IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVIN MARVELL TONEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83246

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of a Supplemental Petition for Writ of Habeas Corpus from Guilty Plea (Post-Conviction)
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVIN MARVELL TONEY, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83246

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of a Supplemental Petition for Writ of Habeas Corpus from Guilty Plea (Post-Conviction)
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

Pursuant to NRAP 17(b)(1), this case is presumptively assigned to the Court of Appeals, as it is a post-conviction appeal that involves a challenge to a denial of a petition for writ of habeas corpus.

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not err when it found Appellant's Post-Conviction Petition was procedurally barred because the Petition was untimely and there was no good cause to overcome the procedural bars.
2. Whether the district court did not err when it found defense counsel was not ineffective for failing to challenge the use of a weapon enhancement to Appellant's sentence under NRS 193.165.
3. Whether the district court did not err when it found Appellant's plea was a knowing, voluntary and intelligent plea of guilty.
4. Whether the district court did not err when it denied Appellant an evidentiary hearing on Appellant's Post-Conviction Habeas Corpus Petition.
5. Whether cumulative error does not require reversal of Appellant's conviction.

STATEMENT OF THE CASE

From February 18, 2017 to February 22, 2017, Appellant Davin Toney (hereinafter "Appellant") robbed five (5) different businesses at gunpoint. On February 27, 2017, the State filed a Criminal Complaint against Appellant charging him with five (5) counts of Burglary while in Possession of a Deadly Weapon, five (5) counts of Robbery with Use of a Deadly Weapon, and one (1) count of Robbery with Use of a Deadly Weapon, Victim 60 Years of Age or Older. On April 27, 2017, a Preliminary Hearing (hereinafter "Preliminary Hearing") was held, and at the conclusion, the justice court held Appellant to answer the above charges in district court. An Amended Criminal Complaint was filed that same day.

On April 28, 2017, the State filed an Information charging Appellant with the above charges as well as two (2) counts of Conspiracy to Commit Robbery. On August 23, 2017, a Guilty Plea Agreement (hereinafter "GPA") was filed and Appellant pled guilty to: Count 1 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count 2 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); and Count 4 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060). The terms of the GPA were as follows:

> The Parties stipulate to an aggregate term of imprisonment of eight (8) years to thirty-five (35) years (96 to 420 months) in the Nevada

> Department of Corrections structured as follows: Count 1 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement. Count 2 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement, to run consecutive to Counts 1 and 2. Count 4 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.

On October 18, 2017, Appellant was sentenced to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 1 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty six (66) months for the use of a deadly weapon; Count 2 – a minimum of forty eight (48) months and a maximum of one hundred ninety five (195) months, concurrent with Count 1; Count 3 – a minimum of thirty six (36) months and a maximum of one hundred forty four (144) months, plus a consecutive minimum of twelve (12) months and a maximum of sixty-six (66) months for the use of a deadly weapon, consecutive to Counts 1 and 2; Count 4 – a minimum of forty eight (48) months and a maximum of one hundred ninety-five (195) months, consecutive to Counts 1 and 2 and concurrent with Count 3. Appellant received a total aggregate sentence of a minimum of ninety-six (96) months and a maximum of four hundred twenty (420) months in the NDOC and two hundred thirty-eight (238) days credit for time served.

The Judgment of Conviction was filed on October 30, 2017. No direct appeal was filed.

On September 14, 2020, Appellant filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). On October 14, 2020, counsel Terrence Jackson, Esq. was appointed. On January 26, 2021, counsel filed a Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus for Post-Conviction Relief (hereinafter "Supplemental Petition"). The State filed its Response on April 19, 2021. On May 13, 2021, Appellant filed a Reply. On June 21, 2021, the district court denied the Petition and Supplemental Petition. The Findings of Fact, Conclusions of Law and Order was filed on July 8, 2021.

On July 15, 2021, Appellant filed a Notice of Appeal. On November 9, 2021, Appellant filed an Opening Brief (hereinafter "AOB").

STATEMENT OF THE FACTS

From February 18, 2017 to February 22, 2017, Appellant committed five (5) robberies at five (5) smoke shops in Las Vegas, Nevada. Appellant's Appendix (hereinafter "RA") 060-067. At his Preliminary Hearing, eyewitnesses from each of the smoke shops testified. Respondent's Appendix RA 014, 019, 022, 026, 034.

On February 18, 2017, Chinthana Thennakoon (hereinafter "Thennakoon") was robbed while he was working at the 99 Center Plus Smoke Shop. RA 015. He described the person that robbed him as a six (6) foot eight (8), a little overweight,

African American male who was wearing a white baseball hat, black sunglasses, and a brown jacket. RA 015.

Right before Thennakoon was robbed, the robber entered the front door of the store and asked about purchasing a blunt wrap as well as a cigar. RA 015. Thennakoon turned around to retrieve those items from behind and when he turned back around the robber pointed a gun at him. RA 015. While pointing the gun at Thennakoon, the robber aggressively asked him to open the register and give him the money. RA 015. Thennakoon opened the register, the robber grabbed about $350 to $400 from the register and placed the money inside of a brown paper bag. RA 015-017. Thennakoon then opened the second register and the robber took money out of that register as well. RA 015. Subsequently, one (1) or two (2) customers entered the store. RA 010. The robber told the customers that the smoke shop was closed, but the customers did not pay attention. RA 016. Appellant then put his gun back inside of his jacket and, while carrying the paper bag filled with cash from the register, slowly exited the through the front door of the store. RA 016. When asked at the Preliminary Hearing about the firearm that the robber pointed at him, Thennakoon testified that he was not sure whether the gun was a toy gun or a real gun. RA 018.

That night, Salman Akram (hereinafter "Akram") was working at Mr. Kay's Smoke Shop also located in Las Vegas, Nevada. RA 019. At approximately 10:40

PM, while he was working, two (2) males entered the store. RA 019. One (1) of the men stood by a jewelry display located near the front door, while the other approached the register at the counter. RA 019. Akram Identified Appellant as the man that approached the register and described him as an African American man who was wearing a baseball cap and sunglasses. RA 019-020.

As Appellant approached Akram at the cash register, he asked for a pack of Newports and then asked for a pack of Swishers. RA 020. Appellant then said he was not going to get the cigarettes, took change out from his pocket, and began to count the change. RA 020. As soon as Akram opened the register, Appellant pulled out a gun, pointed it at Akram, and told him to shut up or he would shoot him. RA 020.

Akram stepped back from the register as Appellant took about $400 from inside of the register. RA 020. After Appellant grabbed the cash, he began to walk towards the door, pointed the gun at Akram, and told him that he better not pull anything from the counter, or he would shoot him. RA 020. Appellant then unlocked the front door, which Akram never locked, and both individuals exited the store. RA 020. At the Preliminary Hearing, Akram testified that the gun Appellant pointed at him that day appeared to be a real gun. RA 021.

A few days later, on February 22, 2017, Sujan Narasingehe (hereinafter "Narasingehe") was working at AS smoke shop in Las Vegas, Nevada. RA 023. At

about 10:04 AM, a man he Identified as Appellant at the Preliminary Hearing, entered the store with Narasingehe's neighbor. RA 023. Eventually, Appellant asked for Swishers cigars. RA 023. Narasingehe grabbed the cigars while Appellant waited by the register. RA 023. Once Narasingehe's neighbor left the store, he asked if he could get Appellant anything else. RA 024. Appellant stated he wanted to purchase a pipe and walked to the cabinet holding the pipes as Narasingehe followed. RA 024.

After a couple of seconds, Appellant pointed out the one he wanted, which Narasingehe said was very unusual in a smoke shop because customers usually take longer to examine the pipes for purchase. RA 024. Narasingehe retrieved the pipe and Appellant told him to go over by the register. RA 024. Once they got to the register, Appellant pulled out a gun and pointed it at Narasingehe. RA 024. While pointing the gun at Narasingehe, Appellant aggressively requested that he open the register. RA 024. At this point, Narasingehe was so nervous he struggled to open the register, but eventually was able to do so. RA 024. Appellant then grabbed all of the money out of the register, which amounted to approximately $140. RA 024. Appellant asked if there was more money, but since it was the early morning, Narasingehe told him that is all the store had. RA 044. Appellant finished grabbing the money from the register and then walked slowly back toward the store and ran out. RA 044. At that point, other customers were in the store and appeared to

Narasingehe not to know what had happened or were pretending not to know. RA 044.

Narasingehe testified at that Preliminary Hearing that he was not sure if the gun Appellant pointed at him that day was a toy or real gun, but he recalled that he was scared because he thought he was going to die that day. RA 026. He was however able to describe the firearm as black in color and was the type of gun one would load from the top as the top would slide back. RA 026. Most importantly, he testified that at the time Appellant pulled out the gun, he did not think it was a toy gun and thought he was going to get shot. RA 026.

Later that same day, Harbehej Singh (hereinafter "Singh") was working at the USA Smoke Shop and Mini Mart also located in Las Vegas, Nevada when he was robbed at gunpoint. RA 026-027. At about 3:00 PM, Singh was working with another employee who was sixty-seven (67) years old. RA 026-027. At that time, Singh's employee was stocking items in the back of the shop and Singh was in the front portion of the shop completing paperwork and helping customers. RA 027. When Singh finished helping some customers, he saw a man, who he Identified as Appellant, standing in line. RA 027.

Appellant had entered the store wearing a beanie and asked Singh for cigars. RA 027. Appellant gave Singh a little over $1 and as Singh thought Appellant was reaching in his pocket to pull out more change, Appellant instead pulled out a gun

and pointed it at Singh's head. RA 027. Singh attempted to grab the firearm from Appellant but was unsuccessful, and, as a result, Appellant told Singh he would shoot him. RA 027. After this, Singh stepped back, told Appellant to take whatever he wanted, and Appellant went over to the register and retrieved the cash out of the register. RA 027. At that time, Singh's co-worker came to the front of the store. RA 027. Appellant then pointed the gun at Singh's co-worker, told him not move or Appellant would shoot him. RA 027. Appellant then finished grabbing the approximately $2,000 in cash and ran. RA 026-027.

After Appellant left the store, Singh looked to see if he could Identify Appellant's vehicle. RA 028. Singh was able to see Appellant get inside of a blue vehicle and he wrote down the vehicle's license plate number. RA 028. Singh recalled seeing a white bald man in the driver's seat and an African American female in the back as Appellant entered the vehicle and sat in the passenger seat. RA 028. The white male then drove the vehicle away. RA 028.

At the Preliminary Hearing, Singh recalled the license plate number to be: 79E092. RA 060. Singh also testified that while Appellant was in the store, he touched some Oreo Cookies packages and Swishers. RA 060. Singh also recalled that the firearm Appellant pointed at him that day was a black Glock semiautomatic firearm. RA 027. Singh later testified that while he did not have more firearm knowledge than knowing the difference between a revolver and semiautomatic, he

knew the firearm he saw was similar to the firearm police carry and was not a toy. RA 032. Moreover, Singh testified that he knew the firearm was not a toy because Appellant would not be able to shoot with a toy gun. RA 032. Singh later clarified that he was very familiar with small firearms and that he was one hundred (100) percent certain that the firearm Appellant pointed at him that day was a Glock. RA 033. He was also certain it was not a toy gun because he knew what toy guns and BB guns look like and that the gun Appellant used was real. RA 033.

Later that night, at approximately 10:30 PM, Norma Escobar was working at Texas Liquor located in Las Vegas, Nevada. RA 034. At that time, Escobar was standing behind the register inside of the store when an African American man, wearing a brown leather jacket, and beanie walked in. RA 034. Escobar recalled that the man, who was not her regular customer, was acting weirdly nervous as he asked for a bottle and Swishers cigars. RA 034. Escobar handed him the Swishers and bottle. RA 034. The man then gave Escobar a $20 bill, Escobar opened the register, the man then pointed his black gun at her, and took all of the money out of the register, which amounted to approximately $200. RA 034-035. Escobar explained that at this point she was in shock and could not recall what the man said to her. RA 034. The man then ran out of the store. RA 035.

In addition to this eyewitness testimony, there was also physical evidence presented that linked Appellant to the five (5) robberies. RA 037-042. LVMPD

Detective David Miller, who was assigned to investigate the robbery series, retrieved surveillance camera footage from the stores. RA 038. Detective Miller took note of certain similarities among the robberies, including that the robberies occurred at the same type of business, the description of the suspect was similar, the suspect was wearing the same unique jacket, and had the same method of operation. RA 038. Based on these similarities, Detective Miller believed it was the same suspect that conducted all five (5) of the robberies. RA 038. Indeed, in all five (5) of the robberies, the suspect wore blue jeans and wore what appeared to be a unique, leather jacket with white along the collar and the sleeve cuffs as well as a type of leather material on the shoulder. RA 039. The suspect also wore a white ball cap, with a sticker on the brim and a black line along a black symbol on the left upper part of the cap. RA 102-103. The suspect was also seen wearing a gray beanie in some of the robberies as well as sunglasses. RA 102-103. Detective Miller also reviewed a map showing the locations of the robberies which further confirmed that the five (5) robberies amounted to a series. RA 040.

While reviewing the surveillance camera footage from the USA Smoke Shop robbery, Detective Miller noticed the suspect in the video approaching the front doors, taking a sip from a tall can, and throwing it in the trash outside of the store before entering. RA 038. The investigating officers later looked in the trash can and saw that there was only one can that fit the description inside and collected it for

processing. RA 039. Testing conducted on the Arizona green tea can revealed that the two (2) fingerprints lifted were a match for Appellant's right middle finger and his right index finger. RA 037. Officers also retrieved the Oreo cookie package Appellant touched at one of the crime scenes to conduct testing. RA 037. Testing of that package revealed that the fingerprint found on the Oreo cookie package matched Appellant's right middle finger. RA 037.

Officers also searched the records for the license plate on the vehicle provided by one of the eyewitnesses. RA 040. Appellant's address was associated with the vehicle's registration and a search warrant was executed. RA 040. A search warrant was also eventually executed at Appellant's apartment where officers located a .177 Daisy Powerline BB gun, and a ball cap, which appeared to be consistent with one of the hats worn in the first robbery, in Appellant's bedroom. RA 041. Detective Miller testified that the gun appeared to be a black semiautomatic firearm but did not look like a Glock. RA 041.

When Detective Miller eventually took Appellant into custody, he was wearing what appeared to be the same leather jacket from the robberies. RA 040. Appellant told Detective Miller that he could find toy guns in his bedroom. RA 041. When Detective Miller spoke with Appellant, Detective Miller pointed to the surveillance picture from one (1) of the robberies in which the suspect wore a gray beanie and asked Appellant where they could find that gray beanie. RA 041.

Appellant told him that the beanie would probably be inside of a drawer in his bedroom. RA 041. Appellant also stated he had toy guns in his bedroom. RA 041.

SUMMARY OF THE ARGUMENT

Appellant has not demonstrated that he was entitled to relief on his claims. First, the district court properly denied Appellant's claim as it was procedurally time barred under NRS 34.726. Appellant filed his Petition over two (2) years late, without any good cause or prejudice to overcome the procedural bar. Ultimately, Appellant cannot demonstrate prejudice sufficient to ignore his procedural default because his underlying claims are meritless. As Appellant failed to make a proper showing of good cause or prejudice to excuse this delay on any of his four (4) grounds, the district court properly denied Appellant's Supplemental Petition.

Second, the district court properly denied Appellant's claim that counsel was ineffective for failing to challenge the weapon enhancement under NRS 193.165 because the record is clear that Appellant's counsel did object to Appellant's weapon enhancement. Therefore, as Appellant's claim that his counsel failed to object to Appellant's weapon enhancement fails, the district court properly denied Appellant's Supplemental Petition.

Third, the district court properly denied Appellant's claim that Appellant's guilty plea was valid because the record demonstrates that Appellant's plea was knowingly and voluntarily entered. Additionally, Appellant's claim that his counsel

was ineffective for misleading him concerning the law fails because it was belied by the record. Therefore, as Appellant's claim that his plea was not voluntarily entered into fails, the district court properly denied his Supplemental Petition.

Fourth, the district court properly denied Appellant's request for an evidentiary hearing because Appellant's claims were belied by the record. Therefore, as Appellant's request for an evidentiary hearing was not justified based on his unsubstantiated allegations, the district court properly denied Appellant's request for an evidentiary hearing.

Finally, Appellant argues cumulative error based on Mulder v. State; however, Appellant fails to assert errors which deprived him of a reasonable likelihood of a better outcome. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Appellant only asserts one error, which was belied by the record. Therefore, as Appellant's claim of cumulative error fails to meet the prejudice prong of Strickland, this claim should be denied. Therefore, Appellant has failed to make a showing that he was entitled to relief, and his conviction should be affirmed.

ARGUMENT

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. See State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S.Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of

discretion. See Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court as long as they are supported by the record. See Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

I. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND APPELLANT'S POST CONVICTION PETITION WAS PROCEDURALLY BARRED AS UNTIMELY

A. Appellant's Petition was Time-barred

A petition challenging a judgment of conviction's validity must be filed within one (1) year of the judgment or within one (1) year of the remittitur, unless there is good cause to excuse delay. NRS 34.726(1). The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). The one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is issued. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two

(2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the Notice within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a duty to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. (quoting Groesbeck v. Warden, 100 Nev. 259, 261, 679 P.2d 1268, 1269 (1984)).

In this case, Appellant's Judgment of Conviction was filed on October 30, 2017. Appellant did not file a direct appeal. Thus, Appellant had until October 30, 2018 to file his Petition. Appellant did not file the instant Petition until September 14, 2020. As such, he was almost two (2) years too late. This delay exceeds the one (1) year delay discussed in Gonzales.

The Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d

1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. 324, 307 P.3d 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Therefore, the district court did not err in denying Appellant's Petition as his Petition was time barred.

B. Appellant Failed to Demonstrate Good Cause or Prejudice to Overcome the Procedural Bar

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

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

added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. 621, 81 P.3d at 526.

To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

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

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to

his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S.Ct. 1584, 1596 (1982)).

Here, Appellant asserts four (4) grounds constituting good cause: (1) his counsel failed to appropriately advise him of the law and that he was factually innocent because it was a toy gun; (2) the State committed misconduct in improperly pleading the case; (3) he failed to timely file his Pro Per Petition because he was not aware of the Davis case; and (4) the State would not be prejudiced under laches but rather would benefit by its wrongdoing. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991), AOB 10-11. However, as discussed below, each of these claims are meritless, therefore the district court did not err in denying Appellant's Supplemental Petition.

1. Appellant's Good Cause Ground One: Appellant Received Effective Assistance of Counsel as the Weapon in this Case Qualified as a Deadly Weapon and was Not a Toy Gun

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel."

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of

attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

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

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

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

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S.Ct. at 2064). "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S.Ct. at 2064–65, 2068).

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S.Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

Moreover, 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.

Indeed, to establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Ultimately, while it is counsel's duty to candidly advise a defendant

regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

Here, Appellant claims he had ineffective assistance of counsel, arguing that his counsel "totally misled him concerning what was the actual law." AOB 10. Appellant cannot establish that counsel failed to appropriately advise him of the law because Appellant relies on law that did not apply to his case when he entered his guilty plea. Further, Appellant cites NRS 202.253, arguing that a toy gun is not considered a deadly weapon. AOB 15-16. However, Appellant's claims fail as NRS 202.253 defines a "firearm" as "any device designed to be used as a weapon from which a projectile may be expelled through the barrel by the force of any explosion or other form of combustion." NRS 193.165 provides in relevant part:

> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years.
>
> […]
>
> 6. As used in this section, "deadly weapon" means:
>
> (a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
>
> (b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or

> threatened to be used, is readily capable of causing substantial bodily harm or death; or
>
> (c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

Additionally, in Manning v. State, 107 Nev. 337, 339, 810 P.2d 1216, 1216 (1991), the Nevada Supreme Court reviewed whether a BB gun constituted a deadly weapon even when it did not have deadly capabilities and could not inflict death or great bodily harm. Although the Court relied on a past version of NRS 202.253, which defined a firearm as "any weapon with a caliber of .177 inches or greater from which a projectile may be propelled by means of explosive, spring, gas, air or other force," it ultimately concluded that the BB gun used by the defendant fit that definition and no additional showing of its deadly capabilities was necessary. Id.

Appellant argues that the Court erred when it enhanced Defendant's sentence under NRS 193.165 for use of a weapon because "the alleged 'weapon in the Amended Information was actually a pellet gun, analogous to a 'toy gun', not an actual firearm". AOB 15-16. However, there was no evidence that a toy gun was used in the commission of the crimes. Additionally, Appellant neglects to apprise this Court that a firearm constituting a deadly weapon was found in Appellant's bedroom. RA 041; NRS 202.253.

Lastly, Appellant fails argue with specificity, failing to support his arguments with factual citations to the record. Ultimately, Appellant's claims of ineffective

counsel for failure to investigate and failure to explain his constitutional rights or the consequences of his plea are nothing more than bare and naked allegations per Hargrove. Thus, the law Appellant cites would not change the outcome of his case, and his claims are not sufficiently supported. Therefore, as Appellant fails to establish ineffective assistance of counsel, thus the district court did not err in denying Appellant's Supplemental Petition.

2. Appellant's Good Cause Ground Two: The State Properly Pled Appellant's Case

A petitioner cannot raise constitutional claims that occurred prior to his guilty plea. A defendant cannot enter a guilty plea then later raise independent claims alleging a deprivation of his rights before entry of the plea. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973). Generally, the entry of a guilty plea waives any right to appeal from events occurring prior to the entry of the plea. See Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975). '"[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process . . . [A defendant] may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'" Id. (quoting Tollett, 411 U.S. at 267).

Here, Appellant claims the State engaged in misconduct, or error, in improperly pleading Appellant's case. AOB 11. Not only is this a bare and naked

assertion so devoid of meaning for the State to effectively respond, but also his claim is meritless because Appellant's case was properly pleaded, as discussed *supra*. Ultimately, the weapon used in Appellant's crimes fit into the definition of deadly weapon under NRS 193.165.

> NRS 193.165. Additional penalty:
>
> Use of deadly weapon or tear gas in commission of crime; restriction on probation.
>
> 1. Except as otherwise provided in NRS 193.169, any person who uses a firearm or other deadly weapon or a weapon containing or capable of emitting tear gas, whether or not its possession is permitted by NRS 202.375, in the commission of a crime shall, in addition to the term of imprisonment prescribed by statute for the crime, be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
> (b) The criminal history of the person;
> (c) The impact of the crime on any victim;
> (d) Any mitigating factors presented by the person; and
> (e) Any other relevant information.
>
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.
>
> 2. The sentence prescribed by this section:
>
> (a) Must not exceed the sentence imposed for the crime; and
> (b) Runs consecutively with the sentence prescribed by statute for the crime.
>
> 3. This section does not create any separate offense but provides an additional penalty for the primary offense, whose imposition is contingent upon the finding of the prescribed fact.

4. The provisions of subsections 1, 2 and 3 do not apply where the use of a firearm, other deadly weapon or tear gas is a necessary element of such crime.
5. The court shall not grant probation to or suspend the sentence of any person who is convicted of using a firearm, other deadly weapon or tear gas in the commission of any of the following crimes:
(a) Murder;
(b) Kidnapping in the first degree;
(c) Sexual assault; or
(d) Robbery.
6. As used in this section, "deadly weapon" means:
(a) Any instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death;
(b) Any weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death; or
(c) A dangerous or deadly weapon specifically described in NRS 202.255, 202.265, 202.290, 202.320 or 202.350.

Added by Laws 1973, p. 1593. Amended by Laws 1975, p. 720; Laws 1979, p. 225; Laws 1981, p. 2050; Laws 1991, p. 1059; Laws 1995, p. 1431; Laws 2007, c. 525, § 13, eff. July 1, 2007.

Lastly, this claim relates to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea and was therefore waived. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973). Therefore, as Appellant's claim that the State engaged misconduct or error was meritless and waived, the district court properly denied Appellant's Supplemental Petition.

3. Appellant's Good Cause Ground Three: Appellant's Reliance on Davis v. State is Misplaced

Appellant claims "the Davis case is relevant to his due process rights which were violated by his guilty plea in this case." AOB 11 However, this claim was both waived and meritless. Appellant's claim was waived in two (2) ways. First, his claim was substantively waived because he failed to raise the claim on direct appeal. NRS 34.810(1) reads:

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

As Appellant cannot raise constitutional claims that occurred prior to his guilty plea and failed to raise the claim on direct appeal, this claim was waived. State v. Eighth Judicial District Court, 121 Nev. 225, 112 P.3d 1070, n.24 (2005) (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973).

Second, Appellant's claim was waived because a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the

time bar in NRS 34.726 applies to successive petitions). While Appellant claims he filed his Petition "as soon as he became aware of … [the holding in] Davis", this claim belied by the record. Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 2319 (1991), AOB 11. In fact, Appellant failed to bring his claim under Davis within one (1) year of the decision. Davis v. State, 107 Nev. P.2d 1169 (1991). Additionally, Appellant has failed to demonstrate good cause why he failed to file his Petition within one (1) year of the Davis decision. Id. Additionally, Appellant cannot demonstrate prejudice as he stipulated to sentences for his use of a deadly weapon when he entered his plea, which was knowingly, intelligently, and voluntarily entered as discussed *infra*. Strickland, 466 U.S. at 687–88, 694, 104 S.Ct. at 2065, 2068; RA 001-013.

Notwithstanding Appellant's claim being waived, it was also meritless for three (3) reasons. First, Appellant's claim was meritless because Davis was inapplicable. Davis v. State, 107 Nev. P.2d 1169 (1991). In Davis, the U.S. Supreme Court reviewed whether 18 U.S.C. § 924(c), i.e. a federal statute which required longer prison sentences for those individuals that used, carried, or possessed a firearm in the commission of a federal "crime of violence or drug trafficking crime," was void for vagueness. The Court explained that "crime of violence" was defined in two (2) of the statute's subparts: the elements clause, 18 U.S.C. § 924(c)(3)(A), and the residual clause, 18 U.S.C. § 924(c)(3)(B). Id. 2323-2324. The Court

concluded that the residual clause of such federal statute, 18 U.S.C. § 924(c)(3)(B), was unconstitutionally vague because there was "no reliable way to determine which offenses qualify as crimes of violence" for application of the increased penalty. Id. 2324. Notably, despite this conclusion, the Court did not conclude that vacating the defendant's sentences was the appropriate remedy, but instead remanded the case to the Fifth Circuit Court for further proceedings:

> We agree with the court of appeals' conclusion that § 924(c)(3)(B) is unconstitutionally vague. At the same time, exactly what that holding means for Mr. Davis and Mr. Glover remains to be determined. After the Fifth Circuit vacated their convictions and sentences on one of the two § 924(c) counts at issue, both men sought rehearing and argued that the court should have vacated their sentences on all counts. In response, the government conceded that, if § 924(c)(3)(B) is held to be vague, then the defendants are entitled to a full resentencing, not just the more limited remedy the court had granted them. The Fifth Circuit has deferred ruling on the rehearing petitions pending our decision, so we remand the case to allow the court to address those petitions. The judgment below is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

Id. 2336.

Thus, Appellant's reliance on Davis was misplaced because the U.S. Supreme Court's decision was based on an interpretation of a federal statute that has no application to Nevada law, let alone NRS 193.165. However, even if Davis was applicable, the appropriate remedy would not necessarily be to vacate Appellant's

deadly weapon enhancements as the U.S. Supreme Court was silent regarding the appropriate remedy for error.

Second, Appellant's claim was meritless because Appellant stipulated to the specific sentences for the deadly weapon enhancement:

> "The Parties stipulate to an aggregate term of imprisonment of eight (8) years to thirty-five (35) years (96 to 420 months) in the Nevada Department of Corrections structured as follows: Count 1 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement. Count 2 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run concurrent with Count 1. Count 3 - Robbery With Use of a Deadly Weapon - a sentence of 36 to 144 months, plus a consecutive 12 to 66 months on the deadly weapon enhancement, to run consecutive to Counts 1 and 2. Count 4 - Burglary While in Possession of a Deadly Weapon - a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3."

Counsel fails to cite to any record that would support his allegation that he used a toy gun in commission of the various crimes. At the Preliminary Hearing, Detective Miller testified about a firearm recovered from Appellant's apartment. Detective Miller testified:

> Q. You recovered a firearm when you searched Mr. Toney's residence?
> A. Yes.
> Q. What kind of firearm?
> A. .177 Daisy Powerline.
>
> Q. A .177 Daisy?
> A. Yes.
> Q. Is that a black semiautomatic Glock?
> A. No, that's a bb gun. A pellet gun.

RA 041. Additionally, the Presentence Investigation Report Offense Synopsis states:

> "Toney agreed to speak with the detective, however, he did not confess to any of the robberies even after he was shown pictures of him wearing the same jacket during the robberies. When asked if the guns were real or not, he only admitted they would find some toy guns in his bedroom. Swat officers served a search warrant at Toney's residence and found a black BB gun that looked like the one used during the robberies."

Presentence Investigation Report, filed September 27, 2017, pp. 6-7. Just because Appellant says they would find some toy guns does not mean the firearm used in all five (5) robberies was a toy gun. He was not arrested immediately after committing each of the robberies, so the actual firearm used was not recovered at the scene of the crimes. As the Nevada Supreme Court has held that a BB gun with a caliber of .177 inches is a firearm under NRS 193.165, Appellant's BB gun was not a toy gun as he claims. Manning v. State, 107 Nev. 337 (1991).

Lastly, Appellant's claim was meritless because freestanding actual innocence claims are not cognizable even in post-conviction proceedings. See Mitchell v. State, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006); See also Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525-26 (2003). Nevada state law does not recognize freestanding claims of actual innocence in a Petition for Writ of Habeas Corpus, but rather only provides for claims of actual innocence where a defendant is attempting to overcome a procedural bar caused by an untimely or successive petition. Id. This is consistent with the Nevada Supreme Court's adoption of the standard established

in Schlup v. Delo. 513 U.S. 238, 315, 115 S.Ct. 851, 861 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 404, 113 S.Ct. 853, 862 (1993)) ("Schlup's claim of innocence is thus not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.").

In contrast, a freestanding claim of actual innocence is a claim wherein a petitioner alleges actual innocence alone, rather than actual innocence supported by a claim of constitutional deficiency, warrants relief. See Herrera, 506 U.S. 390, 113 S.Ct. 853 (1993). The Herrera Court acknowledged that claims of actual innocence based on newly discovered evidence have never been held as a ground for habeas relief absent an independent constitutional violation in the underlying criminal proceeding. Id. The Court noted such claims were traditionally addressed in the context of requests for executive clemency, which power exists in every state and at the federal level. Id. 414-15, 113 S.Ct. 867-68. However, the Court assumed, arguendo, that a federal freestanding claim of actual innocence may exist where a petitioner was sentenced to death and state law precluded any relief. Herrera, 506 U.S. at 417, 113 S.Ct. at 869; Schlup, 513 U.S. at 317, 115 S.Ct. at 862. The United States Supreme Court has never found a freestanding claim of actual innocence to be available in a non-capital case. See, e.g., Herrera, 506 U.S. at 404-405, 416-417; House v. Bell, 547 U.S. 518, 554, 126 S.Ct. 2064, 2086 (2006); see also Carriger v.

Stewart, 132 F.3d 463, 476 (9th Cir. 1997); Jackson v. Calderon, 211 F.3d 1148, 1165 (9th Cir. 2000).

Here, Appellant claims "he was not, and could not be considered, anything other than factually innocent of a weapon's enhancement". AOB 14. Appellant fails to cite any Nevada authority which would allow him to raise a freestanding claim of actual innocence and improperly suggests such a claim before this Court. "Actual innocence" is a term of art that should only be raised in the context of an attempt to overcome post-conviction procedural bars to petitions for writ of habeas corpus. Even in the post-conviction context, where at least "actual innocence" claims can be made in order to have other arguments heard on the merits, there is no such concept as a "freestanding" actual innocence claim where a person can claim they deserve some kind of relief solely because they proclaim their innocence.

Actual innocence means factual innocence not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "*must* show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S.Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S.Ct. 851, 861 (1995)).

Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d 530.

"Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of the barred claim." Schlup, 513 U.S. at 316, 115 S.Ct. at 861. The Eighth Circuit Court of Appeals has "rejected free-standing claims of actual innocence as a basis for habeas review stating, '[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.'" Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996) (citing Herrera v. Collins, 506 U.S. 390, 400, 113 S.Ct. 853, 860 (1993)). Furthermore, the newly discovered evidence suggesting the defendant's innocence must be "so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 315, 115 S.Ct. 861. Once a defendant has made a showing of actual innocence, he may then use the claim as a "gateway" to present his constitutional challenges to the court and require the court to decide them on the merits. Id.

Here, Appellant cannot establish that he was actually innocent because he is not alleging newly discovered facts. Moreover, Appellant was not really alleging that he is actually innocent. Instead, he was arguing legal insufficiency and not actual

innocence. Ultimately, Appellant's claim that his deadly weapon enhancement sentences should be vacated because they are unconstitutional pursuant to United States v. Davis, 588 U.S. _(2019) was waived and meritless. As Appellant failed to make proper showing of good cause or prejudice to excuse this delay, the district court properly denied Appellant's Supplemental Petition.

4. Appellant's Good Cause Ground Four: The Issue is Not That the State was Prejudiced but that Appellant Cannot Show Prejudice to Overcome the Procedural Bar

Appellant claims "there exists no question of latches in this case". AOB 11. Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972.

In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction,

an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…"

The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, the Judgment of Conviction was filed on October 30, 2017; thus, Laches does not apply because it has not been five (5) years. Ultimately, Appellant cannot demonstrate prejudice sufficient to ignore his default because his underlying claims are meritless, as discussed above. As Appellant failed to make proper showing of good cause or prejudice to excuse this delay on any of his four (4) grounds, the district court properly denied Appellant's Supplemental Petition.

II. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE WEAPON ENHANCEMENT UNDER NRS 193.165

As discussed in Section I(B)(1), Appellant claims his defense counsel was ineffective for failing to object to the weapons enhancement. However, Appellant's claim that his counsel failed to object was belied by the record. During Appellant's

Preliminary Hearing, after the State rested its case, his counsel, Geordan G. Logan (hereinafter "Mr. Logan"), objected to several things, including the deadly weapon enhancement. During Appellant's Preliminary Hearing, Mr. Logan objected and the following conversation occurred:

> MR. LOGAN: The second thing that the state really needs to Identify is a deadly weapon was used. The state of the law in Nevada is pretty clear that a deadly weapon needs to be a weapon that is truly deadly. It's deadly by its design or manufacture is deadly because it's stated in some statute or is deadly because the manner in which it was used. It has to be an inherently deadly weapon. There was absolutely no evidence presented whatsoever that this was a real gun as opposed to a toy gun. We have one witness who says I am an expert and I know what a black semiautomatic Glock looks likes. That's what it was. Then the detective who seizes this item and he said everything seized was consistent with what he sees in the video. This is the consistent with the weapon I saw in the video. He says absolutely doesn't look like a Glock. It was a toy. He says when he asks Mr. Toney do you have any weapons in the house he says all he has are toys. Every single person who testified other than the one gentleman who was 100 percent sure it was a black Glock semiautomatic every other witness didn't know whether it was a toy or real. They don't know if it was a gun.
>
> THE COURT: To be fair the detective said it was a bb gun just because your client called it a toy a bb gun is not a toy. That's what your client called it. The detective recovered a bb gun.
>
> MR. LOGAN: Right. Even still some evidence must be presented that that bb gun that was found or the weapon that was used in these events was in fact a real deadly weapon an inherently dangerous weapon. They did not present any evidence as to that. If we are going to go based on the testimony of all of these people who state they are non-gun experts and they weren't sure if it was a toy or not, there's absolutely no evidence of a deadly weapon. He testified that he held it like this. That's not using something in a manner that is inherently dangerous or deadly. He held it like this.
>
> THE COURT: If he points it at your face it's not inherently dangerous?
>
> MR. LOGAN: It's not. It's not.
>
> THE COURT: Okay.
>
> MR. LOGAN: If I hold a pen at someone's face holding something at someone's face is not in and of itself inherently dangerous. I briefed this matter pretty extensively. The deadly weapon statute and case law in Nevada is very clear it has to be an inherently dangerous weapon. There are three tests. One test is based on the manner which it was constructed if it was constructed to be used for something deadly like a real gun.

> The other test is that it's used in a deadly manner. Holding it and pointing it at someone is not using it in a deadly manner. The third test is it in fact falls under one of the statutes that lists it as a deadly weapon. In order to use that test the state must present some evidence that this gun falls within the statutes as a deadly weapon. No such evidence was presented.

RA 043. During the Preliminary Hearing Mr. Logan not only objects to the deadly weapon enhancement, but argues the law in court saying, "The state of the law in Nevada is pretty clear that a deadly weapon needs to be a weapon that is truly deadly. It's deadly by its design or manufacture is deadly because it's stated in some statute or is deadly because the manner in which it was used. It has to be an inherently deadly weapon. There was absolutely no evidence presented whatsoever that this was a real gun as opposed to a toy gun." Id. Regardless, even had Appellant's counsel failed to object, there would still be no merit to his claim because counsel can not be ineffective for failing make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Whether Appellant's counsel had objected or not, a BB gun is a firearm under NRS 193.165; thus, such an objection is futile.

Thus, Appellant's claim that his counsel failed to object to the weapon enhancements was clearly belied by the record. Therefore, as Appellant fails to establish that his counsel failed to object to the weapon enhancements, the district court properly denied his Supplemental Petition.

III. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND THAT APPELLANT'S GUILTY PLEA WAS VALID

Pursuant to NRS 176.165, after sentencing, a defendant's guilty plea can only be withdrawn to correct "manifest injustice." See also Baal v. State, 106 Nev. 69, 72, 787 P.2d 391, 394 (1990). The law in Nevada establishes that a plea of guilty is presumptively valid, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394.

To determine whether a guilty plea was voluntarily entered, the Court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. A proper plea canvass should reflect that:

> [T]he defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; (2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; (3) the defendant understood the consequences of his plea and the range of punishments; and (4) the defendant understood the nature of the charge, i.e., the elements of the crime.

Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983) (citing Higby v. Sheriff, 86 Nev. 774, 476 P.2d 950 (1970)). The presence and advice of counsel is a significant factor in determining the voluntariness of a plea of guilty. Patton v. Warden, 91 Nev. 1, 2, 530 P.2d 107, 107 (1975).

This standard requires the court accepting the plea to personally address the defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d 367. A court may not rely simply on a written plea agreement without some verbal interaction with a defendant. Id. Thus, a "colloquy" is constitutionally mandated and a "colloquy" is but a conversation in a formal setting, such as that occurring between an official sitting in judgment of an accused at plea. Id. However, the court need not conduct a ritualistic oral canvass. State v. Freese, 116 Nev. 1097, 13 P.3d 442 (2000). The guidelines for voluntariness of guilty pleas "do not require the articulation of talismanic phrases," but only that the record demonstrates a defendant entered his guilty plea understandingly and voluntarily. Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973); see also Brady v. United States, 397 U.S. 742, 747-48, 90 S.Ct. 1463, 1470 (1970).

Appellant alleges that he did not knowingly and intelligently enter his plea because he had ineffective assistance of counsel which "totally misled him concerning what was the actual law", "did not adequately evaluate possible defenses available" to him, and "did not fulfill … elementary command to investigate". AOB 10, 21, 24. However, this claim was belied by the record. During Appellant's Preliminary Hearing, Mr. Logan argued the law surrounding deadly weapon

enhancements and multiple possible defenses that were available to Appellant at that time.

> MR. LOGAN: If I hold a pen at someone's face holding something at someone's face is not in and of itself inherently dangerous. I briefed this matter pretty extensively. The deadly weapon statute and case law in Nevada is very clear it has to be an inherently dangerous weapon. There are three tests. One test is based on the manner which it was constructed if it was constructed to be used for something deadly like a real gun. The other test is that it's used in a deadly manner. Holding it and pointing it at someone is not using it in a deadly manner. The third test is it in fact falls under one of the statutes that lists it as a deadly weapon. In order to use that test the state must present some evidence that this gun falls within the statutes as a deadly weapon. No such evidence was presented. I don't think they have made their burden on the deadly weapon on any of the counts. We also have a count of victim over 60.

RA 043. Appellant's counsel argued the law surrounding a deadly weapon enhancement to the Court, while Appellant was present. Thus, the claim that Appellant's counsel failed to investigate his case and the law surrounding deadly weapon enhancement was belied by Mr. Logan's in court statement "I briefed this matter pretty extensively. The deadly weapon statute and case law in Nevada is very clear it has to be an inherently dangerous weapon." RA 043. Clearly, Appellant's counsel, Mr. Logan, "explore[d] all avenues leading to facts relevant to guilt and degree of guilt or penalty" as required under ABA Standard 4.1, an lawyers duty to investigate. ABA Standard 4.1, as he thoroughly argued the law surrounding deadly weapon enhancements during the Preliminary Hearing.

Further, Appellant's claim that his plea was not voluntarily entered into was belied by his signing of his GPA, and the answers he gave during his plea canvass. Appellant acknowledged that he understood the parties' negotiation by acknowledging and signing the GPA. Notably, by signing the GPA, Appellant also acknowledged that he "discussed with his attorney any possible defenses, defense strategies and circumstances which might be in [his] favor." AOB 016.

The Court's canvass of Appellant demonstrates that he reviewed the GPA in its entirety with counsel and understood the nature of his plea:

> MR. LOGAN: So the matter is resolved today. Today Mr. Toney will be pleading guilty to Robbery with Use of a Deadly Weapon, a Category B felony. Burglary while Possession of a Deadly Weapon, two counts of each. We'll be looking at an aggregate sentence of 8 to 35 years in NDOC.
>
> THE COURT: Okay.
>
> MR. DICKERSON: Correct, Your Honor. The GPA lays out the structure for that sentencing.
>
> THE COURT: Okay. I see. So specifically Count 1, Robbery With Use would be a 36 to 144, plus consecutive 12 to 66. Count 2 would be, is Burglary with a Deadly 48 to 195, to run concurrent with Count 1. Count 3, Robbery With Use would be 36 to 144, plus consecutive 12 to 66, consecutive to Counts 1 and 2. Count 4 would be Burglary While in Possession, a sentence of 48 to 195 months, to run consecutive to Counts 1 and 2, but concurrent with Count 3.
>
> MR. DICKERSON: Correct.
>
> THE COURT: Mr. Toney, have you had an opportunity to go over this entirely with your attorney?

THE DEFENDANT: Yes, I have.

RA 002-003. Appellant also unequivocally stated that he understood the charge he was pleading to:

> THE COURT: All right. Mr. Toney, have you been given a copy of an amended information charging you with Count 1, Robbery With Use of a Deadly Weapon; Count 2, Burglary While in Possession of a Deadly Weapon; Count 3, Robbery With Use of a Deadly Weapon; Count 4, Burglary While in Possession of a Deadly Weapon?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Have you had an opportunity to read that amended information and to discuss it fully with your attorney –
>
> THE DEFENDANT: Yes.
>
> THE COURT: -- so that he could answer any questions that you may have?
>
> THE DEFENDANT: Yes.
>
> THE COURT: You have any -- do you understand what's in the amended information? What it's charging you with?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Do you have any questions about the meaning of any of the charges that are in the amended information?
>
> THE DEFENDANT: No.

RA 003-004. Further, Appellant affirmed that he understood the rights he was forfeiting by pleading guilty and was entering his plea voluntarily:

> THE COURT: Okay. That's, you know, that's what, 6, 7 pages long. It talks about various things, consequences of the plea. It talks about if

> you were in the country illegally or if you were an immigrant, what potential it could have. Talks about the rights that you're waiving. You understand you're waiving your constitutional right against self-incrimination? I'm going to ask you what you did that causes you enter a guilty plea in just a minute here. You'd be waiving the constitutional right to a speedy trial, to confront cross-examine any witnesses who would testify against you, as well as some other things. You read that part?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And the voluntariness part. Is there anything, I mean, let me put it this way, other than what's in this Guilty Plea Agreement and what we've discussed in court, has anyone made you any threats or any promises in order to get you to enter a Guilty Plea here?
>
> THE DEFENDANT: No.

RA 003-004. The record demonstrates that Appellant's plea was knowingly and voluntarily entered. Further, it establishes that Appellant was aware of the law. Thus, Appellant's claim that his counsel was ineffective for misleading him concerning the law fails because it was belied by multiple records. Therefore, as Appellant's claim that his plea was not voluntarily entered into fails, the district court properly denied his Supplemental Petition.

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANT AN EVIDENTIARY HEARING ON CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall

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

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070,

1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."). Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S.Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003)). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. 668, 688, 104 S.Ct. 2052, 2065 (1994).

Appellant's claim that an evidentiary hearing was "necessary to show that counsel did not adequately research the law or facts" was belied by the record. Appellant's counsel argued the law of deadly weapon enhancements at Appellant's Preliminary Hearing, as discussed previously. Additionally, Appellant does not assert any new facts that would entitle him to an evidentiary hearing. During the district court hearing held on June 21, 2021, the Court concluded:

> THE COURT: … an evidentiary hearing wouldn't produce … the weapon that was used. The fact that they didn't find it, that -- anyway, so it's procedurally barred[.]

RA 079.

Further, Appellant's reliance on Hatley v. State was misplaced because unlike the Defendant in Hatley, Appellant has failed to allege facts in his petition, which, if true would entitle him to relief. Hately v. State, 100 Nev. 214, 678 P.2d 1160 (1984). Therefore, as Appellant's request for an evidentiary hearing was not justified based on his unsubstantiated allegations, the district court properly denied this claim in Appellant's Supplemental Petition.

V. APPELLANT'S NEW CLAIM OF CUMULATIVE ERROR RAISED FOR THE FIRST TIME ON APPEAL IS WAIVED FOR FAILURE TO RAISE IT BELOW

On appeal, Appellant attempts to raise a new ground upon which he is allegedly entitled to relief, claiming "the numerous errors and deficiencies of counsel in this case require reversal of the conviction." AOB 29. Because this claim was not presented to the district court, this court should decline to take it into consideration as well. See Guy v. State, 108 Nev. 770, 180, 839 P.2d 578, 584 (1992) (stating: "[b]ecause appellant failed to present these hearsay exceptions at trial, the trial court had no opportunity to consider their merit. Consequently, we will not consider them for the first time on appeal."); see also McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to address arguments not raised before the district court). Therefore, the district court could not have abused its discretion since it did

not have the opportunity to address Appellant's newly raised claim below. Thus, such allegations should be denied. See also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (providing that a petitioner cannot raise a new claim on appeal that was not presented to the district court in postconviction proceeding); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Even if Appellant's claim of cumulative error were proper, Appellant asserts a claim of cumulative error in the context of ineffective assistance of counsel, which is meritless. Within Appellant's argument of cumulative error, Appellant only asserts one error made by Appellant's counsel, that of failing to investigate. This claim was belied by the record as discussed previously. Appellant's counsel objected to the deadly weapon enhancement at the Preliminary Hearing; thus, he clearly conducted a proper investigation of Appellant's case prior to the hearing.

Lastly, the Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Appellant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should

evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Appellant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). There was no error in this case let alone cumulative error.

While the Nevada Supreme Court has noted that some courts do apply cumulative error in addressing ineffective assistance claims, it has not specifically adopted this approach. See McConnell v. State, 125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009). However, the Eighth Circuit Court of Appeals has concluded that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S.Ct. 980 (2007) (quoting Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)).

Even if the Court applies cumulative error analysis to Appellant's claims of ineffective assistance, Appellant fails to demonstrate cumulative error warranting reversal. A cumulative error finding 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).

Appellant has not shown any errors that, even if aggregated, would establish a reasonable likelihood of a different, more beneficial result at trial or on appeal. Assuming arguendo that some or all Appellant's allegations have merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome. Therefore, for all the foregoing reasons, Appellant's claim of cumulative error fails.

CONCLUSION

Based on the above reasons, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Petition and Supplemental Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction).

Dated this 7th day of January, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,892 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of January, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 7, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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