Supreme Court has already ruled on the merits of this issue. *See* AA Vol. 2, at 236, 238-240. Specifically, the Nevada Supreme Court held that:

> Because the district court correctly canvassed Pigeon under current Nevada law, and the record reflects that Pigeon was competent and that his waiver was knowing, intelligent, and voluntary, we conclude the district court did not abuse its discretion in granting Pigeon's request to represent himself and waive his right to" counsel.

AA Vol. 2, at 240. Therefore, Appellant's claim is precluded as the Nevada Supreme Court already made a final ruling on the merits regarding the instant issue.

III. APPELLANT'S CLAIM OF CUMULATIVE ERROR IS INAPPROPRIATELY RAISED AND IS WITHOUT MERIT

Appellant raises a new claim of cumulative error, which is outside of the underlying pleadings. *See* Opening Brief, at 29. Also, Appellant fails to show good cause as to why this Court should hear Appellant's new matter or demonstrate that Appellant is prejudiced.

In addition, Appellant claims that "numerous errors in this case require reversal of the conviction. *See* Opening Brief, at 29. However, Appellant's claim is without merit and is bare and naked.

This Court will generally decline to hear new matters on appeal that have not been raised in the underlying pleadings. *See* McNelton v. State, 115 Nev. 396, 415-416, 990 P.2d 1263, 1275-76 (1999). However, if Appellant shows "cause and prejudice for" failing to "raise it below," this Court may hear the appellant's newly raised claims. *See* Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

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

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. *See*, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). Logic dictates that there can be no cumulative error where the appellant fails to demonstrate any single violation of Strickland. *See* Turner v. Quarterman, 481 F.3d

292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (*citing* Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)).

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

Additionally, an appellant must support his or her claims with specific factual allegations, which would entitle the appellant to relief if true. *See* Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Moreover, bare and naked allegations are insufficient, nor are those belied and repelled by the record. Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

Also, this Court will generally decline to hear new matters on appeal that have not been raised in the underlying pleadings. *See* McNelton v. State, 115 Nev. 396, 415-416, 990 P.2d 1263, 1275-76 (1999). However, if Appellant shows "cause and prejudice for" failing to "raise it below," this Court may hear the appellant's newly raised claims. *See* Hill v. State, 114 Nev. 169, 178, 953 P.2d 1077, 1084 (1998).

Here, Appellant failed to assert cumulative error in his underlying motion. Additionally, Appellant fails to show good cause concerning his failure to raise them in his underlying motion. Even so, Appellant is not prejudiced because there were no errors to cumulate as the district court's sentence did not rely on a mistaken assumption of Appellant's criminal record. Therefore, this Court should decline to hear Appellant's new matter.

In any event, Appellant has not demonstrated any claim warranting relief under Strickland. Appellant fails to show cumulative error because there are no errors to cumulate. Appellant fails to allege what "numerous errors" constitute cumulative error. Opening Brief, at 29. In any event, Appellant's claims are either belied by the record, bare and naked, meritless or otherwise barred. Therefore, Appellant has failed to establish cumulative error, and this court should dismiss Appellant's claim.

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/ / /

CONCLUSION

Therefore, for the above reasons, this Court should AFFIRM the district court's denial of Appellant's Motion to Vacate or Modify Sentence and Supplemental Points and Authorities to Vacate Habitual Criminal Sentence or Modify Sentence.

Dated this 17th day of November, 2021.

Respectfully submitted,

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

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 5,417 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17th day of November, 2021.

Respectfully submitted

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

BY */s/ Karen Mishler*
KAREN MISHLER
Chief Deputy District Attorney
Nevada Bar #013730
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 17, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

TERRENCE M. JACKSON, ESQ.
Counsel for Appellant

KAREN MISHLER
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

KM/Corey Hallquist/ed