IN THE SUPREME COURT OF THE STATE OF NEVADA

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Nov 15 2021 03:34 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

DENZEL DORSEY,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-839313-W

Docket No: 83644

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
DENZEL DORSEY #1099468,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-21-839313-W **Denzel Dorsey, Plaintiff(s)**
vs.
Brian E. Williams, Defendant(s)

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A-21-839313-W
Case No Dept. 18
Dept. No

FILED
AUG 11 2021
CLERK OF COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

DENZEL DORSEY
Petitioner,

v.

Brian E. Williams
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: HIGH DESSERT STATE PRISON IN CLARK COUNTY, NV

2. Name and location of court which entered the judgment of conviction under attack: Eighth Judicial District Court, Dept. XV, 200 Lewis Avenue, Las Vegas, NV 89101

3. Date of judgment of conviction: October 8th, 2019

4. Case number: C-17-323324-1

5. (a) Length of sentence: 60-150 MONTHS NDOC

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(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ✓.....

If "yes," list crime, case number and sentence being served at this time: N/A

.....

.....

7. Nature of offense involved in conviction being challenged: SMALL Habitual Criminal (INVASION OF THE HOME)

8. What was your plea? (check one)

(a) Not guilty .....

(b) Guilty ..... ✓

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: N/A

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury .....

(b) Judge without a jury .....

11. Did you testify at the trial? Yes ..... No ✓.....

12. Did you appeal from the judgment of conviction? Yes ✓..... No .....

13. If you did appeal, answer the following:

(a) Name of court: The Supreme Court of the State of Nevada

(b) Case number or citation: No. 79845

(c) Result: Conviction AFFirmed

(d) Date of result: January 8, 2021

(Attach copy of order or decision, if available.)

(Copy Attached:)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No ✓

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: .....

(2) Nature of proceeding: .....

.....

(3) Grounds raised: .....

.....

.....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

.....

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)..... N/A .....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify:

(a) Which of the grounds is the same: .....

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ✓.....

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Keith Brower, Catiyln McAmis, Gary Modafferi, Yi Zheng, and Terrence M. Jackson (Direct Appeal)

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ✓.....

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: Whether the court erred when it allowed the in-court identification when the identification proceedures were impermissibly suggestive by witness tampering and when there was no out of court identification proceedures done to establish reliability

Supporting FACTS (Tell your story briefly without citing cases or law.): According to the incident report, Officer T. Roundy says that he was dispatched to the residence of Kevin Nazzareno where an attempted burglary occured. Upon his arrival, Officer T. Roundy asked Kevin several questions concerning the suspect. Kevin described the suspect as a black male between 25 and 30 years old. Kevin stated that he couldn't remember the clothing, but stated that the black male was medium built, being approximately 6-01, and 190 pounds. He also stated he could see into the vechicle, and the black male appeared to be the only occupant.

PSU detectives were able to locate the vechicle in the fashion show mall parking lot several hours later and after the vechicle had made several stops. The defendant was arrested for being in possession of the keys belonging to the vechicle and was later booked in the Henderson Jail without the officers having done any show up identification or photo line up in regard to whether if the defendant was their true suspect to the crime. The Henderson Jail Staff measured and weighed the defendant which he was 5-9 and 165 pounds. A height and weight that clearly doesn't match the description of the suspect

given by the victim in this case.

ON MAY 5, 2017, the petitioner was present during his preliminary hearing proceeding and where he watched the prosecution tamper with the witness during the State's direct examination of Kevin. Kevin initially wasn't able to identify the defendant until the State solely pointed to the defendant and asked the victim if I had looked familiar to him as the suspect. This is a direct violation of the defendant's due process rights and should of elicit an objection by trial counsel. Also, the court allowed the positive in-court identification when the court first-hand had witnessed the witness tampering. The defendant was not guaranteed his right to a fair trial in the result of this error. The State and the investigation team failed to do any pre identification investigation such as show-up or photo line up.

The petitioner rights were violated in the result of the courts error to allow the positive in-court identification. This warrants Reversal.

(b) Ground TWO: Whether a Brady Violation occurred when the State Withheld evidence that were Material to the defendant

Supporting FACTS (Tell your story briefly without citing cases or law.): On November 28, 2016, the defendant was arrested for possibly being the suspect to a burglary that occurred in the City of Henderson. According to the incident report, during the arrest of the defendant, officers had allegedly discovered what appeared to be evidence linking the defendant to the crime.

The officers reported that the defendant was wearing a dress coat that had fresh tears on the left sleeve. Officers also stated that the defendant hands were dirty and had fresh cuts on his right hand. futher, they stated that the defendant have any explanation for the tears or cuts only stating that they were old, and which apparently the defendant challenged those allegations. The Officers then reported that they retained the the jacket and a glove that had fresh blood on the knuckle and booked it in as evidence. Photographs were tooken of the defendant hands and was also suspose to be booked into evidence.

PSU Detective McEeany testified the statements of evidence that was given in the incident report during the defendant preliminary hearing. And on August 31, 2017, there was a

Court order that the Discovery be presented to the defendant. The discovery provided to the defendant from the State lacked any photographs of the said evidence that was testified by State Witnesses and used to induce guilt upon the defendant. The photographs of the defendant Jacket, glove and hand should of been provided to the defendant as this evidence was critical to the defense; since it was used as a leveraging factor to put the defendant in the ring of fire as being the possible suspect that has commited this crime. It is the States duty to provide an accuse with all evidence that is used to bring guilt upon him. This evidence could of been used for the defendants right to an effective cross examination. ESpecially, since the defendant alleges that the prosecution case include a perjured testimony.

(c) Ground THREE: Whether Ineffective Assistance of Counsel Violated the defendant 6th and 14th Amendments.

Supporting FACTS (Tell your story briefly without citing cases or law.): After the defendant was arrested and took into custody, the court appoint Keith Brower to represent the defendant in his court proceedings. It is pre-assumed that the attorney has diligently looked over the case and had learnt of all the inculpatory and exculpatory facts of the case.

On May 2, 2021, Keith Brower was present in court as the preliminary hearing was set-forth to proceed. Keith Brower failed to request any of the inculpatory evidence and photographs that was used to impute guilt upon the defendant prior to the proceeding. This evidence could of been used for the defense and effective cross-examination of the state witnesses that testified against the defendant.

During the cross examination of Kevin Narzenc at the defendants preliminary hearing, the State prosecutor engaged in witness tampering after the key eye-witness had intially failed to give a positive in-court identification of the defendant as being the suspect to the crime. Keith Brower failed to object to the court when he stood by his client and watched the state

Prosecutor point solely to the defendant in a strong bodily gesture and engaged in witness tamper when the prosecutor asked Kevin Narzeno if I had looked familiar to the witness as the suspect he saw. This failure to object has allowed the state prosecutor to **execute** an illegal method to tamper with the key eye witness to gain a favorable result in the identification of the defendant as being the suspect.

On May 15, 2017, Keith Brower and the defendant was present at the initial arrangement where the defendant pled not guilty to the charges. The court further ordered, pursuant to Statue, Counsel has 21 days for the filing of any writs on the behalf of the defendant. Keith Brower then allowed the time to exhaust without filing any writs or motions to suppress the identification of the defendant as being the suspect.

This failure to object to the prosecutor misconduct in the tampering of the witness and counsel failure to not file any writs or motions, has prejudiced the defendant. On November 29, 2017, Keith Brower withdrew as counsel as there was a conflict of interest concerning the case.

It is also respectfully submitted that on January 16, 2018, the court appointed attorney Catiyln Mc Amis to represent the defendant after the with-

drawal of counsel Keith Brower. The court then ordered that the defendant trial be set for April 23, 2018.

The defendant, intially upon meeting her, informed counsel Catiyln McAmis that he was factually innocent of the said charges that's against him and that he had two witnesses that wanted to come forth in support of his actual innocence claim. The defendant also informed counsel that there was concerns with the brady material that was not provided within the discovery that was provided by the State. Counsel seemed proactive in her listening but then soon later had disregarded to gather the brady material and failed to investigate the defendant witnesses as they both attempted to reach out to catiyln McAmis, and which both of the defendants witnesses had later testified that Counsel simply disregarded them. In the later affidavit and testimony of defendant witness Davey Dorsey he stated that he attempted to contact Catiyln McAmis but was never able to do so as she would never return any of his calls. Davey also stated that even caught her in the courtroom during one of the defendants court appearances where she wouldn't even give [redacted] him two minutes of her time and rudely stated that she didn't have time for him. The defendant would also concurr with Davey statements because counsel would never return any of his calls or messages.

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The defendant then learnt that Counsel was was working to negoate a global deal with the defendants other attorney Yi Zheng that was representing him in Justice Court case no. 17FZ1598X. There was a pre-existing conflict of interest with Counsel Yi Zheng concerning the defendant but then Yi Zheng was ultimately able to work with Catiyln Mc Amis to get the defendant to enter a global deal which would violate his 6th and 14th Amendents. It was after the defendant had entered the guilty plea where he wanted to withdraw his plea and proceed to trial, and where counsel Catiyln Mc Amis refused to file a presentence motion to withdraw his plea which the defendant has a right to under NRS.

The defendant then eventually was able to learn the language of law to file: pro per motion to Dismiss Counsel and pro per motion to withdraw plea. These motions asserted the ineffective assistance of counsel and counsel failure to reasonably investigate the defendants case matters. The Court granted the motion to dismiss counsel and continued matters on the latter.

On Febuary 15, 2019, the defendant filed a pre-sentence motion to withdraw plea, through tory Modafferi ESQ, with two affavdits in support of his actual innocence claim and the ineffective assistance claim of Catiyln Mc Amis. After Multiple evidentiary

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hearings, the court ordered a denial of the defendants motion to withdraw plea and then sentenced the defendant to a term of 60 - 150 months. The defendant then filed a timely notice of appeal which the court then appointed Terrence M. Jackson to represent the defendant in his appeal proceedings.

On June 10, 2020, appellant Counsel filed an inadequate opening brief which lacked any sufficent issues or gaunds in the witness tampering engaged in by the prosecutor, the brady violation by the state withholding certain evidence, the conflict of interest that proceeded to violate the defendant's rights, or the courts abuse of discretion in denying the defendants motion to withdraw plea and excluding the statements given by the defendants witnesses. Appellent Counsel was therefore ineffective and has prejudiced the defendant as the defendant didn't have the oppurtunity to present these underlined issues, in this petition, to the appellant court for review and possible relief if granted.

On January 8, 2021, The Nevada Supreme Court Affirmed the conviction. Thus, the ineffective assistance of Counsel in the defendant case proceedings has denied the defendant to a fair trial and direct appeal.

8D

(d) Ground FOUR: Whether Defendant 6th and 14th Amendments was violated when a conflict of interest proceeded in prejudicing him into entering a global Deal.

Supporting FACTS (Tell your story briefly without citing cases or law.): The petitioner submits that ~~are~~ on January 9, 2018, attorney Yi Zheng advised she could not confirm as counsel in this appealing case due to conflict and requested the court to appoint the defendant counsel. It was then the very next day on January 10, 2018, that the court erred by allowing attorney Yi Zheng to confirm as counsel of record in the defendants other pending case in Justice Court case no. 17F21598X, and where she was then later able to prejudice the petitioner into entering a negotated global deal despite her knowing that there was a pre-existing conflict of interest concerning the defendant.

This error is not harmless as Counsel manipulation was used to get the defendant to enter a GLOBAL Deal that prejudiced him from going to trial and therefore violating this 6th and 14th Amendments of the Constitution.

(e) ~~(a)~~ Ground ~~ONE:~~ FIVE: Whether The District Court Abused Its Discretion By Denying The Defendant Pre-Sentence Motion To Withdraw Plea; and excluding the statements given by defendant witnesses

Supporting FACTS (Tell your story briefly without citing cases or law.): On Febuary 15, 2019, the defendant filed a presentence motion to withdraw plea, through Gary Modafferi, with attached exhibits of two affadiuits offered in support of the defendants actual innocence claim. Davey Dorsey gave an affidavit as him being the true suspect and gave an confession that he was the one who commited the offense. Takiya clemons gave an affidavit as a alibi witness that states that she watched the petitioner hand Davey the keys to the vechicle the night prior to the incident and stated that the petitioner was with her during the time that the incident occurred. Both of their statements were corroborated by the circumstances of the case that suggest their trustworthiness.

The petitioner also raised claims of ineffective assistance of counsel and supplemented in his motion to withdraw plea: pro per motion to dismiss counsel and pro per motion to withdraw plea, which both of these motions asserts the ineffective assistance of counsel of Catiyln McAmis failing to reasonably investigate the petitioners case matters and allowing him to enter a plea

of guilty instead of proceeding to trial.

The court decided that a evidentiary hearing was needed, and after multiple evidentiary hearings, the court gave a order denying the defendants Motion to withdraw plea. On August 16, 2019. The court reasonably abused its discretion.

The Court ruled that the petitioners witnesses had lacked creditibility, even as their testimon corroborated with circumstances of the case. The Court stated that Davey couldn't give the court small intricate details of the enviroment of The City of henderson, which isnt relevant to the circumstances of the case, also despite Davey's testimony that he was intoxicated on Xanax, that induces memory loss and blurred vision, the morning of November 28, 2016. The petitioner also would like to note that during a vechicle search the officers that found several prescription pills, which ultimately belonged to Davey.

The Court also stated that Davey admissions were belied by the record, and stating that Davey claimed he drove to the home of the incident around 1:00 pm and 2:00 pm on November 28, 2016, when the incident occurred approximately at 11:55 a.m. This isnit belied by the record when Davey testified that he was high of Xanax at the time of the incident and also stated that he got there some-

time in the afternoon - between noon and two o'clock. but then lastly stated noon before the state lead him otherwise. The court also stated that Davey testified that he knocked on the front and back doors before breaking the door, and that in contrast, Kevin Nazarzeno testified that at the time of the burglary he was in bed when he heard the door bell ring multiple times, got up because of the constant ringing, and witnessed the front door being punched upon walking downstairs. This reason for the court to state that Davey testimony was belied is insufficent as Davey never testified that he knocked on the back door, he only stated that he tried to look through it. Kevin was upstairs laying in his bed and wouldn't be able to see this action take place, unless he was paying attention to his back window, which he never testified having done such action.

The Court also stated that Takiya's testimony was not credible simply because of her relationship with the petitioner and asserted that she just wanted to prevent the defendant from serving a long sentence, despite her testimony corroborating with the circumstances of the case. The court further stated that Takiya told the defendant during a jail call that Defendant wouldn't get in trouble if he had remained home and only focused on her and his hustle. This reason for the Court to find Takiya Statements not credible is insufficent

as the reason for her statement is overly broad and doesn't imply that her testimony lacked credibility when her testimony given in court corroborates with circumstances of the case. Also, for the court to use this phone call as if Takiya was refering that the petitioner had commited the offense was wrongly asserted and shouldn't been used to find Takiya lacking in credibility.

The court also stated that the record shows that the defendant commited the crime. The court then refered to the alleged evidence used against the defendant despite that the state has not given no photographic or physical evidence that would show that the statements and testimony of said evidence, given by state witnesses, is even factual. The court should of investigated to see this evidence, just as the court investigated to see whether if the defendant witnesses was credible. Also, the Court asserted when the defendant was explained that the car GPS system tracked his rental car to the location of the crime, the defendant looked down and stated, "An Shit." This statement is insufficent to use to imply that this makes the defendant guilty of the crime. Therefore, in totality, the court abused its discretion by denying the defendants Presentence Motion to Withdraw plea and excluding the statements given by defendant witnesses.

10C

(c) Ground ~~THREE~~ six: Whether ineffective assistance of appellant counsel deprived defendant to an adequate direct appeal.

Supporting FACTS (Tell your story briefly without citing cases or law.): On June 10, 2020, appellant counsel, Terrence M. Jackson, filed an inadequate opening brief which lacked any sufficent grounds and failed to raise, but not limited to, the witness tampering engaged in by the prosecutor, the Brady viclation by the state withholding certain evidence, the ineffective assistance of counsel not reasonably investigating case factors and witnesses, the conflict of interest that proceeded to viclate the defendants Consitutional rights, or the court abuse of discretion in denying the defendant motion to withdraw plea and excluding the statements given by defense witnesses which were corroborated by circumstances of the case.

Appellant counsel was therefore ineffective for not raising these concerning issues and has prejudiced the defendant as the defendant/petitioner didn't have the opportunity to present these underlined issues, in this petition, to the appellate court for review and possible relief if granted.

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(d) Ground seven: Whether the Accumulation of errors in this case violated the defendant Constitution rights under the fifth, Sixth and Fourteenth Amendments and requires reversal

Supporting FACTS (Tell your story briefly without citing cases or law.): Petitioner's Conviction and sentence violate the fifth, Sixth and Fourteenth Amendments to the United States Consitution because the Cumulative effect of the errors alleged in this petition deprived him of his Federal Constitutional rights, including, but not limited to his rights to due process of law, equal protection, Confrontation, the effective assistance of Counsel.

The cumulative effect of any of the errors identified herein, if any one were not sufficent in severity to justify a grant of post-conviction relief, justify relief in their combined magnitude. The cumulative effect of those errors rendered the trial proceedings unfair and supports relief based on a claim of cumulative error.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 13th day of the month of July, 2021.

DENZEL DORSEY #1099468

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

DENZEL DORSEY

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-17-328324-1 Does not contain the social security number of any person.

DENZEL DORSEY

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, DENZEL DORSEY, hereby certify pursuant to N.R.C.P. 5(b), that on this 13th day of the month of July, 2021, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

DENZEL DORSEY

High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

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IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DENZEL DORSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79845-COA

FILED

JAN 08 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Denzel Dorsey appeals from a judgment of conviction, entered pursuant to a guilty plea, of home invasion. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

First, Dorsey argues the district court erred by denying his presentence motion to withdraw his guilty plea. A defendant may move to withdraw a guilty plea before sentencing, NRS 176.165, and "a district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just," *Stevenson v. State,* 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). In considering the motion, "the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just." *Id.* at 603, 354 P.3d at 1281. The district court's ruling on a presentence motion to withdraw a guilty plea "is discretionary and will not be reversed unless there has been a clear abuse of discretion." *State v. Second Judicial Dist. Court (Bernardelli),* 85 Nev. 381, 385, 455 P.2d 923, 926 (1969).

Dorsey claimed he should be allowed to withdraw his guilty plea because he was innocent of the crime charged. The district court held an

COURT OF APPEALS
OF
NEVADA

(O) 1947B

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evidentiary hearing. After hearing testimony from Dorsey's and the State's witnesses, the district court found Dorsey's witnesses were not credible, considered the totality of the circumstances, and found there was no fair and just reason to permit the withdrawal of Dorsey's guilty plea. The record supports the district court's findings. *See Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990) ("On matters of credibility this court will not reverse a trial court's finding absent a clear showing that the court reached the wrong conclusion."), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000). Therefore, we conclude the district court did not abuse its discretion by denying this claim.[1]

Next, Dorsey argues he should either be allowed to withdraw his guilty plea or have his sentence modified because the written plea agreement "understated the possible punishment" and "incorrectly" stated he was "facing" a sentence of 60 to 120 months. Dorsey misstates the underlying facts. The written plea agreement stated that, if he failed to appear for any court dates or was arrested for any new offenses, Dorsey *stipulated* to a sentence of 60 to 120 months. The written plea agreement went on to correctly state the range of possible sentences under NRS 207.010 in the event Dorsey was adjudicated a habitual criminal. Therefore, we conclude Dorsey is not entitled to relief on this claim.[2]

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[1]Dorsey argues for the first time on appeal that he may not have been competent when he entered his guilty plea and counsel was ineffective for not investigating his competency. Because these arguments were not raised in the court below, we decline to consider them on appeal. *See Rimer v. State*, 131 Nev. 307, 328 n.3, 351 P.3d 697, 713 n.3 (2015).

[2]To the extent Dorsey challenged the legality of the stipulated sentence, we note that parties may negotiate for an infirm sentence. *See Breault v. State*, 116 Nev. 311, 314, 996 P.2d 888, 889 (2000). And Dorsey

Next, Dorsey argues the stipulated terms in his guilty plea agreement agreeing to "habitual criminal treatment" and the existence of the requisite prior convictions were unconstitutional. Dorsey's stipulation to the existence of the prior convictions necessary for habitual criminal adjudication was permissible. *See Hodges v. State*, 119 Nev. 479, 484, 78 P.3d 67, 70 (2003). Dorsey's reliance on *McAnulty v. State*, 108 Nev. 179, 826 P.2d 567 (1992), and *Stanley v. State*, 106 Nev. 75, 787 P.2d 396 (1990), is misplaced as they have been explicitly overruled. *See Hodges*, 119 Nev. at 484, 78 P.3d at 70. Therefore, we conclude Dorsey is not entitled to relief on this claim.

Next, Dorsey argues the district court erred by sentencing him to an overly harsh and disproportionate sentence. The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will refrain from interfering with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). And, regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d

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does not allege the district court's deviation from the stipulated sentence was improper. *See* NRS 174.035(4); *Sandy v. Fifth Judicial Dist. Court*, 113 Nev. 435, 440 n.1, 935 P.2d 1148, 1151 n.1 (1997) ("[T]rial judges need not accept sentence bargains.").

220, 221-22 (1979)); *see also Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime).

The 60-to-150-month prison sentence imposed is within the parameters provided by the relevant statute. *See* NRS 207.010(1)(a). Dorsey does not allege that this statute is unconstitutional. Dorsey also does not allege that the district court relied on impalpable or highly suspect evidence. Having considered the sentence and the crime, we conclude the sentence imposed is not grossly disproportionate to the crime, it does not constitute cruel and unusual punishment, and the district court did not abuse its discretion when imposing sentence.

Finally, Dorsey argues the cumulative effect of the errors in this case warrants reversal. As Dorsey has identified no errors, we conclude there are no errors to cumulate. *See Morgan v. State*, 134 Nev. 200, 201 n.1, 416 P.3d 212, 217 n.1 (2018). Accordingly, we

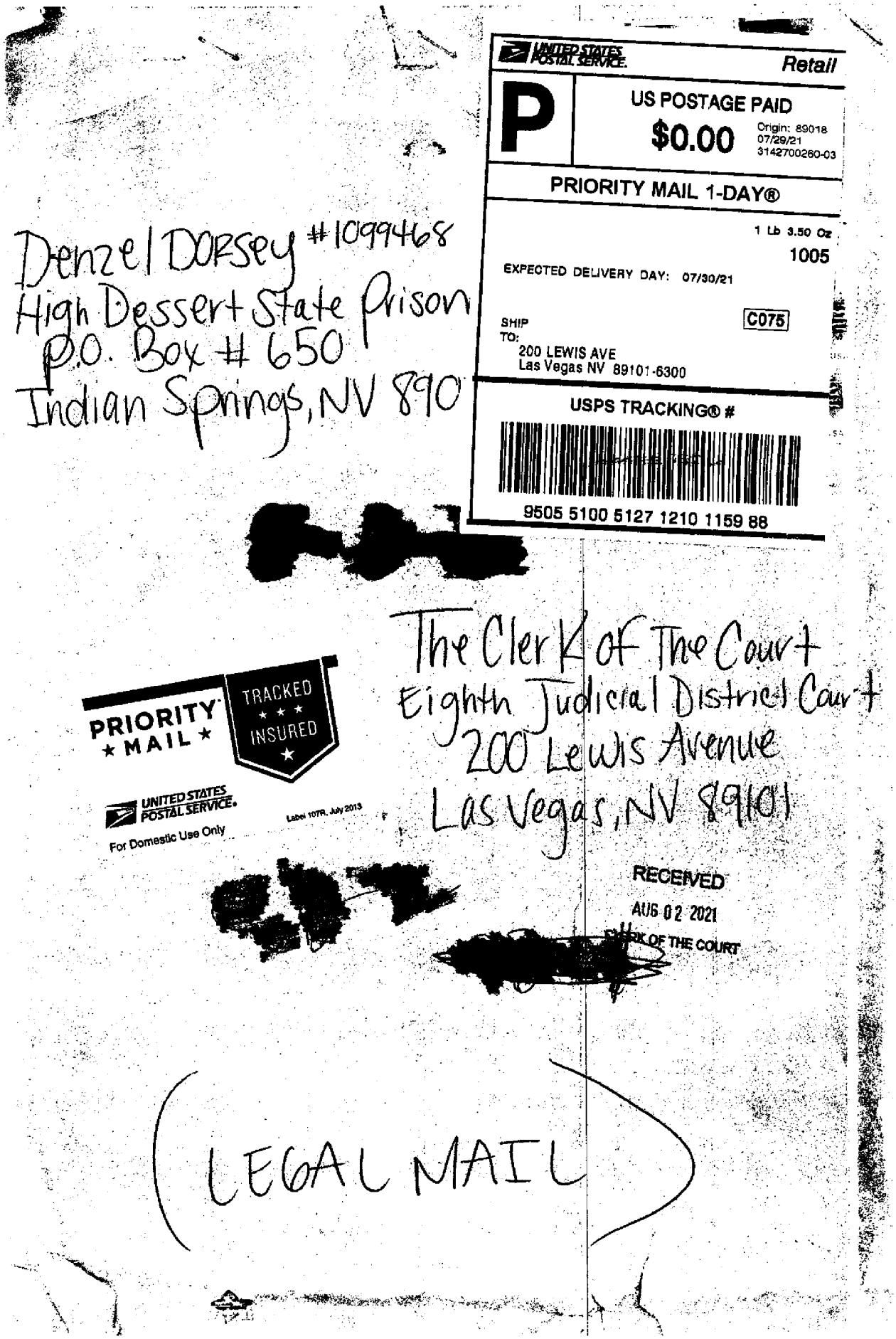
ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Joseph Hardy, Jr., District Judge
Terrence M. Jackson
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk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District Court
Clark County, Nevada

Case A-21-839313-W
Dep Dept. 18

Denzel Dorsey
Petitioner,
Vs.
The State of Nevada
Respondant,

Memorandum of Points & Authorites
In Support Of
Writ of Habeas Corpus (post-Conviction)

Come now, Denzel Dorsey, Petitioner in Proper Person under Haines V. Kerner, 92 S. Ct 594, 596 (1972) (pro se pleadings are to be held to a less stringent Standard than pleadings drafted by attorneys) and submits the instant Memorandum of Points & Authorites in Support of Writ of Habeas Corpus (post-Conviction).

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Points and Authorites

I.
Procedural History

On or about November 28, 2016, an information was filed charging the petitioner with count 1: Attempted burglary; count 2: Malicious Destruction of Property.

On March 13, 2018, petitioner entered a global plea deal and plead guilty to count 1: Invasion of the home. Additionally, the state agrees not to seek Habitual Criminal treatment. Further, the state will not oppose dismissal of count 2 and case no. 17F21598X after rendition of sentence. However, If I fail to go to the Division of Parole and Probation, fail to appear at any future court date or arrested for any new offenses, I will stipulate to habitual criminal treatment and to a sentence of Sixty(60) to One hundred and twenty (120) months.

On June 6, 2018, petitioner filed a pro per Motion to dismiss counsel and pro per Motion to Withdraw plea. On June 12, 2018, the court granted pro per Motion to dismiss Counsel and continued all other matters.

On February 15, 2019, Petitioner filed a Presentence Motion to Withdraw plea through Gary Modafferi, ESQ. After multiple evidentiary hearings, the court submitted an order denying the petitioners Presentence Motion to Withdraw plea on August 6, 2019.

Sentencing took place on October 3, 2019, and the petitioner was sentenced to Sixty(60) to One hundred

and fifthy (150) months under the small habitual criminal.

On October 15, 2019, notice of appeal was filed. On January 6, 2021, the Nevada Supreme Court affirmed the conviction.

The instant Writ of Habeas Corpus (post-conviction) made in accordance with NRS 34.726 is timely and before this court for review.

II.

Testimonial Statement of facts

Kevin Nazareno testifed that he was present at the home of 2731 Warm Rays Avenue during the occurance of the incident.

He was lying upstairs in his bedroom bed when he heard multiple door bell rings.

He seen a black male attempt to gain entry of the home by breaking the front door glass window.

He ran to the front door and the suspect ran away to a vechicle which the suspect appeared to be alone.

He remembered the vechicle license plate number and called the police.

He stated that the black male was around 150 to 200 pounds and about 6 feet or abit taller.

He would be able to identify the Suspect if he saw him again.

He was not able to intially identify the petitioner as the

Suspect at the Preliminary hearing proceeding until the State solely pointed out the petitioner.

(See, P.H.T 1-19)

Travis Roundy testified that he works for the City of Henderson Police Department and that on November 28, 2016, he was dispatched to the home of 2731 Warm Rays Avenue in reference to an attempted burglary.

He made contact with Kevin Nazarenc who was present during the incident.

He stated that Kevin described the suspect as a black male being between 25 and 30 years old. Kevin also described the black male as medium build, being approximately "6-0" and 190 pounds.

That Kevin couldnt remember the clothing or if the black male was wearing gloves or not.

(See, Exhibit C)

James McGeahy testified that he worked for the City of Henderson Police department and he was in the Problem Solving unit.

That on November 28, 2016, he was assigned to investigate the incident that occurred at the home of 2731 Warm Rays Avenue.

That he learned that the vechicle that was involved in the crime had GPS location. He was able to locate the vechicle hours later after the incident at the Fashion Show mall parking lot and made contact with the petitioner who was in possession of the keys that belong to the vechicle.

That he noticed that the petitioner appeared to have fresh tears of frays on his right sleeve and fresh bcut on his left knuckle. That the petitioner had no explanation for the tears, or cut other than stating that they were old.

That the City of Henderson Police department never followed up with a show up or photographic line up to gain a positive and reliable identification.

(See, incident Report and E.H.T.)

Davey Dorsey testified that he was the person who committed the offense at the home of 2731 Warm Rays Avenue on November 28, 2016 and that the petitioner was wrongfully accused of the crime.

He borrowed the vechicle (953LGM) the night prior to the incident. The vechicle was a rental car that belong to the petitioner.

That on November 28, 2016, he was intoxicated off prescription pills and he attempted to gain entry into the home of 2731 Warm Rays Avenue in the City of Henderson.

He noticed that someone was home then fled to the vechicle. He then drove to return the vechicle back to the petitioner. The petitioner was with his girlfriend at her cousin apartment.

That the petitioner had no involvement or knowledge of the attempted burglary at the time he returned the vechicle to the petitioner.

That he tried to confess to the crime but the petitioners attorney wouldnt give him even 2 minutes of her time.

(See, E.H.T and exhibit A)

Takiya Clemons testified that she was the petitioners girlfriend at the time of the incident.

That she was with the petitioner at her cousin apar-ment on November 28, 2016, and the night prior to that day.

That she witnessed the petitioner hand Davey the Keys to the vechicle (953LtM) to borrow the night prior to the incident.

That the petitioner stayed the night with her.

That on November 28, 2016, the petitioner and her had woke up kind of late together at her cousin apartment.

She witnessed Davey pull up with the vechicle in the after-noon hours and watched the petitioner then drive off with Davey in the vechicle.

(See, E.H.T and exhibit B)

III

Summary of the Arguement

Petitioner argues that he was denied his right to a fair trial and that the series of breach in his case proceedings has led him into a wrongful conviction. The petitioner asserts that the intial prosecutional misconduct that was adduce at the preliminary hearing proceeding, to gain a positive identification of the petitioner, has beyond prejudiced the petitioner to be further incarcerated for a crime he didnt commit. Also, the petitioner argues that the district court abused its discretion by denying the petitioners

Presentence Motion to withdraw plea and by excluding the two defense Witnesses as lacking in credibility when they was actually corroborated and against penal interest.

Petitioner further argues that he was not guaranteed the protection of the 6th and 14th Constitutional Amendments as he was prejudiced by ineffective assistance of Counsel throughout his entire Case proceedings. Trial Counsel failed to object, failed to gather important case material and failed to reasonably investigate the defense Witnesses.

Finally, the Petitioner argues that Cumulative error has preceded throughout his Trial Proceeding and that it was so prejudicial that he was not guaranteed a fair trial, and therefore, in totality, warrants reversal of his Conviction.

IV.

Arguement of issues

I.) WHETHER THE COURT ERRED WHEN IT ALLOWED THE IN-COURT IDENTIFICATION WHEN THE IDENTIFICATION PROCEDURES WERE IMPERMISSIBLY SUGGESTIVE BY WITNESS TAMPERING.

A Criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions. Watters v. State, 129 Nev. Adv. Rep 94, 313 P.3d 243, 246 (2013). The district Court has a duty to protect the defendant's right to a fair trial and to provide order and decorum in trial proceedings. Rudin v. State, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004); See also United States v. Evanston 651 F.3d 1080, 1091 (9th Cir. 2011)

(stating that the district court is to manage the trial proceedings so as to avoid causing a significant risk of undermining the defendant's due process rights to a fair trial and impartial jury).

As Was Stated in Bruno V. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983):

Even more egregious, however, are attempts by representatives of the government to resort to these reprehensible means to shortcut their responsibility to ferret out all admissible evidence and use only that to meet their burden of proof. We fear the resort to such conduct indicates either an absence of sufficient evidence to convict or reflects shoddy government efforts that have failed to unearth admissible evidence... He has no obligation to win at all costs and serves no higher purpose by so attempting. Indeed, it is much a duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. [Berger v. United States, 295 U.S. 78, 55, 79 L.Ed. 1314, 55, S.Ct 629 (1934)].

It is respectfully submitted that on May 5, 2017, the Court allowed a positive in-court identification of the petitioner by the eye witness during the preliminary hearing proceeding. The State engaged in prosecutional misconduct by tampering with the witness Kevin Navazeno to gain a favorable result in identification, after Kevin initially undermined the petitioner's identification as being the suspect. The Court should of moved to supress the identification of the petitioner as being the suspect in this case as the Court witnessed first hand the State's misconduct during the direct examination of

Kevin. The Court violated its law under NRS 50.115 (3)(4) which states:

NRS 50.115 (3)(4)

3.) Except as provided in Subsection 4:

(a) Leading questions may not be used on direct examination of a witness without the permission of the Court.

(b) Leading Questions are permitted on Cross examination.

4.) Except that the prosecution may not call the accused in a criminal case, a party is entitled to call:

(a) An adverse party; or

(b) A witness identified with an adverse party and interrogate by leading questions...

The Court is tasked with determining questions of law, Namely whether or not a party is inappropriate by asking questions of the witness, and whether or not the Constitutional rights of the individual is being upheld. In this case, the Petitioners Constitutional rights is clearly not being upheld by the State and the Court.

I would like to direct the Court to remember what had occurred during the State's direct examination of Kevin Navarette on pg 12 Lines 4-19 of the preliminary hearing; it follows:

P.H.T pg 12 Lines 4-19

Q: Do you think you'd recognize him if you saw him again?

A: Yes.

10.

Q: Now, you've been sitting in court all morning. Have you seen the same person that you saw try and break into your house on November 7th, 2016 here in Court?

A: I think.

Q: You think. Is that person still here in court?

A: I dont know actually.

Q: Well, let me ask you. The person that you thought you saw that kind of looked familiar, do you see him in the courtroom as you sit here right now?

A: NO, I dont think so.

Q: So I am going to point to a person. This gentleman that's seated at counsel table wearing glasses, you dont recognize him?

Asking a Witness if an accused looks familiar to a witness as a suspect, rises to the level of misconduct and should have elicited an objection prior to the witness being allowed to answer. Prosecutor's duty is not to convict but to see that justice is being served. Lee v State, 112 Nev. 642, 917 P.2d 940 (1996).

The intolerable acts on the behalf of the State only proves that the prosecuter only wanted to meet their burden of proof, instead of upholding the law of justice by making sure that the guilt doesn't escape and that the wrongfully accused finds liberty. As the U.S. Supreme Court has indicated, a prosecutor's misconduct may be so egregious that it rises to the level of a due process violation. Darden v. Wainwright 477 U.S. 168, 181 (1986). This appealing case is a clear example of how the state's misconduct, that was made during an important stage of the

11.

preliminary hearing, could lead a witness into wrongly identifying an accussed as being an suspect in a case.

The State and its detectives failed to do a show up or photo line up which also corrupts the identification reliability when the linchpin of due process analysis is the identification reliability. Manson V. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

The Relevant factors include the oppurtunity of the witness to view the Criminal at the time of the crime, the witness degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation. A Court must weigh the Corrupting effect of the Suggestive identification against these and any other factors affecting reliability.

The State has investigated the case and have obviously learned that the petitioner didn't match the description of the suspect that was given by Kevin Nazareno. Kevin admitted that there was nothing distorting his vision of the suspect and could Remember the suspect again if he had saw him face to face. He also said that the suspect was a black male around 200 pounds and about 6ft or taller. If you take a look at (exhibit D) thats attached to this petition, you would find it fact that the petitioner was only 5'9 and 165 pounds as he was booked into the Henderson Jail on November 28, 2016 which was the exact day of the incident. It is clear that Kevin Nazareno was wrongly lead by the misconduct of the State to give an positive incourt identification when he knew intially that the petitioner was not the suspect he said he would of remembered if he had seen him again.

It is Hereby respectfully submitted that the court erred when it allowed the positive in court identification; and the prosecutional misconduct

in witness tampering to gain a more favorable result was not harmless and has prejudiced the petitioner in his case proceedings.

II.) WHETHER A BRADY Violation Occurred when the State Withheld evidence that was MATERIAL to the DEFENSE.

During the course of the case proceeding the State Commited a Serious Breach of the petitioners Consitutional rights by withhading certain evidence that was material to the petitioner. It is respectfully submitted that during the arrest of the petitioner they're were photographs that were or should of been tooken of the jacket, hands and glove that was used as evidence against the petitioner to impute guilt upon him. The petitioner also argues that he even challenges the allegations given from the arresting officier during his arrest in saying that they were factually old scars and not new. (see, arrest report).

The State even presented witnesses that testified these allegations without diliberately disclosing the material evidence to the defense as it was ultimately used as evidence against him. The photographs of the material evidence could have been used for, but not limit to, a effective Cross-examination to potentially impeach, i.e., discredit, the state witnesses. The petitioner was thus denied the right of effective cross-examination which would amount to a Consitutional error of the first Magnitude and no amount of showing of want of prejudice would cure it.

We can agree that the due process requires the State to disclose material evidence favorable to the defense. (Brady v. Maryland, 373 U.S. 83, 87, 10 L. Ed 2d 215, 835 Ct. 1194 (1963). Evidence is material when there is a reasonable probability that had the evi-

dence been available to the defense the result of the proceeding would have been different. (United States V. Bagley, 473 U.S. at 678).

In Brady the Supreme Court held that the Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. at 87. The Bagley Court further concluded that a defendants due process rights could be violated even where the defendant did not request such evidence. United States v. Bagley, 473 U.S. at 682. Further, Once a reviewing Court has identified Consitutional error pursuant to Bagley, a new trial is warranted without additional harmless error analysis. Kyles v. Whitley, 514 U.S. 419. Also due process requires the State to preserve Material evidence. State V. Hal, 105 Nev. 7, 9, 768 P.2d 349, 350 (1989).

In determining whether a prosecutor's nondisclosure of information to the defense is of sufficient Significance to result in the denial of the defendant's due process right to a fair trial, the Standard is not one focusing on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather is one reflecting an overriding concern with the justice of the finding of guilt, and such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt such as photographs, DNA, Fingerprints, etc; thus, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed, and such means that the omission must be set clear and evaluated in the context of the entire record. The petitioner argues that if the prosecutor decided

to present any photographic evidence to the defense, the photographs would indicate that there was not any fresh tears upon the petitioners nor was there any fresh scars or cuts on the petitioners hands. The photographs would further potentially impeach certain State witnesses testimonies and it would also strengthen the petitioners actual innocence claim. The said photographs was in fact material Evidence and should of been disclosed in the discovery that was ordered by the court on August 31, 2017. The court ordered discovery lacked any photographic evidence of the jacket, hand or glove that was testified and ultimately used to impute guilt upon the petitioner through the course of his case proceedings. The prosecutors choice to withhold certain material evidence is a clear violation of the petitioner due process rights. This Warrants reversal.

III.) WHETHER INEFFECTIVE ASSISTANCE OF Counsel VIOLATED THE PETITIONERS Sixth AND Fourteenth CONSITUTIONAL AMENDMENTS.

The two-part test applicable for a claim of ineffective assistance of counsel is that set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984):

"First, the defendant must show Counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense..."

Concerning the first requirement, the Supreme Court has explained that the accused must show that Counsels representation fell below an objective Standard of reasonableness. Id. at 688. The Court has also explained that, in meeting the second requirement, the accused can establish prejudice by showing that the attorneys deficient performance actually had an adverse effect

on the defense, that is, that the attorneys performance was sufficiently poor that it "undermines confidence in the outcome". Id at 693-94.

Reversing a conviction for ineffective assistance of Counsel, the Nevada Supreme Court in Sanborn v. State, 107 Nev. 399, 812 P.2d 1279 (1991) stated:

To State a claim of ineffective assistance of counsel that is sufficient to invalidate a judgement of Conviction, Sanborn must demonstrate that trial counsel's performance fell below an objective standard or reasonableness and that counsels deficiencies were so severe that they rendered the jury's verdict unreliable. See Strickland v. Washington, 46 U.S. 668, 1045 Ct. 2052, 80 L. Ed 674 (1984); Warden v. Lyons, 100 Nev. 430, 683 F.2d 504 (1984). Focusing on Counsels performance as a whole, and with due regard for the strong presumption of effective assistance accorded counsel by this court and strickland, we hold that Sanborn's representation indeed fell below an objective Standard of reasonableness. Trial counsel did not adequately perform pretrial investigation, failed to pursue evidence supportive of a claim of self-defense, and failed to explore allegations of the victims propensity towards violence. Thus, he "Was not functioning as the Counsel guaranteed the defendant by the Sixth Amendment. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

A.) Trial Counsel failed to object to the prosecutional misconduct in ~~witness~~ tampering.

During the State's direct examination of Kevin Nazareno, Trial Counsel Keith Brower stood by his client, without objection, and watched the state solely point to the petitioner and asked Kevin

if the petitioner had looked familiar to him. (See, P.H.T pg 12-13). The improper behavior on the behalf of the State should of elicit an objection prior to the witness being able to respond. Kevin was then able to identify the petitioner as he could not intially do so.

Trial Counsel failure to object to the witness tampering and misconduct has driven the petitioner to be faced in court as the identified suspect when he is actually innocent of the crime. Had Trial Counsel raised an objection, the court could of protected the petitioners due process rights. Also, the petitioner asserts that Trial counsel should of filed a Writ to Suppress the identification of the petitioner as the suspect, after the result of the preliminary hearing proceeding.

B.) Trial Counsel failure to gain material evidence from the State.

AS the due process requires the State to disclose material evidence favorable to the defense, the Sixth Amendment guarantees the right to effective assistance of Counsel and that requires that counsel reasonably investigate and to provided the defendant a reasonable defense for trial.

During the arrest of the petitioner, the State Witnesses testified that the jacket, photographs of hand, and glove was booked into evidence. This evidence was ultimately used to impute guilt upon the defendant and should of been presented these photographs within discovery from the State. As asserted in the petitioners affidavit, the petitioner asserts that he wanted his Counsel to

request and investigate the evidence. The petitioner informed trial Counsel that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. But surely the truth-seeking process is corrupted by the withholding of evidence favorable to defense, regardless of whether the evidence is directly contradictory to the evidence offered by the prosecution.

Trial Counsel was ineffective for failing to request and investigate the evidence before allowing the petitioner to enter a guilty plea. Trial Counsel investigation would have shown that the evidence would in fact contradict and impeach the testimony of State Witnesses.

C.) Trial Counsel failure to investigate and interview witnesses on the behalf of the defense.

United States v. Armontrout, 900 F.2d 127 (8th Cir. 1990) (holding that trial counsels failure to conduct investigations in not contacting potential witnesses when the defendant provided counsel with their names which would have supported the defense... consulted ineffective assistance of Counsel.

Here, Counsel was informed and provided with complete investigative matters of the case which contained crucial witness accounts of the incident and favorable evidence that could have been offered to bolster the petitioners defense. Trial Counsel Catylin McAmis, failed to investigate and interview two witnesses that was crucial to the defense. One witness wanted to confess to the crime and the other witness was an alibi witness. The importance

to prepare and have an adequate defense gives an accused the proper means to face the jury at trial. But in Contrast, the ineffective assistance of counsel could drive even the innocent into a wrongful conviction.

The petitioner asserts that he filed a proper motion to dismiss counsel; and proper Motion to withdraw plea on June 6, 2018, which both Motions rise to surface the inadequate assistance of counsel that the petitioner was recieving from trial counsel. The proper Motion to dismiss Counsel was granted on June 12, 2018.

The petitioner would like to further point this Court to Buffalo v. State, 901 P.2d 647, 1139 (1995), where post conviction proceedings attacked the trial attorney for the utter lack of time spent with him prior to trial. It was alleged that the attorney spent less than two hours with him in the two months prior to trial. In the present case, it appears that trial counsel did no investigation of essential case factors before she had allowed her client to enter a plea. Trial counsel failed to investigate the material evidence that was withheld by the prosecutor and also failed to interview the two crucial defense witnesses.

The American Bar Association (ABA) Standards on the prosecutor and defense function emphasize the crucial importance of investigation by criminal defense attorneys for their clients. The ABA Standard 4.1 States inter alia:

4.1 Duty to Investigate

It is the duty of the lawyer to Conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty. The

investigation should always include effort to secure information in the possession of the prosecution and law enforcement authorites. The duty to investigate exists regardless of the accused admission or statements to the lawyer of facts consituting guilt or his stated desire to plead guilty.

The petitioner would like to respectfully conclude, had trial counsel: object to the prosecutional misconduct in witness tampering, gathered the material evidence from the prosecutor, and interviewed the two important defense witnesses, the petitioner would not have pleaded guilty and could have had an adequate defense before the jury of the Court. The ineffective assistance of counsel has in total prejudiced the petitioner and has denied him of his due process rights. This warrants Reversal.

IV.) WHETHER Defendants DUE PROCESS RIGHTS WAS VIOLATED WHEN A CONFLICT OF INTEREST PROCEEDED IN PREJUDICING HIM INTO ACCEPTING A GLOBAL DEAL.

The Petitioner submits that on January 9, 2018, attorney Yi Zheng ESQ, advised she could not confirm as counsel in this present case due to conflict and requested the Court to appoint the petitioner counsel. See, Court minutes C-17-323324-1; or exhibit I But it was the very next day on January 10, 2018, that the petitioners Sixth and 14th due process rights was violated when attorney Yi Zheng was able to confirm as counsel of record in the petitioners other pending criminal case no 17F21598X. See court minutes 17F21598X; or exhibit It is noteably shown that attorney Yi Zheng knew that a conflict had existed concerning the petitioner and his rights ~~would~~ be

jeopardized but attorney Yi Zheng pursued to handle the petitioners case matters with a personal motive. This error is not harmless as Counsel Manipulation Was used to prejudice the petitioner into accepting a global deal through negotiations with the State and the petitioners trial Counsel in this present case. The petitioners trial Counsel in this present case was also ineffective for allowing her client to enter a guilty plea through the negotiations of Yi Zheng, ESQ.

An error is harmless if the Court can determine "beyond a reasonable doubt that the error complained of did not contribute to the verdict Obtained". Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

It is noteably shown throughout the record in case no. 1721598x, that attorney Yi Zheng kept advising the Court that she was in progess of negotiating a global deal that would possibly dismiss the case that she Was retained for. Attorney Yi Zheng ESQ used this oppurtunity within the conflict of interest to resort to Coversion by being able to negotiate a global plea when she was not supose to and also by using the benefits of plea as leverage to get the petitioner to enter a plea. This action would allow attorney Yi Zheng to collect the $10,000 payment, that the petitioner payed to retain her legal Services, Without having to do any further investigation of the petitioners case matters or proceed in a jury trial. This Error is not harmless and it has had a detrimental effect on the petitioners due process rights. This Warrants Reversal.

V.) WHETHER THE DISTRICT COURT ABUSED

ITS DISCRETION BY DENYING THE DEFENDANTS PRE SENTENCE MOTION TO WITHDRAW PLEA;

A Defendant May Move to Withdraw a guilty plea before Sentencing, NRS 176.165, and "A district Court may grant a defendants Motion to withdraw his plea before Sentencing for any reason where permitting withdrawl would be fair and just. Stevenson v. State, 131 Nev. 598, 604, 354 P. 3d 1277, 1281 (2015). In Considering the Motion, "the district Court must Consider the totality of the Circumstances to determine whether permitting Withdrawl of a guilty plea before Sentencing would be fair and just". Id at 603, 354 P. 3d at 1281. The district Courts ruling on a presentence Motion to Withdraw plea" is discretionary and will not be reversed unless there has been a Clear abuse of discretion.". State v. Second Judicial Dist. Court (Bernardelli), 85 Nev. 381, 385, 455 P. 2d 923 926 (1969).

Substancial evidence in the record reflects that the petitioner was led into a Wrongful Conviction by entering a guilty plea through the ineffective assistance of counsel as raised in this petitione. The petitioner rose this claim and also presented two witness es that testified statements in regards to the petitioners actual innocence claim. This was all presented in the petitioners presentence Motion to Withdraw plea and Within the exhibits attached. (See, presentence Motion to Withdraw plea) Especially troubling in this case Was that the petitioner Was prejudiced When the district Court abused its discretion and denied the petitioners Pre Sentence Motion to Withdraw plea. (See, exhibit 6)

The Court in this case erred because it ignored the

ineffective assistance of counsel and how that may have affected the defendants entering of a plea. The Court should of took in consideration: trial Counsels failure to object to the witness tampering; trial Counsel failure to gain the favorable Material evidence from the States possession; and trial Counsel failure to reasonably investigate case Matters and interview crucial witnesses on the behalf of the defense; and also the conflict of interest that proceeded to violate the petitioners due process rights. The Court merely considered the defense arguement that he was factually innocent and concluded that the defense Witnesses were not sufficiently credible, wrongly assuming they were biased because of their relationship to the defendant. The record also suggest that their statements were trustworthy as they corroborated with essential case factors and should of been admitted into evidence.

The petitioner respectfully asserts that the district Court in its standard of ruling the petitioners PreSentence Motion to Withdraw plea, was governed by a more Stringent standard than required for a PreSentence Motion to Withdraw plea. The district Court should of considered whether a Consitution violation has probably resulted in the conviction, then applied a more permissive standard under Stevenson in whether if it was fair and just to able the petitioner to withdraw his plea.

Petitioner directs the Court attention to the case of Schlup v. Delo, 513 U.S. 298, 130 L.Ed 2d 808, 115 S.Ct 851, as follows:

> Where a federal habeas Corpus petitioner, who was Convicted in State Court and Sentenced to death, raised a Claim of actual innocence of the crime by asserting

that his trial Counsel had been ineffective for failing to interview alibi Witnesses; and the State had failed to disclose critical exculpatory evidence. The district Court and Court of Appeals denied to Consider the Claims. On Certiorari, the Supreme Court Vacated the Court of Appeal decision and remanded the Case to the Court of Appeal with instructions to remand to the district Court for further proceedings. The Supreme Court decision held that the Courts below were using the incorrect Standard in determining the Claims. Schlup V. Delo, 513 U.S. 298, reversed.

Here, the defendant brought forth Substancial evidence that demonstrated how his plea was not valid and that he was actually innocent of the charges against him. The court wrongly found that the record does not support the defendants Claims and excluded the testimonies of the defense witnesses as lacking in credibility. The petitioner would like to demonstrate to this court how the district Court abused its discretion by denying the defendants PreSentence Motion to Withdraw plea and how the reasons for the denial of the motion was not accurate nor sufficient enough to rule that it was not fair and just to permit the withdrawl of his plea before Sentencing.

The district Court stated that the record shows that defendant committed the crime and used the testimony of officer McLeany. The testimony stated that there was fresh tears on the defendant sleeves and a fresh cut upon his hand. He also Stated that there was a glove with fresh blood found on the defendant. The district court wrongly relied on the allegations given from

officer McBeany without requesting that the State present any physical or photographic evidence of the allegations made against the defendant. Had the State presented this evidence the Court would find that the prosecutors case include a perjured testimony.

The district Court further stated that the Court does not find Davey credible and wrongly claimed that Davey stated that he drove to the Nazareno home around 1:00 pm and 2:00 pm when the incident occurred at 11:55 am. The district Court was wrong for asserting that reason when Davey testified that he got there like noon. E.H.T at 13: 21-23. Also Davey testified that he was high on Xanax the Morning of November 28, 2016, and he could not remember the small details of that day. E.H.T at 30: 11-15. The Petitioner would like to further note that there was prescription pills that was found during the search of the vechicle that belongs to Davey and supports his claims[1] (See, arrest report). The district Court also found Davey testimony not credible because Davey testified that he knocked on the front and back doors before breaking the front door. The district Court stated that in Contrast Kevin testified that at the time of the burglary he was in bed when he heard the door bell ring multiple times, got up because of the constant ringing, and witnessed the front door being punched upon walking downstairs. This reason for finding Davey not credible is not sufficient as there isn't anything within the record that would suggest that Davey Statement are false. Kevin testified that at the time of the burglary he was upstairs in bed ~~at~~ asleep still and only woke up because the Constant ringing of the doorbell. P.H.T

1. See, exhibit H

25.

at 5-6. Davey could of in fact knocked on the front and back doors of the home before he broke in. Davey never denied him ever ringing the doorbell, he just stated that he had knocked on the door again just right before he put his hands through the window. E.H.T. at 46:17-25. Kevin was upstairs asleep in bed and there is a possibility that he may not of heard the knocks. Thus, Davey's admissions are not belied by the record. Also the petitioner would like to state that Davey may have been a little intimidated by the prosecutors unprofessional manner given throughout court that day. The court had to address the prosecutor for their unnecessary combative behavior and for raising a loud voice in court. E.H.T at 11:2-6.

The district court also found the testimony that was given by Takiya, supporting the assertion that Davey committed the crime, as not credible. The district court wrongly asserted a jail call where Takiya told the defendant that he would not get into trouble if he remained at home and only focused on her and his hustle. The Statement by Takiya is overly broad and does not whatsoever indicate that the defendant was not in fact with Takiya during the time of the incident but it rather shows her fustration with the defendant in regards to his encounters with the law enforcement. It is clear that the petitioner was in deed arrested after leaving Takiya at her cousin apartment that afternoon. It is appropriate to find that Takiya was refferring to the defendants arrest after he had left her. The district court also found it reasonable to conclude that Takiya just wanted to prevent the defendant from serving a prison term since she was the defendants boyfriend and had a child with him. It is wrong for a court to simply find a witness

not credible because of their relationship to a person and especially when their statements corroborates with essential case factors. see, order denying motion; or exhibit 6)

The district court abused its discretion by denying the petitioners Pre-Sentence motion to withdraw plea when the court failed to consider the witness tampering at defendants preliminary hearing, the ineffective assistance of counsel the defendant was recieving as raised in this petition, the brady violation, and also the two witnesses that supported the defendants actual innocence claim.

The petitioner has satisfied the law that the Nevada Supreme Court set forth in Stevenson, and should of been permitted to withdraw the plea before sentencing. So as the courts well aware theres two different standards. Theres a fair and just standard, a more lenient, permissive standard which is applied by the courts before sentencing, and then there's the correct manifest injustice standard which is the much more demanding standard which is applied after sentencing. So because of the fact that the Pre Sentence Motion to Withdraw Plea was brought well before sentencing and the defendant has demonstrated critical evidence, the petitioner should of been able to withdraw his plea as it would be fair and just to allow the withdrawl of plea.

One of the things in Stevenson that the Nevada Supreme Court said was important was how quickly did the person have a change of mind or change of heart about wanting to withdraw his plea. In this case, the petitioner wanted to immediately withdraw his plea and it's indicated by the pleadings that were filed pro

se - it was less than a week after the petitioner had entered a plea that the petitioner wanted to withdraw his plea but trial Counsel simply refused to submit any motions on the defendants behalf. It took the defendant about two months to do proper and due diligence to research and file the two pro se motions: proper Motion to dismiss Counsel; and proper Motion to Withdraw plea.

Given the fact that trial Counsel had investigated the defendants preliminary hearing proceeding where the alleged Victim was unable at first to identify the person and later did so after the State tampered with the Victim, there was significant doubt and trial Counsel should of investigated the claims that her client wanted investigated concerning withheld material evidence by the State and also the two witness that the defendant wanted interviewed. Trial Counsel failed to reasonably investigate essential case matters and having not done it is probably the most important of fair and just reasons because any adequate investigation from trial Counsel would of prevented the defendant from entering a plea and proceeded to trial.

When deciding a Presentence Motion to Withdraw plea the district Court does not need to make a determination of whether or not there's proof beyond a reasonable doubt, that's a determination for the jury to make, and I would argue the State of evidence in this case that between Davey and Takiga's testimony, the ineffective assistance of counsel and the fact that there was no pre-investigation line up or identification of the defendant that there is good cause, there is substantial reason, there is fair and just reason under Stevenson to allow the defendant to withdraw

the plea.

A.) WHETHER THE District Court Abused Its Discretion by EXCluding The Statements of Defense Witnesses When Corroborating CirStances Indicate they WERE Trust Worthy.

The Petitioner presented two Witnesses in support of the defendants Pre Sentence Motion to Withdraw Plea and his actual innocence Claim. Davey Dorsey Submitted an affidavit and testified that the defendant was Wrongfully accused and that Davey Was the One who had actually Committed the offense. (See, Daveys affidavit or exhibit A). Takiya Clemins Submitted an affidavit and testified that she Witnessed the petitioner hand Davey the Keys to the Vechicle to borrow and that she Was With the petitioner at her Cousin apartment during the time the incident had occurred. (See, Takiya's affidavit or exhibit B).

The Statements given in Davey and Takiyas affidavits were consistant with their testimonys in Court and indicate they were trustWorthy as they corroborated With Circumstances of the Case. Futhermore, Davey and Takiya's affidavit Carries an additional "indicia of trustWorthiness because they memorialized it on paper, under Oath, and presented it as truth to a Court of law." Luna V. Cambra, 306 F.3d 954, 963 (9th Cir. 2002), amended by 311 F.3d 928 (2002).

The District Court held a evidentiary hearing

to evaluate the defense witnesses and then later excluded their statements as not credible when their statement had in fact corroborated with circumstances.

In determining that the two defense witnesses were not credible, the district court noted that the statements were made from a party who may just want to prevent the defendant from doing a prison sentence, rendering them untrustworthy. Although this is a relevant consideration, the defense witnesses presented evidence sufficient to warrant a finding of trustworthiness regarding their statements and to allow him to withdraw his plea.

The district court statutory test for determining the admissibility of statements against penal interest under NRS 51.345 is whether the totality of the circumstances indicate the trustworthiness of the statements and that the statements corroborates. Walker v. State, 116 NEV. 670, 676, 6 P.3d 477, 480 (2000).

IN Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), the United States Supreme Court addressed the constitutionality of "an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." 547 U.S. at 321. The United States Supreme Court began by noting that while the Constitution provides state and federal rulemakers with broad latitude to establish exclusionary rules for evidence in criminal trials, that latitude is limited by the Constitution's guarantee that a

Criminal defendant must have "a meaningful opportunity to present a complete defense." Id at 324. The Court stated that this right is abridged by evidence rules that infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." Id.

However, the Court clarified that "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Id at 326. The Court then critiqued the evidentiary rule at issue based on its focus on the strength of the prosecution's case regardless of the credibility of the prosecution's witnesses or the reliability of its evidence and without considering the probative value of the proffered defense evidence. Id. at 329. The Supreme Court concluded that the evidentiary rule did not "rationally serve the end that... it was designed to promote, i.e., to focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." Id. at 330. As a result, the Court held that the rule was arbitrary and violated the defendant's right to a meaningful opportunity to present a complete defense. Id. at 331.

Davey's affidavit and his testimony were consistent and corroborates with circumstances. The GPS tracker system on the vechicle also strengthens Davey statements as the GPS shows that the vechicle did in fact stop at Takiya's cousin apartment before the defendant was arrested at the Fashion Show Mall. Davey stated that after he had committed the crime at the home

of Kevin Nazareno, he drove to the defendant who was with Takiya at her cousin apartment at the location of Viking Street during the time of the proceeding incident. The GPS system reflects that the vechicle did indeed make a stop at that location after the vechick left the home of Kevin Nazareno on November 28, 2016. See, Gps tracker in arrest report or exhibit E).

The district court also noted in their reason for excluding the statements from Davey and Takiya was the timing that the defendant had presented the witnesses, and that it wasn't until Only after the defendant violated the terms of his plea and bail release that he offer to provide evidence proving that Davey committed the residential burglary. The petitioner challenges the district court conclusion by asserting that the defendant did indeed file his own pro per Pre Sentence Motion to Withdraw plea on June 6, 2018 which was months before the defendant allegedly violated any terms of his plea. In fact, the defendant had filed the motion while still being in custody since he had intially entered his plea. In the defendants Pro Per Pre-Sentence Motion to Withdraw plea, it asserts that trial counsel was ineffective for failing to adequately investigate essential case matters and that the defendant had a witness who wanted to confess to the crime. (see, pro per Motion to Withdraw plea). This is evidence that the petitioner did want trial counsel to investigate and present the statements from Davey and Takiya. before any violation according to the district court. (See, exhibit F)

Davey testified that he wanted to confess to the crime and tried to confess to the defendants trial Counsel

during one of the defendants court appearances but trial Counsel was rude to him and would not even give him two minutes of her time (see, Daveys affidavit or Exhibit A).

Considering the corroborating circumstances, the petitioner conclude that the district court abused it's discretion in excluding the testimony from Davey and Takiya because the exclusion of the defense evidence affected the defendants constitutional right to a meaningful appurtunity to present a complete defense. Any discrepancies with other evidence should be left to the jury to assess. WOODS, 101 Nev. at 136, 696 P.2d at 469-470 (stating that it is "for the jury to evaluate the story and to decide how much credence it should be given"). Accordingly, the district court abused its discretion in excluding the testimony of Davey and Takiya on the grounds provided in this argument. This warrants reversal.

VI.) WHETHER INeffective Assistance of Appeallent Counsel deprived defendant to an adequate Direct Appeal.

When attorneys fail to brief a case adequately, this court is forced to divert its limited resources to the task of compensating for counsel's derelictions in order to reach and resolve the merits of the appeal properly. Because the purpose of briefing is to inform this court of all authorities relevant to the issues raised in the appeal, a deficient performance by counsel may alter the outcome of an appeal. See State, Emp Sec. Dep't v. Weber, Supra. Moreover, a defendant in a direct

appeal from his judgment of conviction has a constitutional right to the effective assistance of counsel. See Evitt v. Lucey, 469 U.S. 387 (1985).

Unfortunately appeallant attorney failed to brief any of the issues thats presented in this petition. Attorney instead briefed issues that did not have merit and only dedicated a few sentences that addressed the district court abuse of discretion in excluding the defense witnesses as not credible. (see, exhibit J)

Appellant was sentenced to the small habit criminal (60-150 months) in the Nevada State Prison. Important individual rights and liberties are thus at stake in this appeal as the defendant has presented evidence concerning his actual innocence. Consequently, this case warrants more elaborate treatment than appellant's counsel accorded it. The petitioner has shown within each issue in this petition how each issue resulted in a Constitutional Violation and how each error was not harmless. Appellant counsel failed to brief any of the issues in this petition. This Warrants Reversal.

VII.) Whether The Accumulation of ERRORS IN THIS CASE Violated the Petitioners Constitutional Rights Under The fifth, Sixth and Fourteenth Amendments And Requires Reversal.

The numerous errors that ocurred in this case require reversal of the conviction. It can be argued that even considered Separately, the errors of the court were such a magnitude that they each requires reversal. But it is clear, when viewed cumulatively, the case for reversal is overwhelming. Daniel v.

State, 119 Nev. 498; see also, Sipsas v. State, 102 Nev. at 123, 216 P.2d at 235, stating: "The accumulation of error is more serious than either isolated breach, and resulted in the denial of a fair trial."

Prejudice may result from the cumulative impact of multiple deficiencies. Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978)(EN Banc), cert denied, 440 U.S. 970, harris by and through Ramseyer v. Wood, 61 F.3d 1432 (9th Cir. 1995).

The multiple errors of counsel's in this case when cumulated together require reversal. A quantitative analysis make that clear. See, Van Cleave, Rachel, When is error not an error? Habeas Corpus and Cumulative error, 46 Baylor Law Review 59, 60 (1993).

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, 854-55 (2000), citing Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998). See also, Big Pond v. State, 101 Nev. 1, 692 P.2d 1228 (1985), Daniel v. State, 119 Nev. 498, 78 P.3d 890 (2003). See also, Mak v. Blodgett, 670 F.2d 614 (9th Cir. 1991).

The Petitioner has set forth seperate post conviction claims and arguements regarding numerous errors, and each one of these errors independently compels reversal of the judgment of conviction. However, even in cases in which no single error compels reversal, a defendant may be deprived of due process if the cumulative effect of all errors in the

case denied him fundamental fairness. Taylor v. Kentucky, 436 U.S. 478, n. 15; Harris v. Wood, 64 F.3d 1432, 1438-1439 (9th Cir. 1995); United States v. McIster, 608 F.2d 785, 791 (9th Cir. 1979).

Petitioner submits that the errors alleged in this petition and those which should of been raised on direct appeal to the Nevada Supreme Court require reversal both individually and because of their cumulative impact. As explained in detail in the seperate claims and arguements on these issues, the errors in this case individually and collectively violated federal constitutional guarantees under the fifth, Sixth, Eighth, and Fourteenth Amendments, as they individually and collectively had a substantial and injurious effect or influence on the judgement and sentence. This is prejudicial under any standard of review. This warrants Reversal.

Conclusion

In Berry v. State, 363 P.3d 1148 (Nev. 2015), relying on Mann v. State, 46 P.3d 1228, 1230 (Nev. 2002), the Court held:

"The Court has long recognized a petitioners right to a post conviction evidentiary hearing when the petitioner asserts claims supported by specific factual allegations not belied by the record that, if true, would entitle him to relief."

Id. at 363 P.3d at 1155; see also, Hathaway v. State, 71 P.3d 503, 508 (Nev. 2003) (court reversing

and remanding district court denial of a Writ of Habeas Corpus for district court to conduct an evidentiary hearing on petitioners specific factual allegations contained in the sworn affidavit and petition.

In this present Writ of Habeas Corpus, the petitioner challenges the validity of the Judgment of Conviction based on the issues presented in this petition. As the issues presented are supported by specific factual allegations, evidence, and the petitioners sworn affidavit, which are not belied by the record, this court must conduct an evidentiary hearing to resolve the factual disputes created by such factual allegations, evidence and the sworn affidavit. See, Vaillan Court v. Warden, 529 P.2d 204 (Nev. 1974) ("... it is error to resolve the apparent factual dispute without granting the accused an evidentiary hearing.").

Wherefore petitioner, Denzel Dorsey, respectfully request of this court to grant the petition entirely and award the relief of a new trial.

In the alternative, appoint the petitioner counsel and conduct an evidentiary hearing on the claims of this petition and grant any relief deemed appropriate.

Dated this 13th Day of July 2021

DP

Affidavit of Denzel Dorsey

State of Nevada)
) ss
County of Clark)

I, Denzel Dorsey, after being duly sworn, depose and states the following:

1. That I am the Defendant/petitioner in case no 17 3233 24; of the Eighth Judicial district Court, Clark County, NV.

2. That I am 27 years of age and competent to testify to the contents of this affidavit. However, as I am unleaned in the art of law, I prepared this affidavit and this Writ of Habeas Corpus.

3. That due to the Nature of the charges I stand wrongfully convicted by; the complexities of the law; my inability to comprehend the Post Conviction Proceedings and my indigency to retain private counsel, I respectfully request the court to appoint me Counsel.

4. That on or about November 28, 2016, I was arrested in relation to this present case no 17-3233241 and that I was brought to The City of Henderson Jail where I was weighed and measured to be 5'9 and 165 pounds which doesn't match the description given by victim.

5. That I am wrongfully convicted and innocent of all charges thats against me.

6. That I gave Davey the keys to the Vechicle to borrow on the late night hours on November 27, 2016 while I was with Takiya at her cousin apartment on Viking St.

7. That Davey borrowed the Vechicle over night while I spent

the night with Takiya watching Netflix at her cousin apartment.

8. That during the time the incident had occurred, I was still with Takiya at her cousin apartment on Viking St.

9. That on November 28, 2016, between the hours of 12:30pm and 1:00pm, Davey returned the vechicle back to me and I had no knowledge of the burglary that Davey had committed.

10. That after I had droped Davey off and was later then arrested in the fashion show Mall parking lot, I never had any fresh tears upon my jacket sleeve nor did I have any fresh cuts upon my hands. That forensic evidence of this alleged evidence would show that this statement holds truth.

11. That I witnessed the prosecutor tamper with the victim/witness during my preliminary hearing proceeding.

12. That the prosecution solely singled me out to the victim/witness when he initially was not able to identify me as the suspect.

13. That trial counsel failed to object to the prosecutor misconduct/witness tampering and was ineffective.

14. That trial counsel failed to investigate essential case matters such as the material evidence that was withheld by the prosecution, the two witnesses I wanted interviewed, and counsel representation to I, Denzel Darsey, fell below reasonable standards for Attorney's representing criminal defendants.

15. That I informed trial counsel, Catiyln McAmis, that I had to witnesses that I wanted her to interview. That I informed trial counsel of these witnesses before she allowed

her client to enter into a plea.

16. That I informed trial counsel that I wanted to request and investigate the evidence that the State failed to disclose within the defendants discovery. That the evidence will show, if presented, that I never had any fresh tears or cuts on my hand or Jacket. That I informed counsel of this before the plea.

17. That the prescription pills found during the Vechicle search belong to Davey.

18. That I had no knowledge or connection to the crime that occurred on November 28, 2016, at the home of 2731 Warm Rays Avenue. That I am being wrongfully accused of this crime because I was found in possession of the keys to the Vechicle involved in this crime - several hours later.

19. That Attorney Yi Zheng, ESQ, used the opportunity to be able to confirm as counsel of Record in my other pending case, to manipulate me into entering a negotiated global deal. That she just wanted to collect the clients $10,000 Payment Without any further investigation of the case she was retained for.

I, Denzel Dorsey, under the penalty of perjury State that the affidavit IS true to the best of my knowledge and wish it to be considered with this petition.

ON This 13th Day of July 2021 x DD

40.

EXHIBIT "A"

0112

EXHIBIT "A"

HIGHLY CONFIDENTIAL COMMUNICATION PROTECTED BY ATTORNEY - CLIENT AND WORK-PRODUCT PRIVILEGES

MEMORANDUM

To : Gary Modafferi, Esq.
From : **Richard Franky, L.P.I.**
RDF INVESTIGATIVE AGENCY
5258 S. Eastern Ave., Suite #102,
Las Vegas, Nevada 89119
(702) 696-9701 // RDFINVESTIGATIVE@AOL.COM

Date : February 14th, 2019
Re : State of Nevada vs. DENZEL DORSEY
District Court Case No. C-17-323324-1
ATTN : Gary Modafferi

RE: DAVEY DORSEY, BIOLOGICAL BROTHER OF OF DENZEL DORSEY

Per your request, this is to inform you that this investigator interviewed Mr. Davey Dorsey. Mr. Davey Dorsey stated the following:

DAVEY DORSEY
DOB: 06/27/1999
2137 East St. Louis
Las Vegas, Nevada 89104
(323) 915-3638

That he will make himself available to the lawyer of Denzel Dorsey and the prosecutor.

That, on or about 11/28/2016, he was 17 years old.

That he is the younger biological brother of Denzel Dorsey.

That, on or about 11/27/2016, he asked Denzel Dorsey if he could please borrow Denzel Dorsey's car rental.

That he received the keys to the car rental on 11/27/2016 in the

afternoon hours.

That he was supposed to have the vehicle to go hangout with a female friend.

That his brother, Denzel Dorsey, had no knowledge about him planning to rob a house.

That, on 11/28/2016, he (Davey Dorsey) did drive to the 2731 Warm Rays Ave. and tried to break into the house.

That he was the one who broke the window and tried to OPEN the front door of the house.

That, after the incident, he ended up driving to where his brother, Denzel Dorsey, was at.

That he never told his brother, Denzel Dorsey, that he had just tried to rob a house.

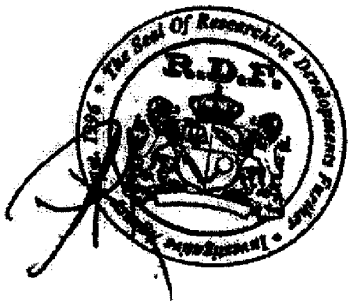
That, after he picked up Denzel Dorsey, Denzel Dorsey and himself drove to Lindell Street.

That he (Davey Dorsey) got out of the car at his sister's house.

That he is referring to Ramika's house.

That Ramika's house was somewhere on Teneya.

That he (Davey Dorsey) is more than willing to take responsibility



for this attempt home invasion.

That he (Davey Dorsey) is more than willing to sign an affidavit or a sworn declaration.

That Denzel Dorsey had NOTHING to do with both the preplanning and the actual attempted home invasion.

That he is specifically talking about the house located at 2731 Warm Rays Ave., Henderson, Nevada 89052.

That he is very sorry for what he did.

That he is coming forward to report the truth regarding 11/28/2016 under HNPD Police Event #16-21448-001.

That Denzel Dorsey is innocent of these criminal charges.

That he (Davey Dorsey) tried to reach out to Denzel Dorsey's female attorney.

That he actually went to the courthouse.

That Denzel Dorsey's female attorney was very rude to him (Davey Dorsey) and she kept telling him that she did not have time for him.

That he wanted to inform the female lawyer that it was him (Davey Dorsey) the one that committed the attempt home invasion on 11/28/2016.

That the female attorney of Denzel Dorsey would not give him 2 minutes of her time.

/////

If you have any questions, please call this investigator at (702) 696-9701 and/or e-mail me at RDFINVESTIGATIVE@AOL.COM. Thank you.

EXHIBIT "B"

GARY MODAFFERI, ESQ.
Nevada Bar No. 012450
LAW OFFICE OF GARY MODAFFERI
815 S. Casino Center Blvd.,
Las Vegas, Nevada 89101
(702) 474-4222
Attorney for Defendant
DENZEL DORSEY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, -vs- DENZEL DORSEY, ID# 02845569 Defendant.	)	CASE NO.: C-17-323324-1 DEPT. NO.: 22

DECLARATION

TAKIYA KEYSHA CLEMONS makes the following declaration:

1. That I have full knowledge of all matters contained herein and am competent to testify thereto.

2. That my date of birth is: 2/25/1995

3. That my current address is 2645 Donna Street, Apt. D North Las Vegas, Nevada 89030

4. That, on or about 11/27/2016, I was living with a female friend by the name of Aisha Jones.

5. That Aisha Jones used to live on Viking Street, Las Vegas, Nevada.

6. That Aisha Jones lived in an apartment complex on Viking Street.

TC

7. That, on 11/27/2016, I was at Aisha Jones's apartment.

8. That, on or about both 11/27/2016 and 11/28/2016, I was dating Denzel Dorsey.

9. That I had been dating Denzel Dorsey for four (4) years prior to 11/27/2016.

10. That, on 11/27/2016, I was OFF from work.

11. That, due to the fact that I was OFF from work, Denzel Dorsey drove to my apartment and decided to stay the night to be with me.

12. That, at some point during the evening PM hours on 11/27/2016, Davey Dorsey came over to my apartment to borrow the car rental.

13. That, on 11/27/2016, I physically saw and witnessed Denzel Dorsey hand over the keys to his car rental to his younger brother, Davey Dorsey.

14. That Denzel Dorsey stayed the night at my apartment.

15. That Denzel and I, hung out, watched Netflix, and had some drinks.

16. That Denzel Dorsey fell asleep with me in the living room on a sofa.

17. That Denzel Dorsey was with me the entire night.

18. That, on 11/28/2016, Denzel and I woke up late.

19. That Denzel Dorsey and I were looking for an apartment to rent on my iPhone.

20. That sometime between 1:00 PM and 2:00 PM, Davey Dorsey came back to my apartment.

21. That Denzel Dorsey left with Davey Dorsey.

T.C

22. That Denzel Dorsey was with me all night long on 11/27/2016 through 11/28/2016 at 1:00 PM.

23. That, at some point after 1:00 PM on 11/28/2016, Denzel Dorsey left with Davey Dorsey.

24. That I fully understand what an alibi witness is.

25. That Denzel Dorsey was with me on 11/28/2016 at 11:55 AM.

26. That the above is the honest-to-God truth.

27. That I have no problem testifying to the above information before a Judge and jury.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. (NRS 53.045).

EXECUTED this 12 day of FEBRUARY, 2019.

Takiya K Clemons

TAKIYA KEYSHA CLEMONS
2645 Donna Street, Apartment #D
North Las Vegas, Nevada 89030
(702) 684-3063
Takiya225clemons@gmail.com

EXHIBIT "C"

HENDERSON POLICE
223 LEAD ST
HENDERSON, NEVADA 89015

Incident Number: 16-21448

Narratives

ENTERED DATE/TIME: 11/28/2016 12:17:00
NARRATIVE TYPE: INCIDENT
SUBJECT: FBR NARRATIVE
AUTHOR: ROUNDY, TRAVIS

On 11-28-16, at approximately 1200 hours, I, Officer T. Roundy #714, was dispatched to 2731 Warm Rays Avenue, in reference to an attempted burglary.

On arrival, I made contact with the homeowner, Kevin M. Nazareno (DOB 6-14-95).

Kevin stated he was upstairs in his bedroom when he heard his doorbell ringing at approximately 1155 hours.

Kevin stated the doorbell was continuously ringing, until he came downstairs and saw a black male standing beyond the front door, through the large glass window. Kevin stated he then saw the black male punch his fist through glass door window, making a fist size hole.

Kevin stated the black male reached his arm (possibly left arm) through the hole and unlock the front door dead bolt from the inside.

Kevin stated he immediately ran to the front door and locked the dead bolt, at which time the black male realized someone was home, and fled to the street.

Kevin then unlocked the dead bolt, ran out to the front of his house, and watched the black male get into a blue Suzuki sedan, which was parked in front of the house, facing southbound. Kevin stood behind the vehicle, and read the Nevada license plate of, "953LGM."

Kevin stated the black male sped away, southbound, then made a U-turn, and sped back down Warm Rays Avenue, northbound, past Kevin who was still standing on the curb.

Kevin stated he could see into the vehicle, and the black male appeared to be the only occupant.

Kevin stated he then called 9-1-1.

Kevin described the black male as being between 25 and 30 years old. Kevin stated he cannot remember the clothing, but stated the black male was medium build, being approximately 6-01, and 190 pounds. Kevin stated he cannot remember if the black male was wearing gloves or not. Kevin stated he does not know the black male, and has never seen him before.

I observed the front door glass to have a fist sized hole in it. I could see the shattered glass, but could not observe any blood.

EXHIBIT "D"

Henderson Police Department

223 Lead St. Henderson, NV 89015

Booking Custody Record

ENTERED LLS

DR NUMBER	FH NUMBER	MNI NUMBER	SUBJECT NAME	ARREST DATE	ARREST TIME
1521448	16		DORSEY, DENZEL	11/28/2016	1404

LOCATION OF CRIME	INTERSECTION	AT LOCATION
2731 Warm Rays Avenue Henderson Nevada 89052		☐

LOCATION OF ARREST	INTERSECTION	AT LOCATION
3200 South Las Vegas Boulevard Las Vegas Nevada 89109		☐

☐ INTERPRETOR NEEDED	☐ SUBJECT COMBATITIVE	☐ SUBJECT SUICIDAL	☐ ASK SUBJECT IF INJURED	INTAKE OFC INITIAL/P#
☑ MIRANDA GIVEN	☐ MIRANDA WAIVED	☑ MIRANDA INVOKED		

MIRANDA	DATE 11/28/2016	TIME 1404	GIVEN BY M. Pitz

PERSON 1	PERSON NAME (LAST, FIRST, MID., SUFFIX)	SSN	D.O.B.	AGE
	DORSEY, DENZEL	620-86-5406	09/24/1993	23

PERSON ADDRESS	HGT	WGT	HAIR	EYES	RACE	GENDER
5101 East Twain Boulevard Las Vegas Nevada	5'9"	165	Black	Brown	Black	Male

HOME PHONE	CELL PHONE	BUSINESS PHONE	OTHER PHONE	PLACE OF BIRTH
				Las Vegas, Californi

ALIAS	ALIAS (LASTNAME/MONIKER, FIRST, MIDDLE)

VIOLATION 1	STATUTE	CLASS	NOC CODE	COUNTS
	205.067.2	Felony	50436	1

DESCRIPTION	
HOME INVASION, (2+)	

PCN NUMBER	WARRANT NUMBER

VIOLATION 2	STATUTE	CLASS	NOC CODE	COUNTS
	206.310	Gross Misdemeanor	58905	1

DESCRIPTION	
DESTROY PROP OF ANOTHER, $250 - $5K	

PCN NUMBER	WARRANT NUMBER

P AND P			
☐ DRINKING VIOLATION	☐ CONTACT WITH VICTIM	☐ IN GAMING ESTABLISHMENT	☐ CONTACT WITH GANG MEMBER
☐ CONTACT WITH CHILDREN	☐ DRIVING VIOLATION	☐ CONTACT WITH CO-OFFENDER	

ARRESTING OFFICER	P NUMBER	TRANSPORTING OFFICER	P NUMBER
McGeahy, James	HP1411	Ashcroft, Jonathan	HP1551

Incident Report

HENDERSON POLICE
223 LEAD ST
HENDERSON, NEVADA 89015

Incident Number: 16-21448-001

Persons Involved

Person#: 0002 **MNI:** 782687 **Can ID Suspect:** No
Event Association: ARRESTED **Contact Date/Time:** 11/28/2016 13:50
Name: DORSEY, DENZEL RONALD
SSN: [redacted] **DOB:** 09/24/1993 **Age:** 23 - 23 **Sex:** MALE **Race:** BLACK
Height: 5' 9" - 5' 9" **Weight:** 165 - 165 lbs **Eye Color:** BROWN **Hair Color:** BLACK
Address: 5101 E TWAIN BLVD, LAS VEGAS, NEVADA **Sector/Beat:**
Phone Type 1: HOME **Phone# 1:** (661) 502-4535 **Ext 1:**
Phone Type 2: CELL/MOBILE **Phone# 2:** (702) 768-3354 **Ext 2:**
DL State: CALIFORNIA **DL#:** **DL Exp. Date:**
Occupation: HAIRDRESSER **Employer/School:** SELF

Person Offenses

Statute Code: 205.067.2 **Enhancers:**
Statute Desc: HOME INVASION, (2+) -INACTIVE 02/2017
Counts: 1
Statute Code: 206.310 **Enhancers:**
Statute Desc: DESTROY PROP OF ANOTHER, $250 - $5K
Counts: 1

Person#: 0003 **MNI:** 1006339 **Can ID Suspect:** No
Event Association: CONTACT **Contact Date/Time:** 11/28/2016 13:50
Name: VELASCO, JOEL
SSN: [redacted] **DOB:** 09/20/1987 **Age:** 29 - 29 **Sex:** MALE **Race:** BLACK
Height: 6' 1" - 6' 1" **Weight:** 185 - 185 lbs **Eye Color:** BROWN **Hair Color:** BLACK
Address: 700 LAS VEGAS, APT: 4307, LAS VEGAS, NEVADA 89101 **Sector/Beat:**
Phone Type 1: **Phone# 1:** **Ext 1:**
Phone Type 2: **Phone# 2:** **Ext 2:**
DL State: **DL#:** **DL Exp. Date:**
Occupation: **Employer/School:**

Person#: 0004 **MNI:** 1006340 **Can ID Suspect:** No
Event Association: CONTACT **Contact Date/Time:** 11/29/2016 13:00
Name: POWELL, MARQUISHA A
SSN: **DOB:** **Age:** - **Sex:** FEMALE **Race:** BLACK
Height: 5' 9" - 5' 9" **Weight:** 0 - 0 lbs **Eye Color:** BROWN **Hair Color:** BLACK
Address: 5101 E TWAIN, NEVADA 89169 **Sector/Beat:**
Phone Type 1: CELL/MOBILE **Phone# 1:** (702) 902-9931 **Ext 1:**
Phone Type 2: **Phone# 2:** **Ext 2:**
DL State: NEVADA **DL#:** 0204459100 **DL Exp. Date:**
Occupation: **Employer/School:**

EXHIBIT "E"

16-21440

Vehicle History

10 BLUE SX4 9S3LGM

Date & Time	Event	Location	Speed	Duration
01:57 PM 11/28/2016	Response: Locate		0	
01:57 PM 11/28/2016	Attempt: Locate	3286-3448 Industrial Rd, Paradise, NV, 89109	11	
01:51 PM 11/28/2016	Travel Start	3286-3449 Industrial Rd, Paradise, NV, 89109	11	
01:50 PM 11/28/2016	Stop	Dio Dr, Paradise, NV	0	1 Minute
01:49 PM 11/28/2016	Drive	Dio Dr, Paradise, NV	0	
01:46 PM 11/28/2016	Response: Locate	Fashion la, Paradise, NV	7	
01:46 PM 11/28/2016	Attempt: Locate	3231-3299 Las Vegas Blvd S, Paradise, NV, 89109	0	
01:44 PM 11/28/2016	Drive	3231-3299 Las Vegas Blvd S, Paradise, NV, 89109	0	
01:43 PM 11/28/2016	Response: Locate	Fashion Show Dr, Paradise, NV, 89109	16	
01:42 PM 11/28/2016	Attempt: Locate	W Twain Ave, Paradise, NV	33	
01:39 PM 11/28/2016	Drive	W Twain Ave, Paradise, NV	33	
01:38 PM 11/28/2016	Response: Locate		0	
01:36 PM 11/28/2016	Attempt: Locate	3800-3911 W Twain Ave, Paradise, NV, 89103	33	
01:37 PM 11/28/2016	Response: Locate	3800-3911 W Twain Ave, Paradise, NV, 89103	33	
01:37 PM 11/28/2016	Attempt: Locate	4328-4361 W Twain Ave, Paradise, NV, 89103	27	
01:36 PM 11/28/2016	Response: Locate	4328-4361 W Twain Ave, Paradise, NV, 89103	27	
01:35 PM 11/28/2016	Attempt: Locate	5001-5125 Cantaro Dr, Spring Valley, NV, 89103	13	
01:29 PM 11/28/2016	Drive	5001-5125 Cantaro Dr, Spring Valley, NV, 89103	13	
01:24 PM 11/28/2016	Drive	3700-3748 S Greenwood Dr, Spring Valley, NV, 89103	3	
01:21 PM 11/28/2016	Response: Locate		12	
01:21 PM 11/28/2016	Attempt: Locate	3700-3748 S Greenwood Dr, Spring Valley, NV, 89103	23	
01:19 PM 11/28/2016	Drive	3700-3748 S Greenwood Dr, Spring Valley, NV, 89103	23	
01:14 PM 11/28/2016	Drive	7261-7309 W Sequoia Springs Dr, Spring Valley, NV, 89147	15	
01:09 PM 11/28/2016	Drive	7100-7288 Spring Mountain Rd, Spring Valley, NV, 89117	27	
01:04 PM 11/28/2016	Drive	3600-3698 S Maryse Dr, Spring Valley, NV, 89103	0	
12:59 PM 11/28/2016	Drive	6801-6898 Pateyon Rd, Spring Valley, NV, 89146	22	

16-21448

12:54 PM 11/28/2016	Travel Start	6435-6499 W Desert Inn Rd, Spring Valley, NV, 89146	37		
12:53 PM 11/28/2016	Stop	3300-3499 S Remuda Trl, Spring Valley, NV, 89146	0	1 Minute	
12:53 PM 11/28/2016	Drive	3300-3499 S Remuda Trl, Spring Valley, NV, 89146	0		
12:48 PM 11/28/2016	Drive	6801-6999 W Desert Inn Rd, Spring Valley, NV, 89146	26		
12:43 PM 11/28/2016	Travel Start	3666-3898 Red Rock St, Spring Valley, NV, 89103	17		
12:39 PM 11/28/2016	Stop	6801-6899 W Viking Rd, Spring Valley, NV, 89103	0	3 Minutes	
12:39 PM 11/28/2016	Drive	6801-6899 W Viking Rd, Spring Valley, NV, 89103	0		
12:34 PM 11/28/2016	Travel Start	5801-5879 W Kelly Ave, Spring Valley, NV, 89103	19		
12:31 PM 11/28/2016	Stop	3800-3850 S Lindell Rd, Spring Valley, NV, 89103	0	3 Minutes	
12:28 PM 11/28/2016	Travel Start	3898-3936 S Spitze Dr, Spring Valley, NV, 89103	18		
12:23 PM 11/28/2016	Stop	3938-3980 S Spitze Dr, Spring Valley, NV, 89103	0	3 Minutes	
12:21 PM 11/28/2016	Drive	3938-3980 S Spitze Dr, Spring Valley, NV, 89103	0		
12:16 PM 11/28/2016	Drive	6524-6598 S Decatur Blvd, Paradise, NV, 89118	64		
12:11 PM 11/28/2016	Drive	Enterprise, NV	37		
12:06 PM 11/28/2016	Drive	I- 215, Paradise, NV	67		
12:01 PM 11/28/2016	Drive	10900-10932 S Eastern Ave, Henderson, NV, 89052	30		
11:56 AM 11/28/2016	Travel Start	2716-2760 Warm Rays Ave, Henderson, NV, 89052	13		
11:52 AM 11/28/2016	Stop	2727-2788 Warm Rays Ave, Henderson, NV, 89052	0	4 Minutes	
11:48 AM 11/28/2016	Drive	2708-2700 Thomasville Ave, Henderson, NV, 89052	15		
11:43 AM 11/28/2016	Drive	Henderson, NV	7		
11:38 AM 11/28/2016	Travel Start	2677-2699 W Horizon Ridge Pkwy, Henderson, NV, 89052	16		
11:29 AM 11/28/2016	Stop	2677-2699 W Horizon Ridge Pkwy, Henderson, NV, 89052	0	9 Minutes	
11:26 AM 11/28/2016	Drive	10534-10598 S Eastern Ave, Henderson, NV, 89052	21		
11:21 AM 11/28/2016	Drive	2605-2699 St Rose Pkwy, Henderson, NV, 89074	0		
11:16 AM 11/28/2016	Drive	10300-10832 S Eastern Ave, Henderson, NV, 89052	6		
11:11 AM 11/28/2016	Travel Start	11244-12078 Sunridge Heights Pkwy, Henderson, NV, 89052	33		
11:10 AM 11/28/2016	Stop	Henderson, NV	0		
11:07 AM 11/28/2016	Drive	Sunridge Heights Pkwy, Henderson, NV	61		
11:02 AM 11/28/2016	Drive	10534-10598 S Eastern Ave, Henderson, NV, 89052	41		
10:57 AM 11/28/2016	Drive	2605-2699 St Rose Pkwy, Henderson, NV, 89074	0		
10:52 AM 11/28/2016	Drive	6348-6178 I- 215, Henderson, NV, 89014	51		

16-21448

10:47 AM 11/28/2016	Drive	I- 515, Henderson, NV	71		
10:42 AM 11/28/2016	Drive	3883-3901 Boulder Hwy, Sunrise Manor, NV, 89121	0		
10:37 AM 11/28/2016	Drive	I- 515, Paradise, NV	70		
10:32 AM 11/28/2016	Drive	601-799 Marks St, Henderson, NV, 89014	20		
10:27 AM 11/28/2016	Drive	I- 515, Paradise, NV	82		
10:22 AM 11/28/2016	Travel Start	1-99 Boulder Hwy, Paradise, NV, 03812	10		
10:20 AM 11/28/2016	Stop	4006-4098 S Nellis Blvd, Sunrise Manor, NV, 89121	0	1 Minute	
10:19 AM 11/28/2016	Drive	4006-4098 S Nellis Blvd, Sunrise Manor, NV, 89121	0		
10:14 AM 11/28/2016	Drive	3518-4098 E Flamingo Rd, Paradise, NV, 89121	0		
10:09 AM 11/28/2016	Drive	I- 515, Sunrise Manor, NV	1		
10:04 AM 11/28/2016	Drive	4810-4830 E Flamingo Rd, Paradise, NV, 89121	0		
09:59 AM 11/28/2016	Travel Start	1-99 Boulder Hwy, Paradise, NV, 03812	13		
09:58 AM 11/28/2016	Stop	4006-4098 S Nellis Blvd, Sunrise Manor, NV, 89121	0	3 Minutes	
09:53 AM 11/28/2016	Drive	1-99 Boulder Hwy, Paradise, NV, 03812	10		
09:49 AM 11/28/2016	Travel Start	6398-6301 Tradition, Sunrise Manor, NV, 89122	6		
09:44 AM 11/28/2016	Drive	6399-6301 Tradition, Sunrise Manor, NV, 89122	17		
09:39 AM 11/28/2016	Drive	4134-4298 Cutrel St, Sunrise Manor, NV, 89122	1		
09:34 AM 11/28/2016	Drive	4249-4201 Camino St, Sunrise Manor, NV, 89122	14		
09:29 AM 11/28/2016	Drive	6680-6924 Naturia Dr, Whitney, NV, 89122	14		
09:24 AM 11/28/2016	Drive	6196-6998 E Tropicana Ave, Whitney, NV, 89122	23		
09:19 AM 11/28/2016	Drive	4581-4598 Stephanie St, Whitney, NV, 89122	19		
09:14 AM 11/28/2016	Drive	5530-5598 E Flamingo Rd, Sunrise Manor, NV, 89122	33		
09:09 AM 11/28/2016	Drive	4932-4998 E Plaza del Sol Dr, Paradise, NV, 89121	1		
09:04 AM 11/28/2016	Drive	4178-4198 E Flamingo Rd, Paradise, NV, 89121	48		
08:59 AM 11/28/2016	Travel Start	2838-2898 E Flamingo Rd, Paradise, NV, 89121	41		
08:58 AM 11/28/2016	Stop	2860-2798 E Flamingo Rd, Paradise, NV, 89121	0	1 Minute	
08:54 AM 11/28/2016	Drive	2400-2498 E Flamingo Rd, Paradise, NV, 89121	32		
08:44 AM 11/28/2016	Drive	Las Vegas, NV	65		
08:39 AM 11/28/2016	Travel Start	1201-1283 S Charnest Ln, Las Vegas, NV, 89102	22		
08:37 AM 11/28/2016	Stop	1201-1283 S Charnest Ln, Las Vegas, NV, 89102	0	2 Minutes	
08:35 AM 11/28/2016	Drive	1201-1283 S Charnest Ln, Las Vegas, NV, 89102	0		

EXHIBIT "F"

Electronically Filed
6/6/2018 2:52 PM
Steven D. Grierson
CLERK OF THE COURT

19

Denzel Dorsey
#2845569, CCDC, NVC
330 S. Casino Center Blvd
Las Vegas, Nevada 89101

MC
DA
PP
ADR-
Caitlyn McAmis

District Court
Clark County, Nevada

The State Of Nevada
Plaintiff,-

-vs-

Denzel Dorsey #2845569
Defendant,

Case NO: #C-17-323324-1
Dept NO # 22 XXII

Date: 06/28/18 Time: 9:00 AM

Motion TO WITHDRAW PLEA

Comes Now, defendant, Denzel Dorsey, in Pro Se, moves this Honorable Court for a Motion TO WITHDRAW PLEA. This motion is made and based upon all papers, pleadings and documents on file with the Clerk of the Court, the points and authorites, and the argument Contained Therein.

Dated this 27 day of May 2018

Respectfully Submitted
Denzel Dorsey #2845569

IN Pro Se, CCDC, NVC
330 S. CASINO Center Blvd
Las Vegas, Nevada 89101

RECEIVED
JUN 06 2018
CLERK OF THE COURT

RECEIVED
MAY 30 2018
CLERK OF THE COURT

Points and Authorities
Argument

In this case, defendant, was appointed counsel and counsel ignored defendants request to reasonably investigate, and now defendant asserts that his guilty plea was not knowingly, voluntarily, and intelligently entered because counsel led him to believe his case was indefensible **Strickland v. Washington.**

Defendant has explained his favorable facts in which counsel ignored the defendant request to investigate, wherein counsel told the defendant that because of his extensive criminal history and since there was drugs in the vechicle, the jury would shame upon him, that the defendant was to lose his trial and became convicted under the habitual criminal act. regardless of the defendants favorable facts that now I submit to rise. The defendant was advised by counsel to take the states plea offer or there would be no other deal but to become habitualize under a 5-20 year sentence. **Cripps v. State.**

The defendant was also expecting his first child to be born at the time he had entered the guilty plea, wherein counsel has told the defendant that the only way to get rid of this to move on with life and to see his first child be born, was to sign the plea agreement with the stipulation that the defendant was to remain out of custody, that his bail was to be reinstated in this case and get an OR in case NO. 17F21598X for dismissal after rendition of sentence. The defendant

(2)

ask his counsel to had put a motion to adjust his custody status wherein counsel said that the defendant wouldn't get a bail and the only way was to sign the plea agreement. The defendant told counsel that he may have a fugitive detainer in the state of California, wherein counsel stated that he would be released within 30 days from the state of Nevada's custody upon entering the plea agreement. The defendant has not seen his relief in being released from Nevada's custody, wherein now the state has placed a informal hold on the defendant until the full resolution of local charges, which the defendant has entered the plea with the knowledge of promise that he was to remain out of custody until sentencing as told by counsel.

Crawford v. State

Therefore, counsel was ineffective for failing to reasonably investigate, failing to explain the strength and weaknesses of the evidence, failing to inform him of the consequences of the plea, failing to provide an adequate defense and failing to ensure defendant understood the sentencing scheme.

Wherefore with the defendants belief that he had no viable defense and therefore no choice than to accept the states plea bargin, and that there is new evidence that could relieve the defendant of guilt and persecution, the defendant moves to submit his declarations and withdraw his plea addressing NRS 176.165.

Declarations by:
Denzel Dorsey

I, Denzel Dorsey, Herby STate:

1.) THAT The true suspect Davey Dorsey has given his confession through an affidavit which relieves defendant of guilt and persecution in this case

2.) THAT I am A 5'9 165 LB Black Male which the true suspect is about 6'1 195 LB and is also a Black male which positively identifies him as the true suspect given by victim in this case.

3.) That the victim never positively identifies the defendant within his Court proceedings.

4.) That after the Occurance of incident the Vechicle (953L bM) made two seperate stop (1) S. Lindell St, which where the defendant were present, and (2) Viking St, which the defendant droped True suspect off without Knowledge of the incident that occurred previously.

5.) Defendant were present on the block of Rochelle/S. Lindell AT the time of the incident

6.) I AM A Layman Not trained in Law.

7.) MY Full NAme IS Denzel Dorsey; Date of Birth 09/24/93; SOCIAL SOcurity #620685408

I, Denzel Dorsey State that the fore mentioned declarations is true to be factual to the best of my knowledge under the penalty of perjury

Dated this 27 day of May 2018

#2845569

DENZEL DORSEY

(4)

Certificate Of service By mailing

I, Denzel Dorsey, do declare pursuant to N.R.C.P 5(b) that on the 27 day of May 2019 I sent a copy of Motion TO WITHDRAW PLEA, AND NOTICE of motion TO;

The Clerk of the court
Regional Justice Center
200 Lewis Avenue
LAS vegas, Nevada 89101

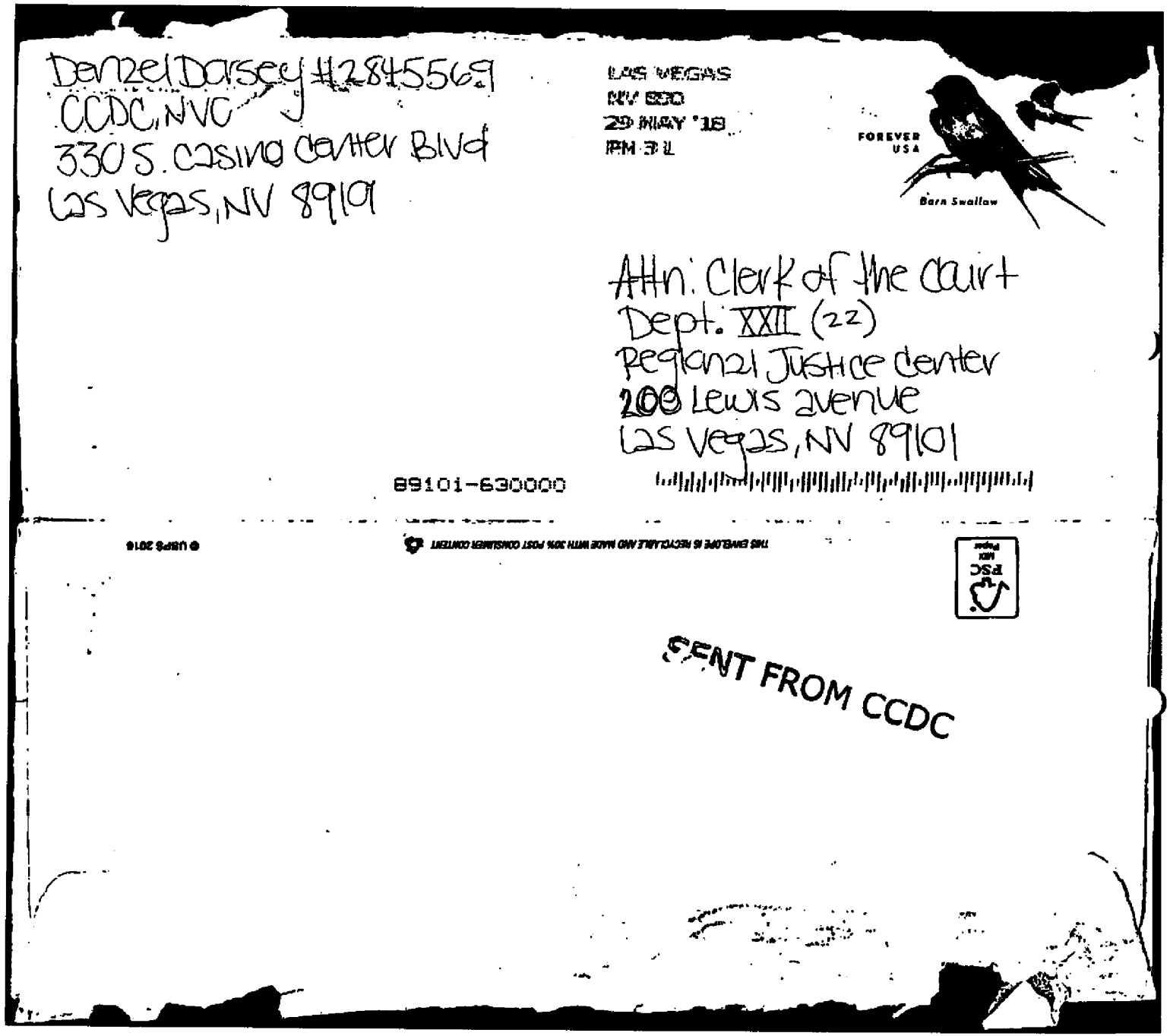
Steven Wolfson
DISTRICT ATTORNEY
200 Lewis Avenue
LAS Vegas, Nevada 89101

KRISTINA WILDEVELD, Esq. [Caitlyn McAMIS]
ATTORNEY AT LAW [court appointed]
550 E. CHARLESTON Blvd suite A
LAS vegas, Nevada 89104

Dated this 27 day of May 2019

Respectfully Submitted
DENZEL DORSEY
#2845569
In PRO SE, CCDC, NVC
330 S. CASINO Center Blvd
LAS vegas, Nevada 89101

(5)


Demzel Darsey #2845569
CCDC, NVC
330 S. Casino Center Blvd
Las Vegas, NV 89101
LAS VEGAS
NV 890
29 MAY '18
PM 3 L
FOREVER
USA
Barn Swallow
Attn: Clerk of the Court
Dept. XXII (22)
Regional Justice Center
200 Lewis avenue
Las Vegas, NV 89101
89101-630000
SENT FROM CCDC

Electronically Filed
6/6/2018 2:52 PM
Steven D. Grierson
CLERK OF THE COURT

19

MC
DA
PP
AOR
Caitlyn McAmis

DENZEL DORSEY
#2845569, CCDC, NVC
330 S. Casino Center Blvd.
LAS Vegas, Nevada 89101

DISTRICT COURT
Clark County, Nevada

The State of Nevada
Plaintiff

-VS-
#2845569

Denzel Dorsey
Defendant

Case No.# C-17-323324-1
Dept. No.# 22 ~~XXII~~

Date: 06/28/18 Time: 9:00 AM

Motion To Dismiss Counsel

Comes Now, defendant, Denzel Dorsey, in Pro Se, moves this Honorable Court for a Motion To Dismiss Counsel, This motion is made and based upon all papers, pleadings, and documents on file with the clerk of the Court. The Points and Authorities, and the argument Contained therein,

Dated this 27 day of MAY 2018

Respectfully Submitted
Denzel Dorsey #2845569

In Pro Se, CCDC NVC
330 S Casino Center Blvd
Las Vegas, Nevada 89101

RECEIVED
JUN 06 2018
CLERK OF THE COURT

RECEIVED
MAY 31 2018
CLERK OF THE COURT

Case Number: C-17-323324-1

Points AND Authorities

Argument

Nev. Rev. Stat. 7.055 provides that:

> An Attorney who has been discharged by his client shall, upon demand... immediately deliver to the Client all papers, documents, Pleadings and items of tangible personal property which belong to or were prepared for that client

In this case, defendant was appointed counsel, and Counsel simply not filing the requested Presentence motion to withdraw Guilty Plea, addressing Nev. Rev. Stat. 176.165 to where the defendant can move to withdraw his plea. and also wherein Counsel has failed to comply with Rule 4(6)1-4 under the Nevada Rules of professional conduct, by failing to Carry out defendants interest in his Court Proceedings whereas Counsel(1) Not reasonably informing defendant about the status of his case matters(2) failing to Communicate with the defendant as oathed by counsel(3) mis informing defendant of Various Court Proceedings on Counsel's behalf(4) by not filing Various motions that defendant has requested

Wherefore, defendant has filed this Motion TO Dismiss Counsel to be heard, and formally requested that Counsel be Dismissed,

Certificate of Service by Mailing

I, Denzel Dorsey, do declare pursuant to N.R.C.P 5(b) that on this day 27 of May 2018 I sent A copy of Motion To Dismiss Counsel, and notice of Motion To;

The Clerk of the Court
Regional Justice Center
200 Lewis Avenue
Las Vegas, Nevada 89101

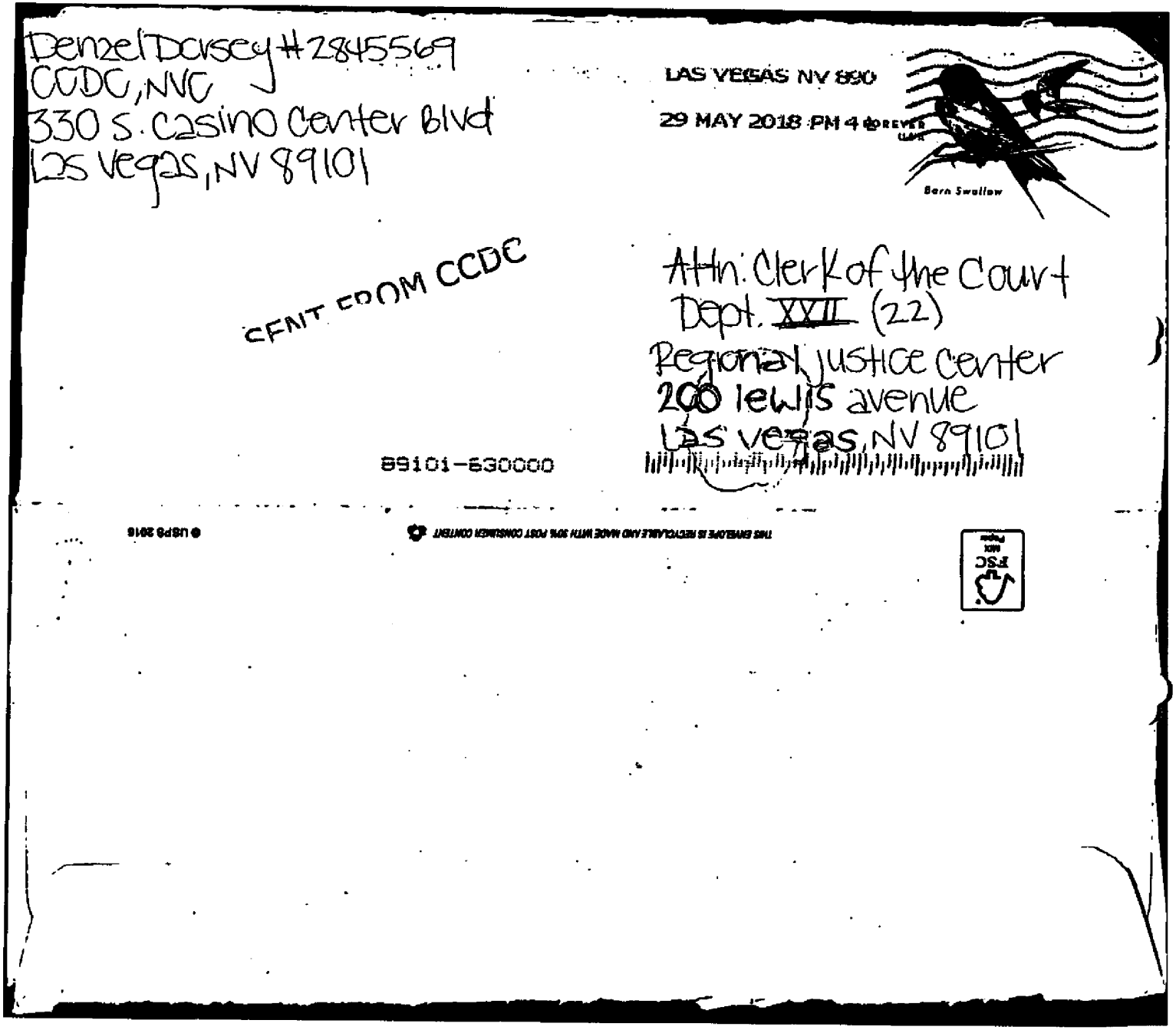
Steven Wolfson
District Attorney
200 Lewis Avenue
Las Vegas, Nevada 89101

Kristina Wildeveld, Esq.
Attorney at Law [Court appointed]
550 E. Charleston Blvd Suite A
Las Vegas, NV 89104

Dated this 27 day of May 2018

Respectfully Submitted,
Denzel Dorsey

In Pro Se, CCDC NVC
330 S. Casino Center Blvd
Las Vegas, Nevada 89101



Demzel Dorsey #2845569
CCDC, NVC
330 S. Casino Center Blvd
Las Vegas, NV 89101

LAS VEGAS NV 890
29 MAY 2018 PM 4

Born Swallow

SENT FROM CCDC

Attn: Clerk of the Court
Dept. ~~XXII~~ (22)
Regional Justice Center
200 Lewis avenue
Las Vegas, NV 89101

89101-630000

THIS ENVELOPE IS RECYCLABLE AND MADE WITH 30% POST CONSUMER CONTENT

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FSC
MIX
Paper

EXHIBIT "6"

Electronically Filed
8/6/2019 11:58 AM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

v.

DENZEL DORSEY,

Defendant.

CASE NO.: C-17-323324-1
DEPT NO.: XV

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

This matter came on for an evidentiary hearing on May 28, 2019, and July 11, 2019, Defendant Denzel Dorsey ("Defendant") was present in custody, represented by counsel, Gary A. Modafferi. Plaintiff State of Nevada ("State") represented by Steven B. Wolfson, Clark County District Attorney, through Sandra K. Digiacomo, Chief Deputy District Attorney. The Court having considered Defendant's moving papers, the opposition, the transcript of Defendant's plea canvass, the written Guilty Plea Agreement ("GPA"), the arguments of counsel, the jail calls, as well as the sworn testimony of the witnesses hereby denies Defendant's Motion to Withdraw Guilty Plea.

I. STATEMENT OF FACTS

On November 28, 2016, Kevin Nazareno ("Kevin") lived at 2731 Warm Rays in Henderson, Clark County, Nevada with his parents, Florentino and Norma Nazareno ("Norma"), who own the residence. *See* Preliminary Hearing Transcript ("PHT") at 4:16–5:6. On that date, Kevin was asleep in his bed when he was awoken by the sound of the front doorbell ringing constantly, as someone kept pushing the doorbell multiple times, would stop and then would press the button again multiple times. *Id.* at 5:12–6:10. Annoyed someone was ringing the doorbell that much; Kevin got out of bed and went to the front door. *Id.* at 6:13–22. The front doors were glass and as Kevin looked over the stair railing from upstairs, Kevin could see a single African American male standing outside the front door punching the glass with his fist. *Id.* at 6:23–7:14. Kevin could also hear banging on the door itself. *Id.* at 7:20–22. Kevin saw the glass on the front door break, which left a round hole with

jagged edges. *Id.* at 8:1–8:24. Kevin stated that an African American male reached through the hole in the glass to unlock the deadbolt with his left hand. *Id.* at 9:3–10. He also stated that the male was wearing a jacket or clothing on his arm. *Id.* at 16:10–19. Kevin rushed forward to the door, grabbed the deadbolt and kept it locked. *Id.* at 9:11–19. At this time, the male realized someone was home and took his arm out of the glass and ran away. *Id.* at 9:23–25.

Kevin went outside of the house and chased after the male. *Id.* at 10:5–6. Kevin saw the male get into a blue Suzuki, four door, on the driver's side. *Id.* at 10:7–20. Kevin was able to obtain the license plate, 953LGM, before the male drove away. *Id.* Kevin did not observe anyone else in the vehicle. *Id.* at 11:9–10. The male had the keys to the vehicle and started the ignition. *Id.* at 18:14–15. Kevin then called the police at approximately 11:55 a.m. and gave them the license plate number. *Id.* at 10:21–25.

Norma was at work on November 28, 2016, when she received a call from her husband around noon, so she rushed home. *Id.* at 21:14–16. When she arrived, she saw that the glass on her front door was broken, and that there was a big hole right by the doorknobs. *Id.* at 23:6–25. First, Norma had to pay $474.41 to have the door boarded up until the glass could be replaced. *Id.* at 24:16–25:5. Next, Norma paid $723.72 to have the glass replaced in the door. *Id.* at 25:6–8.

Officer James McGeahy ("Officer McGeahy") of the Henderson Police Department, Problem Solving Unit, was assigned this residential burglary on November 28, 2016. *Id.* at 30:18–24. He and his squad began investigating immediately. *Id.* at 31:1–5. The plate, 953LGM, was run through their database and returned to a rental car. *Id.* The rental car company was contacted and the officers learned that it was rented to a female and had a GPS equipped on it; therefore, the rental car company was able to provide officers with the exact location of the vehicle at that moment. *Id.* at 31:6–10. At that point, two officers went to the rental car company to have direct contact with the person tracking the vehicle with the GPS. *Id.* at 31:23–25.

The GPS for the vehicle showed that it was located on the street of the residential burglary, so officers wanted to make contact with the car. *Id.* at 32:11–12. Within a very short time of the residential burglary, officers made contact with the vehicle at the Fashion Show Mall. *Id.* at 32:18–19. Officers observed the vehicle in the parking garage picking up another person and then parked

the vehicle near Dillard's. *Id.* at 33:18–22. Officers contacted the vehicle and Defendant was arrested. *Id.* at 36:20–25. Officer McGeahy made contact with Defendant to let him know he was under arrest for the residential burglary at 2731 Warm Rays and noticed that the jacket Defendant was wearing had several tears on his left arm that were fresh and frayed. *Id.* at 37:2–22. Defendant also had injuries on his right hand with some dried blood and appeared to be fresh. *Id.* at 37:23–38:10. During a search incident to arrest, the key to the Suzuki rental vehicle was found in Defendant's pocket, along with one glove with some blood on it. *Id.* at 38:11–39:13. The other matching glove was found in the vehicle. *Id.* at 39:13–39:18. Both the jacket and gloves were booked into evidence. *Id.* at 40:5–9.

When Officer McGeahy told Defendant what he was being arrested for, he explained that the rental car had a GPS tracker which placed him at the location of the crime; Defendant looked down and said "ah shit." *See* Declaration of Arrest ("DOA") at 3, attached as Exhibit "4" to State's Opposition to Defendant's Motion to Withdraw Guilty Plea. The GPS records for the vehicle showed the following:

> 11:52 a.m.: the vehicle is stopped at 2727-2729 Warm Rays in Henderson for 4 minutes
> 11:56 a.m.: the vehicle started traveling
> 12:01 p.m.: the vehicle was traveling 30 mph in the 10300-10532 block of Eastern
> (north of the victim's residence by the intersection of Coronado Center and Eastern)
> 12:06 p.m.: the vehicle was traveling 67 mph on westbound I-215
> 12:11 p.m.: the vehicle was traveling 37 mph in Enterprise, NV
> 12:16 p.m.: the vehicle was traveling 54 mph near 5524-5698 S. Decatur
> 12:23 p.m.: the vehicle stopped at 3938-3980 S. Spitze Drive for 3 minutes
> 12:26 p.m.: the vehicle began traveling
> 12:31 p.m.: the vehicle stopped at 3800-3850 S. Lindell for 3 minutes
> 12:34 p.m.: the vehicle started traveling
> 12:39 p.m.: the vehicle stopped at 5801-5899 block of W. Viking for 3 minutes
> 12:43 p.m.: the vehicle started traveling
> 12:48 p.m.: the vehicle was traveling 26 mph near 5901-6099 W. Desert Inn
> 12:53 p.m.: the vehicle stopped at 3300-3498 S. Ramuda Trl for 1 minute

See Vehicle Rental Agreement and History Printout for November 28, 2016, attached as Exhibit "5" to State's Opposition to Defendant's Motion to Withdraw Guilty Plea.

The vehicle made no other stops and was on Fashion Show Drive at 1:43 p.m. and at 3231-3299 Las Vegas Boulevard South ("Fashion Show Mall") at 1:44 p.m. *Id.*

II. PROCEDURAL HISTORY

On November 28, 2016, Defendant was arrested for Attempt Invasion of the Home and Malicious Destruction of Property. Defendant was released after his arrest on a $6,000 surety bond, despite having four prior felony convictions in Nevada and California. Defendant was arraigned in justice court on December 19, 2016, and a preliminary hearing was scheduled for February 15, 2017. Because Defendant's attorney had to withdraw due to a conflict, the preliminary hearing was continued to March 30, 2017.

On February 22, 2017, the State filed an Amended Criminal Complaint charging Defendant with Invasion of the Home and Malicious Destruction of Property. On March 30, 2017, the defense moved to continue the preliminary hearing because defense counsel had had no contact with Defendant and it was reset for May 2, 2017. On May 2, 2017, the preliminary hearing was conducted; at its conclusion, Defendant was held to answer in district court on both charges.[1] Further, the State filed a Notice of Prior Burglary and/or Home Invasion Convictions and Notice of Intent to Seek Punishment as a Habitual Criminal in the Information listing Defendant's two convictions from Nevada for Attempt Burglary in case number C-12-279732-1 and Invasion of the Home in case number C-12-284308-1.

On May 15, 2017, Defendant pleaded not guilty and waived his speedy trial right. The trial was scheduled for September 11, 2017. On September 7, 2017, the defense moved for a continuance, which was not objected to by the State as it was the first trial setting. The trial was reset for December 4, 2017. On November 30, 2017, Defendant's counsel moved to withdraw due to a conflict and Defendant indicated he wished to hire private counsel; a status check was set for December 12, 2017, and continued to January 9, 2018, to see if counsel would confirm.

[1] Defendant did not present any witnesses at the preliminary hearing; *i.e.*, neither Davey Dorsey nor Takiya Clemons testified.

In December 2017, an arrest warrant for Defendant was issued in 17F21598x for Invasion of the Home, two counts of Burglary and Possession of Stolen Property. Defendant was booked on the warrant in the beginning of January 2018. On January 9, 2018, private counsel was still unable to confirm and the State moved to remand Defendant without bail for committing new crimes while out of custody in this case. The court remanded Defendant with no bail and set a status check to appoint counsel for January 16, 2018. On that date, new appointed counsel confirmed for Defendant and a trial date was scheduled for April 23, 2018.

On March 13, 2018, Defendant pleaded guilty to Invasion of the Home pursuant to a guilty plea agreement which stated, in part:

> The State will retain the right to argue. Additionally, the State agrees not to seek habitual criminal treatment. Further, the State will not oppose dismissal of Count 2 and Case No. 17F21598X after rendition of sentence. The State will not oppose standard bail after entry of plea. However, if I fail to go to the Division of Parole & Probation, fail to appear at any future court date or am arrested for any new offenses, I will stipulate to habitual criminal treatment, to the fact that I have the requisite priors and to a sentence of sixty (60) to one hundred twenty (120) months in the Nevada Department of Corrections. Additionally I agree to pay full restitution including for cases and counts dismissed. *See* GPA at 1–2.

Defendant stated during his plea canvass that he was pleading guilty on his own free will and that he committed the instant offense. *See* Reporter's Transcript of Hearing Re State's Request for Entry of Plea Filed June 14, 2018 ("RTH"), at 5–6. Pursuant to the terms of the agreement, Defendant was released on his own recognizance due to his prior bail not having been exonerated. *Id.* at 6–7. The Court also cautioned Defendant that if he failed to go to the Division of Parole and Probation, to appear at any future court date, or was arrested on any new offenses, he would serve as a habitual criminal. *Id.* at 7. A sentencing date was scheduled for July 17, 2018. *Id.*

On April 26, 2018, Defendant filed a Motion to Place on Calendar to Address Custody Status and Hold. Defendant was on parole in California at the time he committed the crimes in this case and 17F21598x; therefore, a hold was placed on him when he was arrested on the latter case. In the motion, Defendant asked to be remanded and for his sentencing date to be moved to a sooner date. The motion was heard on May 8, 2018, at which time the Court rescheduled Defendant's sentencing to June 5, 2018; however, Defendant was not remanded.

On June 5, 2018, defense counsel stated that sentencing could not proceed as Defendant wanted to withdraw his guilty plea and to dismiss her as counsel. Defendant stated he had filed the motions previously but the court indicated it had not received them. The matter was continued to June 12, 2018, for a status check regarding the motions and a new sentencing date. On June 6, 2018, Defendant filed in pro per a Motion to Dismiss Counsel and a Motion to Withdraw Plea. On June 12, 2018, the court granted Defendant's Motion to Dismiss Counsel and set another status check for confirmation of counsel for June 28, 2018. On June 28, 2018, all matters were continued to July 17, 2018. On July 3, 2018, the State filed an Opposition to Defendant's Pro Per Motion to Withdraw Plea.

On July 11, 2018, Defendant was arrested just after midnight in California for Receiving Stolen Property, as Defendant was in possession of property stolen from a residential burglary which occurred earlier on July 10, 2018. Thus, on July 17, 2018, Defendant failed to appear and a bench warrant was issued in the instant case and Defendant's Motion to Withdraw Plea was also taken off calendar. On July 24, 2018, a Motion to Quash Bench Warrant was filed by Defendant's newly retained counsel. The motion stated that Defendant was presently incarcerated in California but would make all future court dates. On July 31, 2018, defense counsel asked for the bench warrant to be quashed because Defendant could not post bail in his California case with the hold from this case. The court denied the motion finding that the bench warrant remaining in place would ensure Defendant's appearance in court subsequent to the resolution of his California case.

On November 8, 2018, Defendant appeared in custody on the bench warrant return and his counsel requested thirty days to determine the status of Defendant's cases in California but the State objected. The Court set a sentencing date for November 27, 2018. On November 27, 2018, newly retained counsel substituted in and the matter was continued to December 13, 2018. On December 13, 2018, defense counsel requested a continuance because he filed a Motion for Expert Services (Investigator) Pursuant to *Widdis* on December 5, 2018. The Motion for Expert Services was granted by the Court on January 9, 2019, in a signed order. On January 17, 2019, it was confirmed the investigator would only be working on information related to a motion to withdraw guilty plea and the sentencing date was rescheduled for February 19, 2019.

On February 15, 2019, Defendant filed a Motion to Withdraw Guilty Plea. On February 19, 2019, the sentencing date was continued to March 28, 2019, to allow the State time to file an opposition to the motion. That date was later changed by the parties and this Court to April 4, 2019. On February 21, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal and Notice of Prior Burglary and/or Home Invasion Convictions adding Defendant's two convictions from California for Burglary, 1st Degree in case number MA058464-01 and Burglary, 1st Degree in case number MA066766- 01. Also on this date, Defendant filed a Supplemental Exhibit in Support of Defendant's Motion to Withdraw Guilty Plea. The State filed an opposition on March 19, 2019.

On April 4, 2019, the Court noted that an evidentiary hearing would be necessary and scheduled the evidentiary hearing for May 13, 2019. On May 9, 2019, the evidentiary hearing was rescheduled by the Court to May 23, 2019. On May 23, 2019, Defendant was not transported. Thus, the evidentiary hearing was rescheduled to May 28, 2019.

On May 28, 2019, the Court heard sworn testimony from Defendant's brother, Davey Dorsey ("Davey"), and Defendant's girlfriend, Takiya Clemons ("Takiya"). The evidentiary hearing was continued to July 8, 2019, to accommodate the State's investigator, Officer McGeahy. On July 2, 2019, the parties agreed to continue the matter and it was rescheduled to July 11, 2019. On July 11, 2019, the Court heard testimony from Officer McGeahy. The State also presented multiple recorded jail calls made by Defendant for the Court to consider. The recorded calls were admitted without objection by the defense. Upon request by both parties, the Court considered all evidence attached to the briefs as exhibits. The Court deferred ruling and this order follows.

III. ARGUMENT

Defendant requests to withdraw his guilty plea by arguing that he is factually innocent of the charges he pled guilty to. The crux of Defendant's argument is that he entered into the plea agreement to protect his minor brother, Davey who committed the residential burglary. To support his assertion, Defendant offered written declarations from both Davey and Takiya that Defendant did not commit the residential burglary. In addition, Davey and Takiya testified at the evidentiary hearing. After reviewing all the evidence presented and under a totality of the circumstances, the

Court concludes that Defendant has not met his burden of proving by a preponderance of the evidence that a credible fair and just reason exists to withdraw his guilty plea.

Nevada Revised Statutes § 176.165 provides that a defendant who has pleaded guilty may petition the court to withdraw his plea "before sentence is imposed or imposition of sentence is suspended." NRS 176.165. A "district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just." *Stevenson v. State*, 354 P.3d 1277, 1281 (2015). When making this decision, a district court "must consider the totality of the circumstances." *Id.*

A plea of guilty is presumptively valid. *Jezierski v. State*, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. *Wynn v. State*, 96 Nev. 673, 615 P.2d 946 (1980). Therefore, the defendant seeking to withdraw a guilty plea must show good cause as to why a denial of the motion to withdraw plea constitutes an injustice. *Wynn*, 96 Nev. at 675, 615 P.2d at 947 (citing *State v. Second Judicial Dist. Court*, 85 Nev. 381, 385 (1969)).

In *Stevenson v. State*, the Nevada Supreme Court determined that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. The court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. *Stevenson*, 354 P.3d at 1281. The court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, stand by counsel's pressure to negotiate a plea, and time constraints. *Id.* As the court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of a voluntary act. *Id.* (quoting *Doe v. Woodford*, 508 F.3d 563, 570 (9th Cir. 2007)).

The court also rejected Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. *Id.* Stevenson did not move to withdraw his plea for several months. *Id.* The court made clear that one of the goals of the fair and just analysis is to allow a hastily entered plea

made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. *Id.* at 1281–82 (quoting *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991)).

The court found that considering the totality of the circumstances, it had no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. *Id.* at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the court would not allow. *Id* (quoting *United States v. Baker*, 514 F.2d 208, 222 (D.C. Cir. 1975)).

Similar to *Stevenson*, this Court, after reviewing the evidence and circumstances, determines none of the reasons presented by Defendant warrant a withdrawal of his guilty plea.

A. Defendant's plea was freely and voluntarily entered.

Because the guilty plea is assumed to be valid, Defendant had the burden of proving his plea was not entered freely and voluntarily. After reviewing the record and the totality of circumstances, the Court determines that Defendant's plea of guilty was and remains valid.

The evidence demonstrates that Defendant understood the terms of his guilty plea and the consequences of his guilty plea. On March 13, 2018, Defendant signed the GPA which states that Defendant was signing the plea agreement voluntarily, after consulting with his counsel, and was not acting under duress, coercion, or by virtue of any promise of lenience except for what is outlined in the agreement. *See* GPA at 5:12–14. Defendant's counsel, under penalty of perjury, signed the Certificate of Counsel certifying she explained to Defendant the allegations contained in the charges, the penalties for each charge and possible restitution, and certified that all pleas of guilty offered by Defendant pursuant to the agreement were consistent with the known facts. *Id.* at 6:2–18.

In addition to making the above representations by signing the GPA, Defendant was extensively and thoroughly canvassed by the district court, with Defendant's counsel present, when he entered his plea on March 13, 2018. *See* RTH at 2–6. The court asked Defendant if anyone forced him to plead guilty, and Defendant said "No, Your Honor." *Id.* at 5:3. Defendant affirmed he was

pleading guilty on his own free will. *Id.* at 5:6–7. When asked by the court, Defendant affirmed he understood the consequences of his guilty plea. RTH at 5:11–15. Before the plea was accepted, the court repeated the facts of the case, including the allegation of his illegal and forceful entry into 2731 Warm Rays Ave, and Defendant affirmed the truthfulness of those facts. *Id.* at 6:10–19.

After reviewing the transcript of the entry of plea in this matter, the Court finds that the transcript does not contain any information showing that Defendant did not enter into his plea freely and voluntarily. Defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers. The plea was voluntary, was not coerced, and was not the result of a promise of leniency. Defendant understood the consequences of his plea, and the range of punishment, and the nature of the charge, *i.e.*, the elements of the crime.

B. Defendant's new representations are belied by the record.

In *Stevenson*, the Nevada Supreme Court noted that the district court gave Stevenson considerable leeway to demonstrate how his counsel lied to or misled him, yet Stevenson struggled to articulate a cohesive response. *Stevenson*, 354 P.3d at 1281. Here, the Court gave Defendant much leeway to bring forth evidence demonstrating how his plea was not valid and that Davey committed the residential burglary. After reviewing the record and all evidence within, the Court finds that the record does not support Defendant's new representations.

Nothing to do with charges

1. The Court warned Defendant not to commit any other crimes.

During the canvass on March 13, 2018, the court explicitly warned Defendant that he stipulated to be treated as a habitual criminal if he was "arrested on any new offenses," and Defendant affirmed he understood the consequences of a new arrest. RTH at 7:11–19. On July 10, 2018, the County of Los Angeles Sheriff's Department responded to a residential burglary in Lancaster, CA. *See* County of Los Angeles Sheriff's Department Incident Report at 1, 4, attached as Exhibit "3" to State's Opposition to Defendant's Motion to Withdraw Guilty Plea. On July 11, 2018, Defendant allegedly committed several traffic violations during an attempt by Los Angeles County officers to commence a traffic stop. *Id.* at 12. During the traffic stop, Defendant allegedly gave officers two false identifications. *Id.* at 16. The officers also discovered Defendant had an outstanding misdemeanor warrant and was driving while his license was suspended or revoked. *Id.*

at 12-13. Defendant was arrested for possession of stolen property, providing false identification, and having an outstanding misdemeanor warrant. *Id.* at 12.

Because Defendant did not heed the Court's warning and was arrested, he violated the conditions of his plea agreement and bail release. Thus, Defendant could be sentenced as a habitual criminal and possibly face a longer prison sentence. It was only after Defendant violated the terms of his plea and bail release that he offered to provide evidence proving that Davey committed the residential burglary.

2. The record shows that Defendant committed the crime.

Defendant argues that he is factually innocent and that his younger brother, Davey, committed the residential burglary. The evidence, however, shows that Defendant, not Davey, committed the crime. Defendant, not Davey was arrested at Fashion Show Mall. PHT at 37–39. Despite detectives observing Defendant exit the vehicle, Defendant denied being in the car, was uncooperative, and falsely identified himself. DOA at 3. Officer McGeahy testified that Defendant had the rental car's key in his pocket, wore a jacket with fresh tears on the left sleeve, had fresh injuries with dried blood on his right hand, and a glove with blood on it was found in his pocket. PHT at 37–39. When Officer McGeahy explained that the car's GPS system tracked his rental car to the location of the crime, Defendant looked down and stated, "ah shit." DOA at 3. Because Defendant, not Davey, committed the crime, the Court concludes that Defendant has not shown good cause for why his plea should be withdrawn.

C. The Court does not find Davey credible.

The Court does not find Davey's testimony credible. During Davey's testimony, the Court observed his demeanor—he was clearly frustrated when the district attorney questioned him as to the details of the crime he allegedly committed.[2] In addition, Davey testified that Defendant was at Takiya's apartment when he asked Defendant for the rental car keys on November 27, 2016. Recorder's Transcript of Hearing Evidentiary Hearing and Defendant's Motion to Withdraw Guilty

[2] The Court notes that Davey struggled to give even basic descriptions of the locations he visited when he supposedly had the rental car including the 2731 Warm Rays Avenue. Davey stated he could not remember the locations because he was high on Xanax the morning of November 28, 2016, and he could not remember what happened that day. See EHT at 22–23.

EXHIBIT "H"

Henderson Police Department

223 Lead St. Henderson, NV 89015

Declaration of Arrest Continuation Page

DR# 1621448

FH# 16

Arrestee's Name DORSEY, DENZEL

Details of Probable Cause (Continued)

They were identified as driver Denzel Dorsey (09/24/1993) and passenger Joel Velasco (09/20/87). Both were extremely uncooperative and denied being in the car although detectives observed them exit the vehicle Both gave bogus names before being identified. Velasco had warrants out of LVMPD Jurisdiction and was ultimately arrested by LVMPD

Detectives attempted to talk with Dorsey, but again was uncooperative At 1404 hours, Det Pilz advised Dorsey of his Miranda Rights of which he stated he understood. After being asked a couple of questions, Dorsey requested a lawyer and the interview was over

I arrived on scene and advised Dorsey that I was going to charge him with Home Invasion and Damage to Property at which time Dorsey asked how. I explained to Dorsey that amongst the evidence, we had GPS locations of the vehicle placing him at the location of the crime Dorsey simply looked down and stated "Ah shit"

Dorsey was wearing a dress coat that had fresh tears on the left sleeve Dorsey's hands were dirty and had fresh cuts on his right hand. Dorsey did not have an explanation for the tears or cuts only stating that they were old

During search incident to arrest, I located the key to the Suzuki in his right pocket Also in the right pocket was a gray and white striped glove that had blood on the knuckle The blood was fresh and was for the right hand I retained the glove as evidence and it was later booked under this DR#.

I also retained Dorsey's jacket and booked it under this DR#.

Photographs were taken of Dorsey and his injuries and booked under this DR#.

A records check of Dorsey revealed an extensive criminal history including burglary, home invasion, narcotic arrests, traffic, larceny, burglary tools and obstruct. In 2012, Dorsey was convicted of Home Invasion (Case #12FN0210A)

A tow truck was requested prior to being towed back to Global Auto (per their request). An inventory of the vehicle was conducted by myself and the following was located and retained as evidence:

1 Three (3) loose white pills with 114 and H imprinted on them; later identified as methocarbamol 500mg (prescription only) muscle relaxer

2. Package of unused ziplock baggies commonly used for illegal drug sales

3 Prescription bottle for Oxycodone made out to Kyle Rossell

4. Several pieces of antique jewelry including a mismatched earrings, necklace pendants and a silver ring with clear stone.

5. Gray glove with white stripes (match to glove found on Dorsey's person)

The prescription bottle was filled on 11/23/16 for 8 pills The bottle contained 1/4 pill

Contact was made with Kyle Rossell's mother who lives near Las Palmas Entrada and Gibson, in the City of Henderson As of this report, it has not been determined how Dorsey came into possession of the prescription bottle

James McGeahy

Declarant's Name

EXHIBIT "I"

Justice Court, Las Vegas Township
Clark County, Nevada

Department: 07

Court Minutes


L008930792

17F21598X **State of Nevada vs. DORSEY, DENZEL** Lead Atty: Yi Lin Zheng

1/10/2018 8:00:00 AM Arrest Warrant Return Hearing (In Custody) Result: Matter Heard

PARTIES PRESENT:	State Of Nevada	Scarborough, Michael
	Attorney	Zheng, Yi Lin
	Defendant	DORSEY, DENZEL

Judge: Bennett-Haron, Karen P.
Court Reporter: O'Neill, Jennifer
Court Clerk: Meccia, Cherie

PROCEEDINGS

Hearings:
1/11/2018 8:00:00 AM: Motion — Canceled
1/24/2018 9:00:00 AM: Preliminary Hearing — Added

Events:

Counsel Confirms as Attorney of Record

Y. Zheng, Esq for J.Momot, Esq

Initial Appearance Completed

Advised of Charges on Criminal Complaint, Waives Reading of Criminal Complaint

Motion by Defense for an O.R. Release

objection by State - further argument by both parties - Motion denied

Oral Motion

by Defense to release the defendant on House Arrest with a bail reduction to $10,000 total - objection by State - State requests no bail or release of any kind - further argument by both parties - denied

Bail Stands - Cash or Surety *Amount: $35,000.00*

Counts: 001; 002; 003; 004 - $35,000.00/$35,000.00 Total Bail

Release Order - Court Ordered Bail AND House Arrest

Counts: 001; 002; 003; 004

Future Court Date Vacated

1/11/18 8:00 am

DISTRICT COURT

CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**January 09, 2018**

C-17-323324-1 State of Nevada
vs
Denzel Dorsey

January 09, 2018 **8:30 AM** **Status Check**

HEARD BY: Johnson, Susan **COURTROOM:** RJC Courtroom 15D

COURT CLERK: Keri Cromer

RECORDER: Norma Ramirez

REPORTER:

PARTIES PRESENT:

Brower, Keith	Attorney
Digiacomo, Sandra K.	Attorney
Dorsey, Denzel	Defendant
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Yi Zheng, Esq., also present. Ms. Zheng advised she could not confirm as counsel due to conflict and requested appointment. State requested Deft. be remanded into custody and to revoke bail. Colloquy regarding outstanding warrants and the procedural history of the case. COURT ORDERED, matter CONTINUED; Deft. REMANDED into custody, NO BAIL. Colloquy regarding contract attorneys and conflict.

CUSTODY (BOND)

CONTINUED TO 1/16/2018 - 8:30 AM

EXHIBIT "J"

SUPREME COURT OF NEVADA
OFFICE OF THE CLERK
ELIZABETH A. BROWN, CLERK
201 SOUTH CARSON STREET, SUITE 201
CARSON CITY, NEVADA 89701-4702

Telephone
(775) 684-1600

April 14, 2020

Denzel Dorsey
Inmate Id: 5899606
PO Box 86164
Terminal Annex
Los Angeles CA 90086

Re: Dorsey (Denzel) vs. State, Docket No. 79845

Dear Mr. Dorsey,

Your "Permission to Have Counsel Supplement Several Issues that was not Presented in the Docketing Statement Originally Filed Jan. 02, 2020 @ 1:39 pm" received on April 14, 2020, has been referred to me for response. Because you are represented by counsel in this appeal, your document is being returned to you, unfiled. Please contact your attorney with any further questions or concerns you may have regarding your appeal.

Sincerely,

R. Wunsch
Deputy Clerk

1 of 4

March 22, 2020
Supreme Court No: 7984
D.C. case NO: C-17-323324

Dear Terrence Jackson,

This is my 2nd letter I have written to you briefly arising to surface the suffient issues that I've found to have merit and must be risen so that I will not be further prejudiced and illegally withheld against my liberty.

I assure you that if you have done any patient case research and due diligence involving my extradinary case, you will have identified the same errors and consitutional violations that have expanded throughout the criminal proceedings leading me into a illegal wrongful conviction.

As I would like you to uphold you to the 5th issue on appeal that you have presented in my docketing statement before the Nevada Supreme Court that was Originally filed Jan 02, 2020 @ 01:39 pm, I pray that these next to fore-going issues which I'll briefly elaborate upon will find it's way anchored within my upcoming opening brief thats due to be filed as of April 13, 2020

I have also filed a petition to the Nevada Supreme Court (Dated March 20, 2020) to have permission to supplement several issues that was not presented in the docketing Statement in hope that they will be risen before the Court.

Please investigate my filed petition including the attached exhibits, all points and authorities,

and all relevant case laws therein.
These are the 8 issues... (please review petition)

I.) whether Judge abuse his discretion when he denied defendant to withdraw his guilty plea

II.) whether the District Court abuse his discretion on petitioners actual innocence claim by excluding two affidavits from Davey Dorsey (culprit) and Takiya Clemons (Alibi witness).

III.) whether the judge abused his discretion by not properly ruling under the correct standard of review involving defendants Motion to withdraw plea and evidentiary hearing pertaining to actual innocence claim — the correct standard of Murray v. Carrier rather than the more stringent Sawyer standard

IV.) whether prosecutional misconduct and a Brady violation was adduce at evidentiary hearing and pre-trial proceedings — After D.A allowed Detective McCleahy to get on the stand and indicate that pictures was taken of defendants jacket and hands having cuts and tears on them, when if the pictures was presented to the defense they would prove that there wasn't.

V.) whether Prosecutional misconduct when the D.A

filed and raised an issue of defendant record having several convictions – Other than The defendant being illegally sentenced to the habitual criminal by the circumstances surrounding it, The D.A relayed to the Courts at his evidentiary hearing on July 11, 2019 that the defendant had a long history of breaking and entering and his brother having no history therefore makes the defendant guilty because of the similarity and/or likeness of crime. Prosecutorial misconduct was utilized in a significant way that was detrimental and this information should of never been used see United States V. McDonald 620 F.2d 563.

VI.) Whether prosecuter misconduct occurred when the witness into a illegal in-court identification – During preliminary hearing the victim/witness undermined the defendant being the perpetator but then the D.A used improper conduct and remarks that were not accidental but calculated to wrongly impute guilt and an in-court identification to the defendant.

VII.) The District Court erred when the defendants Due process was violated and he was prejudiced by allowing a conflict of interest proceed – The Courts allowed attorney Yi Zhong to confirm as counsel on Case NO: 17F21598X when on January 09, 2018 in this appealing case no: C-17-323324-1

she could not confirm as counsel due to conflict. Attorney Yi Zheng then used manipulation to induce and coerced defendant into accepting a Global deal that prejudiced defendant. This was a form of trickery and deceit as she just wanted a easy $10,000 by using my 9 month pregnant girlfriend and habitual criminal to take a plea to close out her case with me. These tactics are within record.

VIII.) <u>whether cumulative error progressed into a plain error review</u>

The combination of errors in this case warrant reversal (see petition dated March 20, 2020 that I filed) and also (see Walker v. Fogliani 83 Nev 154)

This was just a briefing of the issues that I would like presented in my opening brief and the petition I filed dated March 20, 2020 is slightly elaborated more in depth than what is articulated in this letter I've sent. I am currently in the los Angeles County Jail in the State of California pending trial.

Sincerely,

Denzel Dorsey #5899606
P.O Box # 86164
Terminal Annex
Los Angeles, CA 90086

cc: Terrence M. Jackson
The Nevada Supreme Court
File

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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

Denzel Dorsey,

Petitioner,

vs.

Brian E. Williams,

Respondent,

Case No: A-21-839313-W
Department 18

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on August 11, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 23rd day of September, 2021, at the hour of

11 o'clock for further proceedings.

Dated this 12th day of August, 2021

Mary Kay Holthus

District Court Judge

FDA 2BB F8A1 D056
Mary Kay Holthus
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Denzel Dorsey, Plaintiff(s)	CASE NO: A-21-839313-W
vs.	DEPT. NO. Department 18
Brian E. Williams, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/13/2021

Denzel Dorsey
#1099468
HDSP
P.O. Box 650
Indian Springs, NV, 89070

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Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Chief Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DENZEL DORSEY,
#2845569

Defendant.

CASE NO: A-21-839313-W
C-17-323324-1

DEPT NO: XVIII

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

DATE OF HEARING: September 23, 2021
TIME OF HEARING: 11:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN NIMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Post-Conviction Petition For Writ Of Habeas Corpus.

This response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of the hearing if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On November 28, 2016, Denzel Dorsey ("Petitioner") was arrested for Attempt Invasion of the Home and Malicious Destruction of Property. On December 19, 2016, Petitioner arraigned in justice court — case number 16FH2022X. On December 19, 2016, and justice court scheduled a preliminary hearing for February 15, 2017. Preliminary hearing continued to March 30, 2017. On May 2, 2017, after the preliminary hearing, Petitioner bound over to district court.

On May 9, 2017, State charged Petitioner by way of information. State charge Petitioner with, count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435); and count two (2) Malicious Destruction of Property (Gross Misdemeanor – NRS 206.310, 193155 – NOC 50905). On May 9, 2017, State filed A Notice of Intent to Seek Punishment as a Habitual Criminal under NRS 207.010(1).

On May 15, 2017, Petitioner pled not guilty and waived his speedy trial right. District court set trial for September 11, 2017. On September 7, 2017, district court reset the trial to December 4, 2017. On November 29, 2017, Petitioner's counsel — Keith Brower — filed a Motion to Withdraw Due to Conflict. On November 30, 2017, district court granted said motion.

On January 16, 2018, Caitlyn McAmis ("McAmis") confirmed as counsel. District court reset trial to April 23, 2018. On March 13, 2018, Petitioner entered a guilty plea to count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435). Defendant signed the guilty plea agreement, which stated *inter alia* :

> The State will retain the right to argue. Additionally, the State agrees not to seek habitual criminal treatment. Further, the State will not oppose dismissal of Count 2 and Case no. 17F21598X after rendition of sentence. The State will not oppose standard bail after entry of plea. However, if I fail to go to the Division of Parole and Probation, fail to appear at any future court date or am arrested for any new offenses, I will stipulate to habitual criminal treatment, to the fact that I have the requisite priors and to a sentence of sixty (60) to one hundred fifty (150) months in the

> Nevada Department of Corrections. Additionally, I agree to pay full restitution including for cases and counts dismissed.

On March 13, 2018, pursuant to the terms of the agreement, district court released Petitioner on standard bail. District Court set sentencing for July 17, 2018. On April 26, 2018, Petitioner filed a Motion to Place on Calendar to Address Custody Status and Hold. On May 8, 2018, district court reset sentencing to June 5, 2018; district court did not remand Petitioner.

On June 5, 2018, at the time of sentencing, Petitioner notified district court that he wished to withdraw his guilty plea and dismiss McAmis as counsel. On June 6, 2018, Petitioner filed a *pro per* Motion to Dismiss Counsel and a Motion to Withdraw Plea. On June 12, 2018, district court granted Petitioner's Motion to Dismiss Counsel. On June 28, 2018, district court continued all matters to July 17, 2018. On July 3, 2018, State filed an Opposition to Petitioner's Motion to Withdraw Plea.

On July 17, 2018, district court issued a bench warrant. Petitioner failed to appear because Petitioner had been arrested in California for Receiving Stolen Property. On July 24, 2018, Petitioner's newly retained counsel — Carl Arnold — filed a Motion to Quash Bench Warrant. On July 31, 2018, district court denied Petitioner's motion.

On November 8, 2018, Petitioner appeared in custody on the bench warrant return. District court reset the sentencing hearing on November 27, 2018. On November 27, 2018, newly retained counsel — Gary Modafferi — appear for Petitioner. District Court reset the sentencing hearing on December 13, 2018.

On December 5, 2018, Petitioner filed Motion for Expert Services (Investigator) pursuant to *Widdis*. On January 9, 2019, district court granted the motion. On January 17, 2019, district court confirmed the investigator would only be working on information related to a Motion to Withdraw Guilty Plea. District court reset the sentencing hearing to February 19, 2019.

On February 15, 2019, Petitioner filed a Motion to Withdraw Guilty Plea. On February 19, 2019, district court reset sentencing to March 26, 2019, so that State could file an opposition to Petitioner's Motion to Withdraw Guilty Plea. On February 21, 2019, the State

filed a Notice of Intent to Seek Punishment as a Habitual Criminal. On March 19, 2019, State filed an Opposition to Petitioner's Motion to Withdraw Guilty Plea. On March 28, 2019, Petitioner filed a Reply to State's Opposition to Motion to Withdraw Guilty Plea.

On May 28, 2019, and July 11, 2019, district court held an evidentiary hearing on Petitioner's Motion to Withdraw his Plea. On August 6, 2019, district court denied Petitioner's Motion to Withdraw Plea. On August 7, 2019, district court issued Notice of Entry of Order.

On October 3, 2019, district court sentenced Petitioner pursuant to small habitual status. District court sentenced Petitioner to count one (1) sixty (60) to one-hundred-fifty (150) months in the Nevada Department of Corrections. Petitioner received four-hundred-twenty-three (423) days for credit time served. District court further ordered count two (2) dismissed. On October 9, 2019, district court filed the Judgement of Conviction ("JOC").

On October 15, 2019, Petitioner filed Notice of Appeal — through Terrance Jackson. On January 8, 2021, the Nevada Court of Appeals Affirmed Petitioner's conviction. On February 3, 2021, the Nevada Supreme Court issued the Remittitur. On August 11, 2021, Petitioner filed the instant *pro per* Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

Defendant's Supplemental Pre-Sentence Investigation Report ("PSI") filed September 23, 2019, provided a recitation of the facts of the subject offenses:

> On November 28, 2016, an officer responded to a local residence in reference to a *home invasion*. Upon arrival, the officer met the one of the residents of the house, who advised the officer that a male, later identified as the defendant, Denzel Dorsey, punched a hole in the glass door window. Mr. Dorsey proceeded to place his hand through the hole and unlock the deadbolt on the door. The resident then ran to the door and locked the deadbolt back. Mr. Dorsey, realized someone was home, fled the scene in a vehicle parked in front of the residence. The officer spoke made contact with the owner of the residence, the victim, who advised that she would like to press charges against Mr. Dorsey.
>
> A records of the vehicle revealed that it had been rented from a local car rental agency. A detective responded to the rental agency and was advised that the vehicle was equipped with a GPS

> Tracker. The travel history of the vehicle confirmed that [the] vehicle was present at the time of the aforementioned incident. Detectives located the vehicle and made contact with Mr. Dorsey, the driver, and another male as they exited the vehicle. The detective attempted to speak with Mr. Dorsey and the male. Both were uncooperative, denied being in the vehicle, and provided fictitious names. When Mr. Dorsey was advised that he was being charged with home invasion, Mr. Dorsey looked down and stated[,] "Ah shit." Mr. Dorsey was observed to be wearing a coat with fresh tears on it, and he had fresh cuts on his right hand. A search incident to arrest located the key to the vehicle in Mr. Dorsey's right pocket along with a glove with fresh blood on it. A search of the vehicle located three prescription muscle relaxers, a package of ziplock baggies, a prescription bottle for Oxycodone with another individual's name imprinted on it, [] several pieces of miscellaneous jewelry, and a glove matching the one retrieved from Mr. Dorsey's pocket.
>
> Based on the above facts, Mr. Dorsey was arrested, transported to the Henderson Detention Center [,]and booked accordingly.

ARGUMENT

I. Petitioner Claims are Outside the Scope of Writ, and Petitioner Failed to Establish Good Cause and a Showing of Prejudice

Petitioner makes a series of claims, listed in his petition, that are outside the scope of habeas review. *See* Petition, at 6-12. Additionally, Petitioner failed to establish good cause and a showing of prejudice to overcome the mandatory procedural bars.

Pursuant to NRS 34.810, "[t]he court shall dismiss a petition if the court determines that [the] *conviction was upon a plea of guilty* . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Petitioner may only escape these procedural bars if he meets the burden of establishing good cause and prejudice. *See* NRS 34.810(3). Where a petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Additionally, "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction

proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "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).

To avoid procedural default, under NRS 34.810(3)(a), Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in an earlier proceedings or to otherwise comply with the statutory requirements, and that Petitioner will be unduly prejudiced if the petition is dismissed. *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 establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,621, 81 P.3d 521,525 (2003) (emphasis added); *See also* Hathaway v. State, 119 Nev. 248, 25 I, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "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, 119 Nev. at 621, 81 P.3d at 525. The Court continued, "appellants cannot attempt to manufacture good cause." Id. at 621, 81 P.3d at 526. 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). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

To establish prejudice, a Petitioner must show "'not merely that the errors of [the proceedings] created [the] possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the State's proceedings with [an] 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. I 584, I 596 (1982)). Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Petitioner failed to address good cause to overcome the mandatory procedural bar. Indeed, Petitioner cannot, since the applicable law and facts were all available when he pled guilty. Additionally, Petitioner failed to show that an impediment external to the defense prevented him from raising these claims in an earlier proceeding and offers no excuse for his failure to raise said issues there. As such, Petitioner cannot show good cause to overcome the procedural bars, and this court should deny the petition.

Lastly, because there is no good cause, this court need not consider prejudice. If this court chooses to examine Petitioner's claims further, he cannot demonstrate prejudice because his underlying claims are meritless.

a. Petitioner's In-Court Identification Claim is Outside the Scope of Habeas Review

Petitioner claims the justice court erred in allowing the Kevin Narazeno ("Victim") of the home invasion to make an in-court identification of Petitioner — during the preliminary hearing — after State allegedly engaged in witness tampering by suggesting to Victim that Petitioner was the suspect of the home invasion. *See* Petition, at 6-6A. However, pursuant to NRS 34.810, Petitioner's claim is outside the scope of habeas review.

On March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid.

Petitioner raised various claims on direct appeal. None of which was the claim that State improperly suggested to Victim that the home invasion suspect was the Petitioner. Petitioner's claim that without the allegedly improper in-court identification, there would not have been enough evidence to establish probable cause to bind Petitioner over to district court should have been raised in a pre-trial petition of writ of habeas corpus. However, Petitioner did not file a pre-trial writ.

In any event, Petitioner misconstrues the facts surrounding the alleged witness tampering. During the preliminary hearing, State asked several times if the Victim noticed anyone in court like the description given of the suspect. Preliminary Hearing ("PH"), at 11-13. Victim was not sure. PH, at 12. Only after Petitioner removed his glasses and the State direct the witness if "he look[ed] familiar," did Victim respond, "Yes, I think so . . . Yes. Without the glasses." PH, at 12-13. At no time did State inform Victim to answer in the affirmative or informed Victim that the Petitioner was the suspect from the home invasion.

Additionally, all the facts were available to Petitioner at the time of appeal. Petitioner failed to raise said claim and does not explain why. Therefore, Petitioner's claim is outside the scope of habeas review and is meritless. Petitioner's claim should be denied.

b. Petitioner's Brady Claim is Outside the Scope of Habeas Review

Petitioner claims State failed to hand over the clothing apparel described in the incident report. *See* Petition, at 7. According to Petitioner, this failure amounts to a Brady violation. Petitioner's claim is outside the scope of habeas review and is without merit.

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); *See also* Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which

did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the outcome. Id. (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)); *See also* Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995) (citing U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. at 1565.

Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. *See* Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

"While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the

defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking Brady. White 970 F.2d at 337.

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence available to the defendant from other sources or defense counsel could have independently obtained through a diligent investigation. *See* Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made.

Here, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim State allegedly withheld Brady material. All of the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why.

Additionally, the apparel worn by the suspect — a torn dress coat — described in the incident report is not Brady material. There is nothing regarding the dress coat that would explain away the charge of a home invasion. Additionally, Petitioner does not explain how the dress coat is exculpatory or how it would have affected the negations. If anything, the lack of the dress coat would hamper State's presentation of the case — if that.

In any event, Victim identified Petitioner as the person who tried to gain entrance to his residence, and State could place Petitioner at the crime scene via GPS. Thus, the dress coat is an insignificant piece of identification evidence.

Lastly, when Petitioner entered the guilty plea agreement, he knew what he was wearing during the home invasion; thus, Petitioner's claim is irrelevant. Therefore, because Petitioner's claim is outside the scope of habeas review and is without merit, Petitioner's claim should be denied.

c. Petitioner's Claim of Ineffective Assistance of Counsel Claims is Outside the Scope of Habeas Review and are Meritless

Petitioner claims (i) Keith Brower ("Brower") provided ineffective assistance counsel by failing to object to State's alleged witness tampering of Victim and failure to obtain inculpatory photos and physical evidence during the preliminary hearing, (ii) McAmis provided ineffective assistance of counsel by failing to investigate Petitioner's case properly, and (iii) Terrence Jackson ("Jackson") provided ineffective assistance of counsel on appeal by failing to raise a series of claims. *See* Petition, at 8D.

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 petitioner must prove they were 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 petitioner 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 [petitioner] 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 petitioner 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).

Moreover, the role of the court is "not to pass upon the merits of the action[s] not taken [by trial counsel] 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). Further, the court should not "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*." Donovan, 94 Nev. at 675 (emphasis added) (quoting Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). To be effective, the Constitution "does not require that [trial] 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." U.S. v. Cronic, 466 U.S. 648, 657, 104 S. Ct. 2039, 2046 (1984). Additionally, 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).

"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 [trial] 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). Therefore, the court must "judge the reasonableness of [trial] 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). Additionally, a

petitioner who contends his attorney was ineffective because he did not *investigate adequately* must show how a better investigation would have resulted in a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Moreover, bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Additionally, "[P]etitioner 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 would entitle the petitioner to relief if true. 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 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).

i. Petitioner's Claim of Ineffective Assistance of Counsel regarding Keith Brower is Outside the Scope of Habeas Review and is Meritless

Petitioner claims Brower failed to object at the preliminary hearing when State allegedly directing Victim to identify Petitioner as the suspect of the home invasion. Additionally, Petitioner claims Brower failed to obtain "any of the inculpatory evidence" used during the preliminary hearing. Petitioner's claims are outside the scope of habeas review and are meritless.

Petitioner fails to demonstrate how counsel's failure to object during the preliminary hearing shows with a reasonable probability that Petitioner would not have plead guilty pursuant to his guilty plea agreement. Additionally, in so far as Petitioner's inculpatory evidence claims. Petitioner does not explain how having the physical *inculpatory* evidence would have shown with a reasonable probability that Petitioner would have asserted his right

to trial.

Also, Petitioner — without meaningful delineation — fails to describe what *inculpatory* evidence he is referencing. Petitioner makes a meritless — and convoluted — assertion that somehow the *inculpatory* evidence could have been used to Petitioner's benefit during cross-examination. Thus, it would have acted as exculpatory evidence that somehow shows with a *reasonable probability* that Petitioner would not have plead guilty.

However, such a claim is meritless and counterintuitive. *Inculpatory* evidence does not act on mathematic principles of multiplication where multiple pieces of *inculpatory* evidence multiplied by each other somehow converts to exculpatory evidence, which then demonstrates with a *reasonable probability* that Petitioner would have asserted his right to trial. If anything, it supports the conclusion that Petitioner would have been incentivized to enter negotiations and ultimately enter into a guilty plea agreement —which is what occurred here.

Therefore, because Petitioner's claim is outside the scope of habeas review and is meritless, Petitioner's claim should be denied.

ii. Petitioner's Claim of Ineffective Assistance of Counsel regarding Caitlyn McAmis is Outside the Scope of Habeas Review and is Meritless

Petitioner claims McAmis failed to investigate Petitioner's case properly. Petitioner's claim is outside the scope of habeas review and is meritless.

Here, Petitioner does not provide sufficient facts to support his claims that counsel failed to investigate the case adequately. If anything, Petitioner provides sufficient facts showing McAmis effectively investigated Petitioner's case via working on a global resolution for Petitioner — which was ultimately successful. *See* Petition, at 8C.

In any event, Petitioner does not show what the investigation could have discovered that would have prevented him, with a *reasonable probability*, from entering into the GPA, nor what an investigation would have produced. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

As indicated above, Petitioner cannot demonstrate he would have plead not guilty but for McAmis failing to conduct a proper pre-trial investigation. Here the district court

thoroughly canvassed Petitioner. At no point during the canvass did Petitioner claim Counsel was coercing Petitioner into accepting the GPA. Additionally, McAmis withdrew from Petitioner's case before Petitioner plead guilty — Gary Modafferi was the attorney on record when Petitioner plead guilty. Moreover, the GPA — signed by Petitioner — indicated that he was "satisfied with the services provided by my attorney." GPA, at 5.

Therefore, Petitioner's claim is outside the scope of habeas review and is meritless. Petitioner's claim should be denied.

iii. Petitioner's Claim of Ineffective Assistance of Appellate Counsel is outside the Scope of Habeas Review

Petitioner claims Jackson failed to raise the above claims on appeal, including "the courts abuse of discretion in denying [Petitioner's] motion to withdraw plea, and excluding . . . statement given by [Petitioner's] witnesses," and counsel not properly investigating Petitioner's case. *See* Petition, at 8D, 11. However, Petitioner claims are outside the scope of habeas review meritless and belied by the record.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland v. Washington, 466 U.S. 668, 686, 689, 104 S. Ct. 2052, 2065 (1984)). A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involve "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753. Additionally, appointed counsel does not have a duty to "raise every "colorable" claim suggested by a client." Jones, 463 U.S. at 754.

Appellate lawyers are not ineffective when they refuse to follow a "kitchen sink" approach to the issues on appeals. Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). On the contrary, one of the most critical parts of appellate advocacy is selecting the proper claims to argue on appeal. Schaff v. Snyder, 190 F.3d 513, 526–27 (7th Cir. 1999). Arguing every conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. Howard, 225 F.3d at 791.

An appellate counsel deciding not to *raise a meritless issue* on appeal is not ineffective. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To establish prejudice based on the deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); *See also* Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir.1991). In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Appellate counsel may not simply raise appeal issues that have *no support in the record*; unsupported arguments and baseless assertions are suitable for summary dismissal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); *See also* NRAP 28(e). Further, 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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Petitioner was informed of his limited right to appeal in his Guilty Plea Agreement. In relevant part, the Petitioner's guilty plea agreement stated:

> WAIVER OF RIGHTS
>
> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> . . .

> 6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to RNS Chapter 34.
>
> . . .
>
> VOLUNTARINESS OF PLEA
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

Guilty Plea Agreement ("GPA"), at 4-5

Petitioner knew of his limited rights to appeal. The guilty plea agreement demonstrates said rights were articulated to Petitioner. Petitioner acknowledged that the waiver of rights was adequately explained to him by counsel. Additionally, Petitioner fails to show that the claims he sought to appeal even had a reasonable likelihood of success on appeal. In fact, the ineffective assistance of counsel claims Petitioner argues should have been raised on appeal are explicitly not permitted to be raised on appeal. "[C]hallenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). Therefore, Petitioner's claims are outside the scope of habeas review.

In any event, Petitioner claims appellate counsel was ineffective because appellate counsel failed to raise the issue on appeal that district court abused its discretion in not allowing Petitioner to withdraw his plea. However, appellate counsel did raise this issue on appeal. On appeal, the Nevada Court of Appeals held the district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). Therefore, Petitioner's claim is belied by the record.

Moreover, Petitioner claims regarding the alleged Brady violation and State allegedly engaging in witness tampering. *See* Petition, at 8D. Appellate counsel is not required to *raise a meritless issue* on appeal. *See* Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner does not show the probability of success on appeal. Petitioner only asserts that such claims would have shown he was innocent without providing any facts to support such a claim.

As discussed above, the chance of these claims being brought successfully on appeal is unlikely. First, the Petitioner does not provide what evidence State allegedly withheld. However, Petitioner claims that a torn dress coat he was wearing while being taken into custody is somehow exculpatory. As discussed above, the dress coat Petitioner wore at the time of the home invasion is not exculpatory — there is no rational analysis to be made showing Petitioner's dress coat explains away the charges. Therefore, this claim is without merit and would have failed on appeal.

Additionally, Petitioner's claim of witness tampering is not supported by the record. *See* PH, at 11-13. The State only asked open-ended questions. Id. At no point did State direct the witness to respond in a particular way. Id. In any event, it was only after Petitioner removed his glasses that Victim could make a positive identification. Id, at 12-13. Therefore, this claim is without merit and would have failed on appeal.

Lastly, Petitioner does not show what an investigation could have discovered, or the investigation would have prevented him, with a *reasonable probability*, from entering into the GPA. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Neither has Petitioner shown what an investigation would have produced. Id. Therefore, this claim is without merit and would have failed on appeal.

d. Petitioner's Claim Counsel Coerced Him into Entering a Guilty Plea Agreement is Belied by Record

Petitioner claims Yi Zheng coerced Petitioner into entering a GPA. However, Petitioner's claim is outside the scope of review and is belied by the record. Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Under 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). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal, 106 Nev. at 72, 787 P.2d at 394. Additionally, a plea of guilty is presumptively valid, and the burden is on the defendant to show defendant did not voluntarily enter into the plea. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citation omitted). A district court may grant a presentence motion to withdraw a guilty plea for any "substantial reason" if it is "fair and just." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); *See also* NRS 176.165.

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. Under Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983), 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.

Additionally, 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 when he enters his plea to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 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.

See 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).

Here, Petitioner fails to provide sufficient factual support to show that Yi Zheng coerced him into entering the GPA. Petitioner only makes the naked assertion that Yi Zheng manipulated him into entering the GPA. *See* Petition, at 9.

However, the record belies Petitioner's claim. On November 9, 2020, Petitioner was canvassed and entered a guilty plea. At no time did Petitioner raise his allegation that counsel was supposedly coercing him into entering a guilty plea.

Moreover, on November 17, 2020, the district court thoroughly canvassed Petitioner:

> THE COURT: Okay. I do have a guilty plea agreement which was filed in open court just a few seconds ago indicating that you had agreed to plead guilty to committing the crime of Count 1, Invasion of the Home, a Category B Felony in violation of NRS 205.061. Sir, did you sign this agreement?
> DEFENDANT: Yes, Your Honor.
> THE COURT: Prior to signing the agreement, did you have an opportunity to review the agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*
> *DEFENDANT: Yes, Your Honor.*
> . . .
> THE COURT: Okay. And just so that I am clear because we couldn't hear that well, sir, did you have an opportunity to review the guilty plea agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: All right. Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*

DEFENDANT: Yes, Your Honor.

Hearing Transcript March 13, 2018, at 3-5.

As indicated above, the district court specifically inquired if Petitioner was giving his plea freely and voluntarily. Petitioner replied in the affirmative and failed to claim Yi Zheng manipulated Petitioner into accepting the GPA. District court specifically inquired *if anyone* made any threats to force him into entering the GPA. Petitioner replied in the negative and again failed to claim Yi Zheng manipulated Petitioner into accepting the GPA.

Additionally, at no time did Yi Zheng represent Petitioner. Petitioner's claim stems from his justice court case — 17F21598X — where John Momot, not Yi Zheng, represented Petitioner. The only time Yi Zheng interacted with Petitioner regarded his justice court case, is on January 10, 2018, when Yi Zheng appeared for John Momot to confirm John Momot as attorney of record and appeared for initial appearance. *See* Memorandum, at 86.

Also, McAmis represented Petitioner during entry of plea in the instant case. McAmis was the attorney on record that engaged in negations and helped form the plea agreement, not Yi Zheng. Petitioner admits this in his petition. *See* Petition, at 8A-8B.

Lastly, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim Petitioner did not enter into the GPA freely, knowingly, and voluntarily. All the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why. Therefore, Petitioner's claim is outside the scope of habeas review and is belied by the record.

e. Petitioner's Claim that District Court Abused its Discretion by Denying Petitioner's Motion to Withdraw Plea is Barred Under Law of the Case Doctrine

Petitioner claims district court abused its discretion when the court denied Petitioner's motion to withdraw plea. However, Petitioner's claim is barred under the Law of the Case Doctrine.

Under the doctrine of the law of the case, issues previously decided by an appellate court may not be reargued in a habeas petition. *See* George v. State, 125 Nev. 1038, 281 P.3d

1175 (2009) (citing Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975)). When the appellate court rules on the merits of a matter, the ruling becomes the law of the case, and the issue will not be revisited. *See* Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); *See also* Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

A petitioner cannot avoid the doctrine of the law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99. *See also* Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994). However, the "doctrine of the law of the case is not absolute," and the appellate court has the discretion to revisit the wisdom of its legal conclusions if the court "determines that such action is warranted." Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

Petitioner brought this same claim on direct appeal. Here, the Nevada Court of Appeals held that district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). Therefore, the above ruling is the law of the case and Petitioner may not reargue this claim in his habeas petition.

II. PETITIONER FAILED TO ESTABLISH CUMULATIVE ERROR

Petitioner argues that the cumulative effect of all the errors entitles Petitioner to reversal. *See* Petition, at 12. Petitioner's claim fails.

The Nevada Supreme Court has not endorsed applying its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. 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). In fact, logic dictates that there can be no cumulative error where the petitioner 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)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

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.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there were no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either belied by the record, meritless, or otherwise outside the scope of habeas review. Additionally, given the evidence of Petitioner's guilt, any claim that he would have been acquitted had these "errors" not occurred fails. As such, Petitioner has failed to establish cumulative error.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner requests an evidentiary hearing in his memorandum of point and authorities. *See* memorandum, at 37-38. However, Petitioner is not entitled to an evidentiary hearing.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. 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 petitioner 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. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). 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, 562, U.S. 86, 105, 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 specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are belied by the record, meritless, or capable of being addressed by the current record. There is no need to expand the record, and an evidentiary hearing is not warranted in the instant case.

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CONCLUSION

For the foregoing reasons, the State respectfully requests this Court DENY Petitioner's Post-Conviction Petition for Writ of Habeas Corpus.

DATED this 3rd day of September, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY */s/ John Niman*
JOHN NIMAN
Chief Deputy District Attorney
Nevada Bar #Deputy Bar

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 3rd day of September, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

DENZEL DORSEY
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

By: */s/ Corelle Bellamy*
Corelle Bellamy
Secretary for the District Attorney's Office

16FH2022X/cb/L-5

Denzel Dorsey #1099468
H.D.S.P.
P.O Box 650
Indian Springs, NV 89070

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Steven D. Grierson
CLERK OF THE COURT

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

State of Nevada,
Plaintiff,

v.

Denzel Dorsey,
Defendant,

C-17-323324-1
CASE NO. A-21-839313-W
DEPT NO. 18

NOTICE OF APPEAL

Notice is hereby given that Denzel R. Dorsey, Defendant above-named, hereby appeals to the Supreme Court of Nevada from the denial of defendants Writ of HABEAS CORPUS (post-conviction), entered in this action on the 2nd day of October, 2021.

Dated this 2nd day of October, 2021.

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11 2021
CLERK OF THE COURT

Defendants Signature

DENZEL R. DORSEY #1099468
H.D.S.P.
P.O. Box # 650
Indian Springs, NV 89070

LAS VEGAS NV 890
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ADMINISTRATION

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CLERK OF THE COURT

Court Administration
EIGHTH Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89155

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Steven D. Grierson
CLERK OF THE COURT

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

DENZEL DORSEY,

Plaintiff(s),

vs.

BRIAN E. WILLIAMS,

Defendant(s),

Case No: A-21-839313-W

Dept No: VI

CASE APPEAL STATEMENT

1. Appellant(s): Denzel Dorsey

2. Judge: Jacqueline M. Bluth

3. Appellant(s): Denzel Dorsey

Counsel:

Denzel Dorsey #1099468
P.O. Box 650
Indian Springs, NV 89070

4. Respondent (s): Brian E. Williams

Counsel:

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

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

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

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

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

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

9. Date Commenced in District Court: August 11, 2021

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 13 day of October 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Denzel Dorsey

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Steven D. Grierson
CLERK OF THE COURT

In the Eighth Judical District
Court of Clark County

Denzel Dorsey
defendant,

Vs.
The State of Nevada
Plaintiff,

Case no: A-21-839313-W
Dept.: 18

Notice of Appeal

I, defendant, Denzel Dorsey, would like to appeal the Court decision that was made on the defendant's Writ of Habeas Corpus (post conviction). The Court denied the defendants Writ of habeas corpus on September 23, 2021.

Dated this 14th day of October 2021

defendant

Denzel Dorsey
H.D.S.P.
P.O. Box # 650
Indian Springs, NV
89070

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OCT 18 2021
CLERK OF THE COURT

Denzel Dorsey #1099468
H.D.S.P.
P.O. Box # 650
Indian Springs, NV 89070

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FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DENZEL DORSEY,
#2845569

Defendant.

CASE NO: A-21-839313-W
C-17-323324-1

DEPT NO: VI

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

DATE OF HEARING: September 23, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable JOE HARDY, District Judge, on the 23rd day of September 2021, the Petitioner not present, and representing himself, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through ALICIA ALBRITTON, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and/or documents on file herein, now, therefore, the Court makes the following findings of fact, conclusions of law and order

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PROCEDURAL HISTORY

On November 28, 2016, Denzel Dorsey ("Petitioner") was arrested for Attempt Invasion of the Home and Malicious Destruction of Property. On December 19, 2016, Petitioner arraigned in justice court — case number 16FH2022X. On December 19, 2016, and justice court scheduled a preliminary hearing for February 15, 2017. Preliminary hearing continued to March 30, 2017. On May 2, 2017, after the preliminary hearing, Petitioner bound over to district court.

On May 9, 2017, State charged Petitioner by way of information. State charge Petitioner with, count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435); and count two (2) Malicious Destruction of Property (Gross Misdemeanor – NRS 206.310, 193155 – NOC 50905). On May 9, 2017, State filed A Notice of Intent to Seek Punishment as a Habitual Criminal under NRS 207.010(1).

On May 15, 2017, Petitioner pled not guilty and waived his speedy trial right. District court set trial for September 11, 2017. On September 7, 2017, district court reset the trial to December 4, 2017. On November 29, 2017, Petitioner's counsel — Keith Brower — filed a Motion to Withdraw Due to Conflict. On November 30, 2017, district court granted said motion.

On January 16, 2018, Caitlyn McAmis ("McAmis") confirmed as counsel. District court reset trial to April 23, 2018. On March 13, 2018, Petitioner entered a guilty plea to count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435). Defendant signed the guilty plea agreement, which stated *inter alia* :

> The State will retain the right to argue. Additionally, the State agrees not to seek habitual criminal treatment. Further, the State will not oppose dismissal of Count 2 and Case no. 17F21598X after rendition of sentence. The State will not oppose standard bail after entry of plea. However, if I fail to go to the Division of Parole and Probation, fail to appear at any future court date or am arrested for any new offenses, I will stipulate to habitual criminal treatment, to the fact that I have the requisite priors and to a sentence of sixty (60) to one hundred fifty (150) months in the

Nevada Department of Corrections. Additionally, I agree to pay full restitution including for cases and counts dismissed.

On March 13, 2018, pursuant to the terms of the agreement, district court released Petitioner on standard bail. District Court set sentencing for July 17, 2018. On April 26, 2018, Petitioner filed a Motion to Place on Calendar to Address Custody Status and Hold. On May 8, 2018, district court reset sentencing to June 5, 2018; district court did not remand Petitioner.

On June 5, 2018, at the time of sentencing, Petitioner notified district court that he wished to withdraw his guilty plea and dismiss McAmis as counsel. On June 6, 2018, Petitioner filed a *pro per* Motion to Dismiss Counsel and a Motion to Withdraw Plea. On June 12, 2018, district court granted Petitioner's Motion to Dismiss Counsel. On June 28, 2018, district court continued all matters to July 17, 2018. On July 3, 2018, State filed an Opposition to Petitioner's Motion to Withdraw Plea.

On July 17, 2018, district court issued a bench warrant. Petitioner failed to appear because Petitioner had been arrested in California for Receiving Stolen Property. On July 24, 2018, Petitioner's newly retained counsel — Carl Arnold — filed a Motion to Quash Bench Warrant. On July 31, 2018, district court denied Petitioner's motion.

On November 8, 2018, Petitioner appeared in custody on the bench warrant return. District court reset the sentencing hearing on November 27, 2018. On November 27, 2018, newly retained counsel — Gary Modafferi — appear for Petitioner. District Court reset the sentencing hearing on December 13, 2018.

On December 5, 2018, Petitioner filed Motion for Expert Services (Investigator) pursuant to *Widdis*. On January 9, 2019, district court granted the motion. On January 17, 2019, district court confirmed the investigator would only be working on information related to a Motion to Withdraw Guilty Plea. District court reset the sentencing hearing to February 19, 2019.

On February 15, 2019, Petitioner filed a Motion to Withdraw Guilty Plea. On February 19, 2019, district court reset sentencing to March 26, 2019, so that State could file an opposition to Petitioner's Motion to Withdraw Guilty Plea. On February 21, 2019, State filed

a Notice of Intent to Seek Punishment as a Habitual Criminal. On March 19, 2019, State filed an Opposition to Petitioner's Motion to Withdraw Guilty Plea. On March 28, 2019, Petitioner filed a Reply to State's Opposition to Motion to Withdraw Guilty Plea.

On May 28, 2019, and July 11, 2019, district court held an evidentiary hearing on Petitioner's Motion to Withdraw his Plea. On August 6, 2019, district court denied Petitioner's Motion to Withdraw Plea. On August 7, 2019, district court issued Notice of Entry of Order.

On October 3, 2019, district court sentenced Petitioner pursuant to small habitual status. District court sentenced Petitioner to count one (1) sixty (60) to one-hundred-fifty (150) months in the Nevada Department of Corrections. Petitioner received four-hundred-twenty-three (423) days for credit time served. District court further ordered count two (2) dismissed. On October 9, 2019, district court filed the Judgement of Conviction ("JOC").

On October 15, 2019, Petitioner filed Notice of Appeal — through Terrance Jackson. On January 8, 2021, the Nevada Court of Appeals Affirmed Petitioner's conviction. On February 3, 2021, the Nevada Supreme Court issued the Remittitur. On August 11, 2021, Petitioner filed the instant *pro per* Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

Defendant's Supplemental Pre-Sentence Investigation Report ("PSI") filed September 23, 2019, provided a recitation of the facts of the subject offenses:

> On November 28, 2016, an officer responded to a local residence in reference to a *home invasion*. Upon arrival, the officer met the one of the residents of the house, who advised the officer that a male, later identified as the defendant, Denzel Dorsey, punched a hole in the glass door window. Mr. Dorsey proceeded to place his hand through the hole and unlock the deadbolt on the door. The resident then ran to the door and locked the deadbolt back. Mr. Dorsey, realized someone was home, fled the scene in a vehicle parked in front of the residence. The officer spoke made contact with the owner of the residence, the victim, who advised that she would like to press charges against Mr. Dorsey.
>
> A records of the vehicle revealed that it had been rented from a local car rental agency. A detective responded to the rental agency and was advised that the vehicle was equipped with a GPS

> Tracker. The travel history of the vehicle confirmed that [the] vehicle was present at the time of the aforementioned incident. Detectives located the vehicle and made contact with Mr. Dorsey, the driver, and another male as they exited the vehicle. The detective attempted to speak with Mr. Dorsey and the male. Both were uncooperative, denied being in the vehicle, and provided fictitious names. When Mr. Dorsey was advised that he was being charged with home invasion, Mr. Dorsey looked down and stated[,] "Ah shit." Mr. Dorsey was observed to be wearing a coat with fresh tears on it, and he had fresh cuts on his right hand. A search incident to arrest located the key to the vehicle in Mr. Dorsey's right pocket along with a glove with fresh blood on it. A search of the vehicle located three prescription muscle relaxers, a package of ziplock baggies, a prescription bottle for Oxycodone with another individual's name imprinted on it, [] several pieces of miscellaneous jewelry, and a glove matching the one retrieved from Mr. Dorsey's pocket.
>
> Based on the above facts, Mr. Dorsey was arrested, transported to the Henderson Detention Center [,]and booked accordingly.

DECISION

I. Petitioner Claims are Outside the Scope of Writ, and Petitioner Failed to Establish Good Cause and a Showing of Prejudice

Petitioner makes a series of claims, listed in his petition, that are outside the scope of habeas review. *See* Petition, at 6-12. Additionally, Petitioner failed to establish good cause and a showing of prejudice to overcome the mandatory procedural bars.

Pursuant to NRS 34.810, "[t]he court shall dismiss a petition if the court determines that [the] *conviction was upon a plea of guilty* . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Petitioner may only escape these procedural bars if he meets the burden of establishing good cause and prejudice. *See* NRS 34.810(3). Where a petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Additionally, "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction

proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "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).

To avoid procedural default, under NRS 34.810(3)(a), Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in an earlier proceedings or to otherwise comply with the statutory requirements, and that Petitioner will be unduly prejudiced if the petition is dismissed. *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 establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,621, 81 P.3d 521,525 (2003) (emphasis added); *See also* Hathaway v. State, 119 Nev. 248, 25 I, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "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, 119 Nev. at 621, 81 P.3d at 525. The Court continued, "appellants cannot attempt to manufacture good cause." Id. at 621, 81 P.3d at 526. 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). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

To establish prejudice, a Petitioner must show "'not merely that the errors of [the proceedings] created [the] possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the State's proceedings with [an] 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. I 584, I 596 (1982)). Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Petitioner failed to address good cause to overcome the mandatory procedural bar. Indeed, Petitioner cannot, since the applicable law and facts were all available when he pled guilty. Additionally, Petitioner failed to show that an impediment external to the defense prevented him from raising these claims in an earlier proceeding and offers no excuse for his failure to raise said issues there. As such, Petitioner does not show good cause, or show any prejudice to overcome the procedural bars. Therefore, the instant Petition is DENIED.

a. Petitioner's In-Court Identification Claim is Outside the Scope of Habeas Review

Petitioner claims the justice court erred in allowing the Kevin Narazeno ("Victim") of the home invasion to make an in-court identification of Petitioner — during the preliminary hearing — after State allegedly engaged in witness tampering by suggesting to Victim that Petitioner was the suspect of the home invasion. *See* Petition, at 6-6A. However, pursuant to NRS 34.810, Petitioner's claim is outside the scope of habeas review.

On March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid.

Petitioner raised various claims on direct appeal. None of which was the claim that State improperly suggested to Victim that the home invasion suspect was the Petitioner. Petitioner's claim that without the allegedly improper in-court identification, there would not have been enough evidence to establish probable cause to bind Petitioner over to district court

should have been raised in a pre-trial petition of writ of habeas corpus. However, Petitioner did not file a pre-trial writ.

In any event, Petitioner misconstrues the facts surrounding the alleged witness tampering. During the preliminary hearing, State asked several times if the Victim noticed anyone in court like the description given of the suspect. Preliminary Hearing ("PH"), at 11-13. Victim was not sure. PH, at 12. Only after Petitioner removed his glasses and the State direct the witness if "he look[ed] familiar," did Victim respond, "Yes, I think so . . . Yes. Without the glasses." PH, at 12-13. At no time did State inform Victim to answer in the affirmative or informed Victim that the Petitioner was the suspect from the home invasion.

Additionally, all the facts were available to Petitioner at the time of appeal. Petitioner failed to raise said claim and does not explain why. Therefore, Petitioner's claim is outside the scope of habeas review and is DENIED.

b. Petitioner's Brady Claim is Outside the Scope of Habeas Review

Petitioner claims State failed to hand over the clothing apparel described in the incident report. *See* Petition, at 7. According to Petitioner, this failure amounts to a Brady violation. Petitioner's claim is outside the scope of habeas review.

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); *See also* Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the

outcome. Id. (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)); *See also* Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995) (citing U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. at 1565.

Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. *See* Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

"While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their

possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking Brady. White 970 F.2d at 337.

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence available to the defendant from other sources or defense counsel could have independently obtained through a diligent investigation. *See* Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made.

Here, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim State allegedly withheld Brady material. All of the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why.

Additionally, the apparel worn by the suspect — a torn dress coat — described in the incident report is not Brady material. There is nothing regarding the dress coat that would explain away the charge of a home invasion. Additionally, Petitioner does not explain how the dress coat is exculpatory or how it would have affected the negations. If anything, the lack of the dress coat would hamper State's presentation of the case — if that.

In any event, Victim identified Petitioner as the person who tried to gain entrance to his residence, and State could place Petitioner at the crime scene via GPS. Thus, the dress coat is an insignificant piece of identification evidence.

Lastly, when Petitioner entered the guilty plea agreement, he knew what he was wearing during the home invasion; thus, Petitioner's claim is irrelevant. Therefore, Petitioner's claim is outside the scope of habeas review and is DENIED.

c. Petitioner's Claim of Ineffective Assistance of Counsel Claims is Outside the Scope of Habeas Review and are Meritless

Petitioner claims (i) Keith Brower ("Brower") provided ineffective assistance counsel by failing to object to State's alleged witness tampering of Victim and failure to obtain inculpatory photos and physical evidence during the preliminary hearing, (ii) McAmis

provided ineffective assistance of counsel by failing to investigate Petitioner's case properly, and (iii) Terrence Jackson ("Jackson") provided ineffective assistance of counsel on appeal by failing to raise a series of claims. *See* Petition, at 8D.

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 petitioner must prove they were 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 petitioner 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 [petitioner] 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 petitioner 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).

Moreover, the role of the court is "not to pass upon the merits of the action[s] not taken [by trial counsel] 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). Further, the court should not "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*." Donovan, 94 Nev. at 675 (emphasis added) (quoting Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). To be effective, the Constitution "does not require that [trial] 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." U.S. v. Cronic, 466 U.S. 648, 657, 104 S. Ct. 2039, 2046 (1984). Additionally, 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).

"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 [trial] 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). Therefore, the court must "judge the reasonableness of [trial] 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). Additionally, a petitioner who contends his attorney was ineffective because he did not *investigate adequately* must show how a better investigation would have resulted in a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Moreover, bare and naked

allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Additionally, "[P]etitioner 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 would entitle the petitioner to relief if true. *See* 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 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).

i. Petitioner's Claim of Ineffective Assistance of Counsel regarding Keith Brower is Outside the Scope of Habeas Review and is Meritless

Petitioner claims Brower failed to object at the preliminary hearing when State allegedly directing Victim to identify Petitioner as the suspect of the home invasion. Additionally, Petitioner claims Brower failed to obtain "any of the inculpatory evidence" used during the preliminary hearing. Petitioner's claims are outside the scope of habeas review and are meritless.

Petitioner fails to demonstrate how counsel's failure to object during the preliminary hearing shows with a reasonable probability that Petitioner would not have plead guilty pursuant to his guilty plea agreement. Additionally, in so far as Petitioner's inculpatory evidence claims. Petitioner does not explain how having the physical *inculpatory* evidence would have shown with a reasonable probability that Petitioner would have asserted his right to trial.

Also, Petitioner — without meaningful delineation — fails to describe what *inculpatory* evidence he is referencing. Petitioner makes a meritless — and convoluted — assertion that

somehow the *inculpatory* evidence could have been used to Petitioner's benefit during cross-examination. Thus, it would have acted as exculpatory evidence that somehow shows with a *reasonable probability* that Petitioner would not have plead guilty.

However, such a claim is meritless and counterintuitive. *Inculpatory* evidence does not act on mathematic principles of multiplication where multiple pieces of *inculpatory* evidence multiplied by each other somehow converts to exculpatory evidence, which then demonstrates with a *reasonable probability* that Petitioner would have asserted his right to trial. If anything, it supports the conclusion that Petitioner would have been incentivized to enter negotiations and ultimately enter into a guilty plea agreement —which is what occurred here.

Petitioner's claim is outside the scope of habeas review and is meritless. Therefore, Petitioner's claim is DENIED.

ii. Petitioner's Claim of Ineffective Assistance of Counsel regarding Caitlyn McAmis is Outside the Scope of Habeas Review and is Meritless

Petitioner claims McAmis failed to investigate Petitioner's case properly. Petitioner's claim is outside the scope of habeas review and is meritless.

Here, Petitioner does not provide sufficient facts to support his claims that counsel failed to investigate the case adequately. If anything, Petitioner provides sufficient facts showing McAmis effectively investigated Petitioner's case via working on a global resolution for Petitioner — which was ultimately successful. *See* Petition, at 8C.

In any event, Petitioner does not show what the investigation could have discovered that would have prevented him, with a *reasonable probability*, from entering into the GPA, nor what an investigation would have produced. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

As indicated above, Petitioner cannot demonstrate he would have plead not guilty but for McAmis failing to conduct a proper pre-trial investigation. Here the district court thoroughly canvassed Petitioner. At no point during the canvass did Petitioner claim Counsel was coercing Petitioner into accepting the GPA. Additionally, McAmis withdrew from Petitioner's case before Petitioner plead guilty — Gary Modafferi was the attorney on record

when Petitioner plead guilty. Moreover, the GPA — signed by Petitioner — indicated that he was "satisfied with the services provided by my attorney." GPA, at 5.

Petitioner's claim is outside the scope of habeas review and is meritless. Therefore, Petitioner's claim is DENIED.

iii. Petitioner's Claim of Ineffective Assistance of Appellate Counsel is outside the Scope of Habeas Review

Petitioner claims Jackson failed to raise the above claims on appeal, including "the courts abuse of discretion in denying [Petitioner's] motion to withdraw plea, and excluding . . . statement given by [Petitioner's] witnesses," and counsel not properly investigating Petitioner's case. *See* Petition, at 8D, 11. However, Petitioner claims are meritless and belied by the record.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland v. Washington, 466 U.S. 668, 686, 689, 104 S. Ct. 2052, 2065 (1984)). A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involve "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753. Additionally, appointed counsel does not have a duty to "raise every "colorable" claim suggested by a client." Jones, 463 U.S. at 754.

Appellate lawyers are not ineffective when they refuse to follow a "kitchen sink" approach to the issues on appeals. Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). On the contrary, one of the most critical parts of appellate advocacy is selecting the proper claims to argue on appeal. Schaff v. Snyder, 190 F.3d 513, 526–27 (7th Cir. 1999). Arguing every

conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. Howard, 225 F.3d at 791.

An appellate counsel deciding not to *raise a meritless issue* on appeal is not ineffective. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To establish prejudice based on the deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); *See also* Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir.1991). In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Appellate counsel may not simply raise appeal issues that have *no support in the record*; unsupported arguments and baseless assertions are suitable for summary dismissal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); *See also* NRAP 28(e). Further, 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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Petitioner was informed of his limited right to appeal in his Guilty Plea Agreement. In relevant part, the Petitioner's guilty plea agreement stated:

> WAIVER OF RIGHTS
>
> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> . . .
>
> 6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I

> remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to RNS Chapter 34.
>
> . . .
>
> VOLUNTARINESS OF PLEA
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

Guilty Plea Agreement ("GPA"), at 4-5

Petitioner knew of his limited rights to appeal. The guilty plea agreement demonstrates said rights were articulated to Petitioner. Petitioner acknowledged that the waiver of rights was adequately explained to him by counsel. Additionally, Petitioner fails to show that the claims he sought to appeal even had a reasonable likelihood of success on appeal. In fact, the ineffective assistance of counsel claims Petitioner argues should have been raised on appeal are explicitly not permitted to be raised on appeal. "[C]hallenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). Therefore, Petitioner's claims are outside the scope of habeas review.

In any event, Petitioner claims appellate counsel was ineffective because appellate counsel failed to raise the issue on appeal that district court abused its discretion in not allowing Petitioner to withdraw his plea. However, appellate counsel did raise this issue on appeal. On appeal, the Nevada Court of Appeals held the district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). Therefore, Petitioner's claim is belied by the record.

Moreover, Petitioner claims regarding the alleged Brady violation and State allegedly engaging in witness tampering. *See* Petition, at 8D. Appellate counsel is not required to *raise a meritless issue* on appeal. *See* Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner does not show the probability of success on appeal. Petitioner only asserts that such claims would have shown he was innocent without providing any facts to support such a claim.

As discussed above, the chance of these claims being brought successfully on appeal is unlikely. First, the Petitioner does not provide what evidence State allegedly withheld. However, Petitioner claims that a torn dress coat he was wearing while being taken into custody is somehow exculpatory. As discussed above, the dress coat Petitioner wore at the time of the home invasion is not exculpatory — there is no rational analysis to be made showing Petitioner's dress coat explains away the charges. Therefore, this claim is without merit.

Additionally, Petitioner's claim of witness tampering is not supported by the record. *See* PH, at 11-13. The State only asked open-ended questions. Id. At no point did State direct the witness to respond in a particular way. Id. In any event, it was only after Petitioner removed his glasses that Victim could make a positive identification. Id, at 12-13. Therefore, this claim is without merit.

Lastly, Petitioner does not show what an investigation could have discovered, or the investigation would have prevented him, with a *reasonable probability*, from entering into the GPA. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Neither has Petitioner shown what an investigation would have produced. Id. As shown above, Petitioner's claim is meritless and belied by the record. Therefore, Petitioner's claim is DENIED.

d. Petitioner's Claim Counsel Coerced Him into Entering a Guilty Plea Agreement is Belied by Record

Petitioner claims Yi Zheng coerced Petitioner into entering a GPA. However, Petitioner's claim is belied by the record. Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Under 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). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal,

106 Nev. at 72, 787 P.2d at 394. Additionally, a plea of guilty is presumptively valid, and the burden is on the defendant to show defendant did not voluntarily enter into the plea. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citation omitted). A district court may grant a presentence motion to withdraw a guilty plea for any "substantial reason" if it is "fair and just." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); *See also* NRS 176.165.

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. Under Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983), 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.

Additionally, 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 when he enters his plea to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 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. *See* 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).

Here, Petitioner fails to provide sufficient factual support to show that Yi Zheng coerced him into entering the GPA. Petitioner only makes the naked assertion that Yi Zheng manipulated him into entering the GPA. *See* Petition, at 9.

However, the record belies Petitioner's claim. On November 9, 2020, Petitioner was canvassed and entered a guilty plea. At no time did Petitioner raise his allegation that counsel was supposedly coercing him into entering a guilty plea.

Moreover, on November 17, 2020, the district court thoroughly canvassed Petitioner:

> THE COURT: Okay. I do have a guilty plea agreement which was filed in open court just a few seconds ago indicating that you had agreed to plead guilty to committing the crime of Count 1, Invasion of the Home, a Category B Felony in violation of NRS 205.061. Sir, did you sign this agreement?
> DEFENDANT: Yes, Your Honor.
> THE COURT: Prior to signing the agreement, did you have an opportunity to review the agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*
> *DEFENDANT: Yes, Your Honor.*
> . . .
> THE COURT: Okay. And just so that I am clear because we couldn't hear that well, sir, did you have an opportunity to review the guilty plea agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: All right. Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*
> *DEFENDANT: Yes, Your Honor.*

Hearing Transcript March 13, 2018, at 3-5.

As indicated above, the district court specifically inquired if Petitioner was giving his plea freely and voluntarily. Petitioner replied in the affirmative and failed to claim Yi Zheng manipulated Petitioner into accepting the GPA. District court specifically inquired *if anyone* made any threats to force him into entering the GPA. Petitioner replied in the negative and again failed to claim Yi Zheng manipulated Petitioner into accepting the GPA.

Additionally, at no time did Yi Zheng represent Petitioner. Petitioner's claim stems from his justice court case — 17F21598X — where John Momot, not Yi Zheng, represented Petitioner. The only time Yi Zheng interacted with Petitioner regarded his justice court case, is on January 10, 2018, when Yi Zheng appeared for John Momot to confirm John Momot as attorney of record and appeared for initial appearance. *See* Memorandum, at 86.

Also, McAmis represented Petitioner during entry of plea in the instant case. McAmis was the attorney on record that engaged in negations and helped form the plea agreement, not Yi Zheng. Petitioner admits this in his petition. *See* Petition, at 8A-8B.

Lastly, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim Petitioner did not enter into the GPA freely, knowingly, and voluntarily. All the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why. Petitioner's claim is belied by the record. Therefore, Petitioner's claim is DENIED.

e. Petitioner's Claim that District Court Abused its Discretion by Denying Petitioner's Motion to Withdraw Plea is Barred Under Law of the Case Doctrine

Petitioner claims district court abused its discretion when the court denied Petitioner's motion to withdraw plea. However, Petitioner's claim is barred under the Law of the Case Doctrine.

Under the doctrine of the law of the case, issues previously decided by an appellate court may not be reargued in a habeas petition. *See* George v. State, 125 Nev. 1038, 281 P.3d 1175 (2009) (citing Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975)). When the appellate court rules on the merits of a matter, the ruling becomes the law of the case, and the issue will not

be revisited. *See* Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); *See also* Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

A petitioner cannot avoid the doctrine of the law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99. *See also* Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994). However, the "doctrine of the law of the case is not absolute," and the appellate court has the discretion to revisit the wisdom of its legal conclusions if the court "determines that such action is warranted." Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

Petitioner brought this same claim on direct appeal. Here, the Nevada Court of Appeals held that district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). The above ruling is the law of the case and Petitioner may not reargue this claim in his habeas petition. Therefore, Petitioner's claim is DENIED.

II. PETITIONER FAILED TO ESTABLISH CUMULATIVE ERROR

Petitioner argues that the cumulative effect of all the errors entitles Petitioner to reversal. *See* Petition, at 12. Petitioner's claim fails.

The Nevada Supreme Court has not endorsed applying its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. 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). In fact, logic dictates that there can be no cumulative error where the petitioner 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)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

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.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there were no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either belied by the record, meritless, or otherwise outside the scope of habeas review. Additionally, given the evidence of Petitioner's guilt, any claim that he would have been acquitted had these "errors" not occurred fails. Therefore, Petitioner's claim is DENIED.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner requests an evidentiary hearing in his memorandum of point and authorities. *See* memorandum, at 37-38. However, Petitioner is not entitled to an evidentiary hearing.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. 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 petitioner 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. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). 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, 562, U.S. 86, 105, 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 specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are belied by the record, meritless, or capable of being addressed by the current record. There is no need to expand the record, and an evidentiary hearing is not warranted in the instant case. Therefore, Petitioner's request for an evidentiary hearing is DENIED

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ORDER

Therefore, it is HEREBY ORDERED that Petitioner's Petition for Post-conviction Relief shall be, and it is, hereby DENIED.

~~DATED this _____ day of October, 2021~~.

Dated this 20th day of October, 2021

DISTRICT JUDGE

NH

DB8 25B D072 98FB
Jacqueline M. Bluth
District Court Judge

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

BY

/s/ John Niman

JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-17-323324-1
vs	DEPT. NO. Department 6
Denzel Dorsey	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 10/20/2021

Steve Wolfson	PDMotions@clarkcountyda.com
Keith Brower	BrowerLawOffice@aol.com
Carl Arnold, Esq.	carl@jharmonlaw.com
Noemy Marroquin	noemy@jharmonlaw.com
Gary Modafferi	modafferilaw@gmail.com

Electronically Filed
10/21/2021 11:18 AM
Steven D. Grierson
CLERK OF THE COURT

ASTA

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

DENZEL DORSEY,

Plaintiff(s),

vs.

BRIAN E. WILLIAMS,

Defendant(s),

Case No: A-21-839313-W

Dept No: VI

CASE APPEAL STATEMENT

1. Appellant(s): Denzel Dorsey

2. Judge: Jacqueline M. Bluth

3. Appellant(s): Denzel Dorsey

Counsel:

Denzel Dorsey #1099468
P.O. Box 650
Indian Springs, NV 89070

4. Respondent (s): Brian E. Williams

Counsel:

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

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

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

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

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

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

9. Date Commenced in District Court: August 11, 2021

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

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

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 83644

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 21 day of October 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Denzel Dorsey

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Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

DENZEL DORSEY,

Petitioner,

vs.

BRIAN E. WILLIAMS,

Respondent,

Case No: A-21-839313-W

Dept No: VI

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

PLEASE TAKE NOTICE that on October 20, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on October 25, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Ingrid Ramos
Ingrid Ramos, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 25 day of October 2021, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Denzel Dorsey # 1099468
P.O. BOX 650
Indian Springs, NV 89070

/s/ Ingrid Ramos
Ingrid Ramos, Deputy Clerk

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10/20/2021 3:04 PM
CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

DENZEL DORSEY,
#2845569

Defendant.

CASE NO: A-21-839313-W
C-17-323324-1

DEPT NO: VI

FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER

DATE OF HEARING: September 23, 2021
TIME OF HEARING: 11:00 AM

THIS CAUSE having come on for hearing before the Honorable JOE HARDY, District Judge, on the 23rd day of September 2021, the Petitioner not present, and representing himself, the Respondent being represented by STEVEN B. WOLFSON, District Attorney, by and through ALICIA ALBRITTON, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and/or documents on file herein, now, therefore, the Court makes the following findings of fact, conclusions of law and order

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PROCEDURAL HISTORY

On November 28, 2016, Denzel Dorsey ("Petitioner") was arrested for Attempt Invasion of the Home and Malicious Destruction of Property. On December 19, 2016, Petitioner arraigned in justice court — case number 16FH2022X. On December 19, 2016, and justice court scheduled a preliminary hearing for February 15, 2017. Preliminary hearing continued to March 30, 2017. On May 2, 2017, after the preliminary hearing, Petitioner bound over to district court.

On May 9, 2017, State charged Petitioner by way of information. State charge Petitioner with, count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435); and count two (2) Malicious Destruction of Property (Gross Misdemeanor – NRS 206.310, 193155 – NOC 50905). On May 9, 2017, State filed A Notice of Intent to Seek Punishment as a Habitual Criminal under NRS 207.010(1).

On May 15, 2017, Petitioner pled not guilty and waived his speedy trial right. District court set trial for September 11, 2017. On September 7, 2017, district court reset the trial to December 4, 2017. On November 29, 2017, Petitioner's counsel — Keith Brower — filed a Motion to Withdraw Due to Conflict. On November 30, 2017, district court granted said motion.

On January 16, 2018, Caitlyn McAmis ("McAmis") confirmed as counsel. District court reset trial to April 23, 2018. On March 13, 2018, Petitioner entered a guilty plea to count one (1) Invasion of the Home (Category B Felony – NRS 205.067 – NOC 50435). Defendant signed the guilty plea agreement, which stated *inter alia* :

> The State will retain the right to argue. Additionally, the State agrees not to seek habitual criminal treatment. Further, the State will not oppose dismissal of Count 2 and Case no. 17F21598X after rendition of sentence. The State will not oppose standard bail after entry of plea. However, if I fail to go to the Division of Parole and Probation, fail to appear at any future court date or am arrested for any new offenses, I will stipulate to habitual criminal treatment, to the fact that I have the requisite priors and to a sentence of sixty (60) to one hundred fifty (150) months in the

Nevada Department of Corrections. Additionally, I agree to pay full restitution including for cases and counts dismissed.

On March 13, 2018, pursuant to the terms of the agreement, district court released Petitioner on standard bail. District Court set sentencing for July 17, 2018. On April 26, 2018, Petitioner filed a Motion to Place on Calendar to Address Custody Status and Hold. On May 8, 2018, district court reset sentencing to June 5, 2018; district court did not remand Petitioner.

On June 5, 2018, at the time of sentencing, Petitioner notified district court that he wished to withdraw his guilty plea and dismiss McAmis as counsel. On June 6, 2018, Petitioner filed a *pro per* Motion to Dismiss Counsel and a Motion to Withdraw Plea. On June 12, 2018, district court granted Petitioner's Motion to Dismiss Counsel. On June 28, 2018, district court continued all matters to July 17, 2018. On July 3, 2018, State filed an Opposition to Petitioner's Motion to Withdraw Plea.

On July 17, 2018, district court issued a bench warrant. Petitioner failed to appear because Petitioner had been arrested in California for Receiving Stolen Property. On July 24, 2018, Petitioner's newly retained counsel — Carl Arnold — filed a Motion to Quash Bench Warrant. On July 31, 2018, district court denied Petitioner's motion.

On November 8, 2018, Petitioner appeared in custody on the bench warrant return. District court reset the sentencing hearing on November 27, 2018. On November 27, 2018, newly retained counsel — Gary Modafferi — appear for Petitioner. District Court reset the sentencing hearing on December 13, 2018.

On December 5, 2018, Petitioner filed Motion for Expert Services (Investigator) pursuant to *Widdis*. On January 9, 2019, district court granted the motion. On January 17, 2019, district court confirmed the investigator would only be working on information related to a Motion to Withdraw Guilty Plea. District court reset the sentencing hearing to February 19, 2019.

On February 15, 2019, Petitioner filed a Motion to Withdraw Guilty Plea. On February 19, 2019, district court reset sentencing to March 26, 2019, so that State could file an opposition to Petitioner's Motion to Withdraw Guilty Plea. On February 21, 2019, State filed

a Notice of Intent to Seek Punishment as a Habitual Criminal. On March 19, 2019, State filed an Opposition to Petitioner's Motion to Withdraw Guilty Plea. On March 28, 2019, Petitioner filed a Reply to State's Opposition to Motion to Withdraw Guilty Plea.

On May 28, 2019, and July 11, 2019, district court held an evidentiary hearing on Petitioner's Motion to Withdraw his Plea. On August 6, 2019, district court denied Petitioner's Motion to Withdraw Plea. On August 7, 2019, district court issued Notice of Entry of Order.

On October 3, 2019, district court sentenced Petitioner pursuant to small habitual status. District court sentenced Petitioner to count one (1) sixty (60) to one-hundred-fifty (150) months in the Nevada Department of Corrections. Petitioner received four-hundred-twenty-three (423) days for credit time served. District court further ordered count two (2) dismissed. On October 9, 2019, district court filed the Judgement of Conviction ("JOC").

On October 15, 2019, Petitioner filed Notice of Appeal — through Terrance Jackson. On January 8, 2021, the Nevada Court of Appeals Affirmed Petitioner's conviction. On February 3, 2021, the Nevada Supreme Court issued the Remittitur. On August 11, 2021, Petitioner filed the instant *pro per* Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

Defendant's Supplemental Pre-Sentence Investigation Report ("PSI") filed September 23, 2019, provided a recitation of the facts of the subject offenses:

> On November 28, 2016, an officer responded to a local residence in reference to a *home invasion*. Upon arrival, the officer met the one of the residents of the house, who advised the officer that a male, later identified as the defendant, Denzel Dorsey, punched a hole in the glass door window. Mr. Dorsey proceeded to place his hand through the hole and unlock the deadbolt on the door. The resident then ran to the door and locked the deadbolt back. Mr. Dorsey, realized someone was home, fled the scene in a vehicle parked in front of the residence. The officer spoke made contact with the owner of the residence, the victim, who advised that she would like to press charges against Mr. Dorsey.
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> A records of the vehicle revealed that it had been rented from a local car rental agency. A detective responded to the rental agency and was advised that the vehicle was equipped with a GPS

> Tracker. The travel history of the vehicle confirmed that [the] vehicle was present at the time of the aforementioned incident. Detectives located the vehicle and made contact with Mr. Dorsey, the driver, and another male as they exited the vehicle. The detective attempted to speak with Mr. Dorsey and the male. Both were uncooperative, denied being in the vehicle, and provided fictitious names. When Mr. Dorsey was advised that he was being charged with home invasion, Mr. Dorsey looked down and stated[,] "Ah shit." Mr. Dorsey was observed to be wearing a coat with fresh tears on it, and he had fresh cuts on his right hand. A search incident to arrest located the key to the vehicle in Mr. Dorsey's right pocket along with a glove with fresh blood on it. A search of the vehicle located three prescription muscle relaxers, a package of ziplock baggies, a prescription bottle for Oxycodone with another individual's name imprinted on it, [] several pieces of miscellaneous jewelry, and a glove matching the one retrieved from Mr. Dorsey's pocket.
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> Based on the above facts, Mr. Dorsey was arrested, transported to the Henderson Detention Center [,]and booked accordingly.

DECISION

I. Petitioner Claims are Outside the Scope of Writ, and Petitioner Failed to Establish Good Cause and a Showing of Prejudice

Petitioner makes a series of claims, listed in his petition, that are outside the scope of habeas review. *See* Petition, at 6-12. Additionally, Petitioner failed to establish good cause and a showing of prejudice to overcome the mandatory procedural bars.

Pursuant to NRS 34.810, "[t]he court shall dismiss a petition if the court determines that [the] *conviction was upon a plea of guilty* . . . and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Petitioner may only escape these procedural bars if he meets the burden of establishing good cause and prejudice. *See* NRS 34.810(3). Where a petitioner does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

Additionally, "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction

proceedings.... [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "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).

To avoid procedural default, under NRS 34.810(3)(a), Petitioner has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in an earlier proceedings or to otherwise comply with the statutory requirements, and that Petitioner will be unduly prejudiced if the petition is dismissed. *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 establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615,621, 81 P.3d 521,525 (2003) (emphasis added); *See also* Hathaway v. State, 119 Nev. 248, 25 I, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "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, 119 Nev. at 621, 81 P.3d at 525. The Court continued, "appellants cannot attempt to manufacture good cause." Id. at 621, 81 P.3d at 526. 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). Any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

To establish prejudice, a Petitioner must show "'not merely that the errors of [the proceedings] created [the] possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the State's proceedings with [an] 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. I 584, I 596 (1982)). Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Petitioner failed to address good cause to overcome the mandatory procedural bar. Indeed, Petitioner cannot, since the applicable law and facts were all available when he pled guilty. Additionally, Petitioner failed to show that an impediment external to the defense prevented him from raising these claims in an earlier proceeding and offers no excuse for his failure to raise said issues there. As such, Petitioner does not show good cause, or show any prejudice to overcome the procedural bars. Therefore, the instant Petition is DENIED.

a. Petitioner's In-Court Identification Claim is Outside the Scope of Habeas Review

Petitioner claims the justice court erred in allowing the Kevin Narazeno ("Victim") of the home invasion to make an in-court identification of Petitioner — during the preliminary hearing — after State allegedly engaged in witness tampering by suggesting to Victim that Petitioner was the suspect of the home invasion. *See* Petition, at 6-6A. However, pursuant to NRS 34.810, Petitioner's claim is outside the scope of habeas review.

On March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid.

Petitioner raised various claims on direct appeal. None of which was the claim that State improperly suggested to Victim that the home invasion suspect was the Petitioner. Petitioner's claim that without the allegedly improper in-court identification, there would not have been enough evidence to establish probable cause to bind Petitioner over to district court

should have been raised in a pre-trial petition of writ of habeas corpus. However, Petitioner did not file a pre-trial writ.

In any event, Petitioner misconstrues the facts surrounding the alleged witness tampering. During the preliminary hearing, State asked several times if the Victim noticed anyone in court like the description given of the suspect. Preliminary Hearing ("PH"), at 11-13. Victim was not sure. PH, at 12. Only after Petitioner removed his glasses and the State direct the witness if "he look[ed] familiar," did Victim respond, "Yes, I think so . . . Yes. Without the glasses." PH, at 12-13. At no time did State inform Victim to answer in the affirmative or informed Victim that the Petitioner was the suspect from the home invasion.

Additionally, all the facts were available to Petitioner at the time of appeal. Petitioner failed to raise said claim and does not explain why. Therefore, Petitioner's claim is outside the scope of habeas review and is DENIED.

b. Petitioner's Brady Claim is Outside the Scope of Habeas Review

Petitioner claims State failed to hand over the clothing apparel described in the incident report. *See* Petition, at 7. According to Petitioner, this failure amounts to a Brady violation. Petitioner's claim is outside the scope of habeas review.

Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. *See* Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25 (2000); *See also* Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687 (1996). "[T]here are three components to a Brady violation: (1) the evidence at issue is favorable to the accused; (2) the evidence was withheld by the state, either intentionally or inadvertently; and (3) prejudice ensued, i.e., the evidence was material." Mazzan 116 Nev. at 67. "Where the state fails to provide evidence which the defense did not request or requested generally, it is constitutional error if the omitted evidence creates a reasonable doubt which did not otherwise exist. In other words, evidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed." Id. at 66 (internal citations omitted). "In Nevada, after a specific request for evidence, a Brady violation is material if there is a reasonable *possibility* that the omitted evidence would have affected the

outcome. Id. (citing Jimenez v. State, 112 Nev. 610, 618-19, 918 P.2d 687, 692 (1996)); *See also* Roberts v. State, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994).

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-400 (1976). Favorable evidence is material, and constitutional error results, "if there is a reasonable probability that the result of the proceeding would have been different." Kyles v. Whitley, 514 U.S. 419, 433-34, 115 S.Ct. 1555, 1565 (1995) (citing U.S. v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383 (1985)). A reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial. Kyles at 434, 115 S.Ct. at 1565.

Due Process does not require simply the disclosure of "exculpatory" evidence. Evidence must also be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation or to impeach the credibility of the State's witnesses. *See* Kyles 514 U.S. at 442, 445-51, 1115 S. Ct. 1555 n. 13. Evidence cannot be regarded as "suppressed" by the government when the defendant has access to the evidence before trial by the exercise of reasonable diligence. United States v. White, 970 F.2d 328, 337 (7th Cir. 1992). "Regardless of whether the evidence was material or even exculpatory, when information is fully available to a defendant at the time of trial and his only reason for not obtaining and presenting the evidence to the Court is his lack of reasonable diligence, the defendant has no Brady claim." United States v. Brown, 628 F.2d 471, 473 (5th Cir. 1980).

"While the [United States] Supreme Court in Brady held that the [g]overnment may not properly conceal exculpatory evidence from a defendant, it does not place any burden upon the [g]overnment to conduct a defendant's investigation or assist in the presentation of the defense's case." United States v. Marinero, 904 F.2d 251, 261 (5th Cir. 1990); *accord* United States v. Pandozzi, 878 F.2d 1526, 1529 (1st Cir. 1989); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989). When defendants miss the exculpatory nature of documents in their

possession or to which they have access, they cannot miraculously resuscitate their defense after conviction by invoking Brady. White 970 F.2d at 337.

The Nevada Supreme Court has followed the federal line of cases in holding that Brady does not require the State to disclose evidence available to the defendant from other sources or defense counsel could have independently obtained through a diligent investigation. *See* Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). In Steese, the undisclosed information stemmed from collect calls that the defendant made.

Here, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim State allegedly withheld Brady material. All of the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why.

Additionally, the apparel worn by the suspect — a torn dress coat — described in the incident report is not Brady material. There is nothing regarding the dress coat that would explain away the charge of a home invasion. Additionally, Petitioner does not explain how the dress coat is exculpatory or how it would have affected the negations. If anything, the lack of the dress coat would hamper State's presentation of the case — if that.

In any event, Victim identified Petitioner as the person who tried to gain entrance to his residence, and State could place Petitioner at the crime scene via GPS. Thus, the dress coat is an insignificant piece of identification evidence.

Lastly, when Petitioner entered the guilty plea agreement, he knew what he was wearing during the home invasion; thus, Petitioner's claim is irrelevant. Therefore, Petitioner's claim is outside the scope of habeas review and is DENIED.

c. Petitioner's Claim of Ineffective Assistance of Counsel Claims is Outside the Scope of Habeas Review and are Meritless

Petitioner claims (i) Keith Brower ("Brower") provided ineffective assistance counsel by failing to object to State's alleged witness tampering of Victim and failure to obtain inculpatory photos and physical evidence during the preliminary hearing, (ii) McAmis

provided ineffective assistance of counsel by failing to investigate Petitioner's case properly, and (iii) Terrence Jackson ("Jackson") provided ineffective assistance of counsel on appeal by failing to raise a series of claims. *See* Petition, at 8D.

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 petitioner must prove they were 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 petitioner 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 [petitioner] 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 petitioner 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).

Moreover, the role of the court is "not to pass upon the merits of the action[s] not taken [by trial counsel] 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). Further, the court should not "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*." Donovan, 94 Nev. at 675 (emphasis added) (quoting Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). To be effective, the Constitution "does not require that [trial] 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." U.S. v. Cronic, 466 U.S. 648, 657, 104 S. Ct. 2039, 2046 (1984). Additionally, 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).

"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 [trial] 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). Therefore, the court must "judge the reasonableness of [trial] 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). Additionally, a petitioner who contends his attorney was ineffective because he did not *investigate adequately* must show how a better investigation would have resulted in a more favorable outcome. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Moreover, bare and naked

allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Additionally, "[P]etitioner 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 would entitle the petitioner to relief if true. *See* 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 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).

i. Petitioner's Claim of Ineffective Assistance of Counsel regarding Keith Brower is Outside the Scope of Habeas Review and is Meritless

Petitioner claims Brower failed to object at the preliminary hearing when State allegedly directing Victim to identify Petitioner as the suspect of the home invasion. Additionally, Petitioner claims Brower failed to obtain "any of the inculpatory evidence" used during the preliminary hearing. Petitioner's claims are outside the scope of habeas review and are meritless.

Petitioner fails to demonstrate how counsel's failure to object during the preliminary hearing shows with a reasonable probability that Petitioner would not have plead guilty pursuant to his guilty plea agreement. Additionally, in so far as Petitioner's inculpatory evidence claims. Petitioner does not explain how having the physical *inculpatory* evidence would have shown with a reasonable probability that Petitioner would have asserted his right to trial.

Also, Petitioner — without meaningful delineation — fails to describe what *inculpatory* evidence he is referencing. Petitioner makes a meritless — and convoluted — assertion that

somehow the *inculpatory* evidence could have been used to Petitioner's benefit during cross-examination. Thus, it would have acted as exculpatory evidence that somehow shows with a *reasonable probability* that Petitioner would not have plead guilty.

However, such a claim is meritless and counterintuitive. *Inculpatory* evidence does not act on mathematic principles of multiplication where multiple pieces of *inculpatory* evidence multiplied by each other somehow converts to exculpatory evidence, which then demonstrates with a *reasonable probability* that Petitioner would have asserted his right to trial. If anything, it supports the conclusion that Petitioner would have been incentivized to enter negotiations and ultimately enter into a guilty plea agreement —which is what occurred here.

Petitioner's claim is outside the scope of habeas review and is meritless. Therefore, Petitioner's claim is DENIED.

ii. Petitioner's Claim of Ineffective Assistance of Counsel regarding Caitlyn McAmis is Outside the Scope of Habeas Review and is Meritless

Petitioner claims McAmis failed to investigate Petitioner's case properly. Petitioner's claim is outside the scope of habeas review and is meritless.

Here, Petitioner does not provide sufficient facts to support his claims that counsel failed to investigate the case adequately. If anything, Petitioner provides sufficient facts showing McAmis effectively investigated Petitioner's case via working on a global resolution for Petitioner — which was ultimately successful. *See* Petition, at 8C.

In any event, Petitioner does not show what the investigation could have discovered that would have prevented him, with a *reasonable probability*, from entering into the GPA, nor what an investigation would have produced. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

As indicated above, Petitioner cannot demonstrate he would have plead not guilty but for McAmis failing to conduct a proper pre-trial investigation. Here the district court thoroughly canvassed Petitioner. At no point during the canvass did Petitioner claim Counsel was coercing Petitioner into accepting the GPA. Additionally, McAmis withdrew from Petitioner's case before Petitioner plead guilty — Gary Modafferi was the attorney on record

when Petitioner plead guilty. Moreover, the GPA — signed by Petitioner — indicated that he was "satisfied with the services provided by my attorney." GPA, at 5.

Petitioner's claim is outside the scope of habeas review and is meritless. Therefore, Petitioner's claim is DENIED.

iii. Petitioner's Claim of Ineffective Assistance of Appellate Counsel is outside the Scope of Habeas Review

Petitioner claims Jackson failed to raise the above claims on appeal, including "the courts abuse of discretion in denying [Petitioner's] motion to withdraw plea, and excluding . . . statement given by [Petitioner's] witnesses," and counsel not properly investigating Petitioner's case. *See* Petition, at 8D, 11. However, Petitioner claims are meritless and belied by the record.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990) (citing Strickland v. Washington, 466 U.S. 668, 686, 689, 104 S. Ct. 2052, 2065 (1984)). A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involve "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Jones, 463 U.S. at 753. Additionally, appointed counsel does not have a duty to "raise every "colorable" claim suggested by a client." Jones, 463 U.S. at 754.

Appellate lawyers are not ineffective when they refuse to follow a "kitchen sink" approach to the issues on appeals. Howard v. Gramley, 225 F.3d 784, 791 (7th Cir. 2000). On the contrary, one of the most critical parts of appellate advocacy is selecting the proper claims to argue on appeal. Schaff v. Snyder, 190 F.3d 513, 526–27 (7th Cir. 1999). Arguing every

conceivable point is distracting to appellate judges, consumes space that should be devoted to developing the arguments with some promise, inevitably clutters the brief with issues that have no chance because of doctrines like harmless error or the standard of review of jury verdicts, and is overall bad appellate advocacy. Howard, 225 F.3d at 791.

An appellate counsel deciding not to *raise a meritless issue* on appeal is not ineffective. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To establish prejudice based on the deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *See* Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir.1992); *See also* Heath v. Jones, 941 F.2d 1126, 1132 (11th Cir.1991). In making this determination, a court must review the merits of the omitted claim. Heath, 941 F.2d at 1132.

Appellate counsel may not simply raise appeal issues that have *no support in the record*; unsupported arguments and baseless assertions are suitable for summary dismissal. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."); *See also* NRAP 28(e). Further, 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, 100 Nev. at 502, 686 P.2d at 225. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id.

Petitioner was informed of his limited right to appeal in his Guilty Plea Agreement. In relevant part, the Petitioner's guilty plea agreement stated:

> WAIVER OF RIGHTS
>
> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> . . .
>
> 6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I

> remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to RNS Chapter 34.
>
> . . .
>
> VOLUNTARINESS OF PLEA
>
> All of the foregoing elements, consequences, rights, and waiver of rights have been thoroughly explained to me by my attorney.

Guilty Plea Agreement ("GPA"), at 4-5

Petitioner knew of his limited rights to appeal. The guilty plea agreement demonstrates said rights were articulated to Petitioner. Petitioner acknowledged that the waiver of rights was adequately explained to him by counsel. Additionally, Petitioner fails to show that the claims he sought to appeal even had a reasonable likelihood of success on appeal. In fact, the ineffective assistance of counsel claims Petitioner argues should have been raised on appeal are explicitly not permitted to be raised on appeal. "[C]hallenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). Therefore, Petitioner's claims are outside the scope of habeas review.

In any event, Petitioner claims appellate counsel was ineffective because appellate counsel failed to raise the issue on appeal that district court abused its discretion in not allowing Petitioner to withdraw his plea. However, appellate counsel did raise this issue on appeal. On appeal, the Nevada Court of Appeals held the district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). Therefore, Petitioner's claim is belied by the record.

Moreover, Petitioner claims regarding the alleged Brady violation and State allegedly engaging in witness tampering. *See* Petition, at 8D. Appellate counsel is not required to *raise a meritless issue* on appeal. *See* Kirksey, 112 Nev. at 998, 923 P.2d at 1114. Additionally, Petitioner does not show the probability of success on appeal. Petitioner only asserts that such claims would have shown he was innocent without providing any facts to support such a claim.

As discussed above, the chance of these claims being brought successfully on appeal is unlikely. First, the Petitioner does not provide what evidence State allegedly withheld. However, Petitioner claims that a torn dress coat he was wearing while being taken into custody is somehow exculpatory. As discussed above, the dress coat Petitioner wore at the time of the home invasion is not exculpatory — there is no rational analysis to be made showing Petitioner's dress coat explains away the charges. Therefore, this claim is without merit.

Additionally, Petitioner's claim of witness tampering is not supported by the record. *See* PH, at 11-13. The State only asked open-ended questions. Id. At no point did State direct the witness to respond in a particular way. Id. In any event, it was only after Petitioner removed his glasses that Victim could make a positive identification. Id, at 12-13. Therefore, this claim is without merit.

Lastly, Petitioner does not show what an investigation could have discovered, or the investigation would have prevented him, with a *reasonable probability*, from entering into the GPA. *See* Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Neither has Petitioner shown what an investigation would have produced. Id. As shown above, Petitioner's claim is meritless and belied by the record. Therefore, Petitioner's claim is DENIED.

d. Petitioner's Claim Counsel Coerced Him into Entering a Guilty Plea Agreement is Belied by Record

Petitioner claims Yi Zheng coerced Petitioner into entering a GPA. However, Petitioner's claim is belied by the record. Bare and naked allegations are insufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "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).

Under 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). Manifest injustice does not exist if the defendant entered his plea voluntarily. Baal,

106 Nev. at 72, 787 P.2d at 394. Additionally, a plea of guilty is presumptively valid, and the burden is on the defendant to show defendant did not voluntarily enter into the plea. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citation omitted). A district court may grant a presentence motion to withdraw a guilty plea for any "substantial reason" if it is "fair and just." Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537 (2004); *See also* NRS 176.165.

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. Under Wilson v. State, 99 Nev. 362, 367, 664 P.2d 328, 331 (1983), 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.

Additionally, 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 when he enters his plea to determine whether he understands the nature of the charges to which he is pleading. Bryant, 102 Nev. at 271, 721 P.2d at 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. *See* 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).

Here, Petitioner fails to provide sufficient factual support to show that Yi Zheng coerced him into entering the GPA. Petitioner only makes the naked assertion that Yi Zheng manipulated him into entering the GPA. *See* Petition, at 9.

However, the record belies Petitioner's claim. On November 9, 2020, Petitioner was canvassed and entered a guilty plea. At no time did Petitioner raise his allegation that counsel was supposedly coercing him into entering a guilty plea.

Moreover, on November 17, 2020, the district court thoroughly canvassed Petitioner:

> THE COURT: Okay. I do have a guilty plea agreement which was filed in open court just a few seconds ago indicating that you had agreed to plead guilty to committing the crime of Count 1, Invasion of the Home, a Category B Felony in violation of NRS 205.061. Sir, did you sign this agreement?
> DEFENDANT: Yes, Your Honor.
> THE COURT: Prior to signing the agreement, did you have an opportunity to review the agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*
> *DEFENDANT: Yes, Your Honor.*
> . . .
> THE COURT: Okay. And just so that I am clear because we couldn't hear that well, sir, did you have an opportunity to review the guilty plea agreement? Did you review it and understand the terms?
> DEFENDANT: Yes, Your Honor.
> *THE COURT: All right. Is anyone forcing you to plead guilty?*
> *DEFENDANT: No, Your Honor.*
> *THE COURT: You're pleading guilty of your own free will?*
> *DEFENDANT: Yes, Your Honor.*

Hearing Transcript March 13, 2018, at 3-5.

As indicated above, the district court specifically inquired if Petitioner was giving his plea freely and voluntarily. Petitioner replied in the affirmative and failed to claim Yi Zheng manipulated Petitioner into accepting the GPA. District court specifically inquired *if anyone* made any threats to force him into entering the GPA. Petitioner replied in the negative and again failed to claim Yi Zheng manipulated Petitioner into accepting the GPA.

Additionally, at no time did Yi Zheng represent Petitioner. Petitioner's claim stems from his justice court case — 17F21598X — where John Momot, not Yi Zheng, represented Petitioner. The only time Yi Zheng interacted with Petitioner regarded his justice court case, is on January 10, 2018, when Yi Zheng appeared for John Momot to confirm John Momot as attorney of record and appeared for initial appearance. *See* Memorandum, at 86.

Also, McAmis represented Petitioner during entry of plea in the instant case. McAmis was the attorney on record that engaged in negations and helped form the plea agreement, not Yi Zheng. Petitioner admits this in his petition. *See* Petition, at 8A-8B.

Lastly, on March 13, 2018, Petitioner plead guilty pursuant to a guilty plea agreement. On August 6, 2019, district court held the guilty plea agreement to be valid. Petitioner raised various claims on direct appeal. None of which was the claim Petitioner did not enter into the GPA freely, knowingly, and voluntarily. All the alleged facts were available to Petitioner at the time of appeal. However, Petitioner failed to raise said claim and does not explain why. Petitioner's claim is belied by the record. Therefore, Petitioner's claim is DENIED.

e. Petitioner's Claim that District Court Abused its Discretion by Denying Petitioner's Motion to Withdraw Plea is Barred Under Law of the Case Doctrine

Petitioner claims district court abused its discretion when the court denied Petitioner's motion to withdraw plea. However, Petitioner's claim is barred under the Law of the Case Doctrine.

Under the doctrine of the law of the case, issues previously decided by an appellate court may not be reargued in a habeas petition. *See* George v. State, 125 Nev. 1038, 281 P.3d 1175 (2009) (citing Hall v. State, 91 Nev. 314, 535 P.2d 797 (1975)). When the appellate court rules on the merits of a matter, the ruling becomes the law of the case, and the issue will not

be revisited. *See* Hall v. State, 91 Nev. 314, 315–16, 535 P.2d 797, 798–99 (1975); *See also* Valerio v. State, 112 Nev. 383, 386, 915 P.2d 874, 876 (1996); Hogan v. Warden, 109 Nev. 952, 860 P.2d 710 (1993).

A petitioner cannot avoid the doctrine of the law of the case by a more detailed and precisely focused argument. Hall, 91 Nev. at 316, 535 P.2d at 798–99. *See also* Pertgen v. State, 110 Nev. 557, 557–58, 875 P.2d 316, 362 (1994). However, the "doctrine of the law of the case is not absolute," and the appellate court has the discretion to revisit the wisdom of its legal conclusions if the court "determines that such action is warranted." Bejarano v. State, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006).

Petitioner brought this same claim on direct appeal. Here, the Nevada Court of Appeals held that district court "did not abuse its discretion by denying this claim." Dorsey v. State, Docket No. 79845-COA (Order of Affirmance, January 8, 2021). The above ruling is the law of the case and Petitioner may not reargue this claim in his habeas petition. Therefore, Petitioner's claim is DENIED.

II. PETITIONER FAILED TO ESTABLISH CUMULATIVE ERROR

Petitioner argues that the cumulative effect of all the errors entitles Petitioner to reversal. *See* Petition, at 12. Petitioner's claim fails.

The Nevada Supreme Court has not endorsed applying its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. 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). In fact, logic dictates that there can be no cumulative error where the petitioner 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)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

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.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there were no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either belied by the record, meritless, or otherwise outside the scope of habeas review. Additionally, given the evidence of Petitioner's guilt, any claim that he would have been acquitted had these "errors" not occurred fails. Therefore, Petitioner's claim is DENIED.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner requests an evidentiary hearing in his memorandum of point and authorities. *See* memorandum, at 37-38. However, Petitioner is not entitled to an evidentiary hearing.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. 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 petitioner 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. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). 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, 562, U.S. 86, 105, 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 specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are belied by the record, meritless, or capable of being addressed by the current record. There is no need to expand the record, and an evidentiary hearing is not warranted in the instant case. Therefore, Petitioner's request for an evidentiary hearing is DENIED

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ORDER

Therefore, it is HEREBY ORDERED that Petitioner's Petition for Post-conviction Relief shall be, and it is, hereby DENIED.

~~DATED this _____ day of October, 2021~~.

Dated this 20th day of October, 2021

DISTRICT JUDGE

NH

DB8 25B D072 98FB
Jacqueline M. Bluth
District Court Judge

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

BY

/s/ John Niman

JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

State of Nevada	CASE NO: C-17-323324-1
vs	DEPT. NO. Department 6
Denzel Dorsey	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 10/20/2021

Steve Wolfson	PDMotions@clarkcountyda.com
Keith Brower	BrowerLawOffice@aol.com
Carl Arnold, Esq.	carl@jharmonlaw.com
Noemy Marroquin	noemy@jharmonlaw.com
Gary Modafferi	modafferilaw@gmail.com

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**September 23, 2021**

A-21-839313-W Denzel Dorsey, Plaintiff(s)
vs.
Brian E. Williams, Defendant(s)

September 23, 2021 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Hardy, Joe **COURTROOM:** RJC Courtroom 11D

COURT CLERK: Kristin Duncan

RECORDER: Matt Yarbrough

REPORTER:

PARTIES PRESENT: Albritton, Alicia A. Attorney

JOURNAL ENTRIES

- Having reviewed the Petition for Writ of Habeas Corpus, as well as the State's Response, and ruing without hearing any oral argument, COURT ORDERED the Petition for Writ of Habeas Corpus, was hereby DENIED for all the reasons set forth in the State's Response, FINDING the following: (1) the Petitions claims were outside the scope of a Writ of Habeas Corpus; (2) Petitioner failed to establish good cause, or show any prejudice; (3) Petitioner's in-court identification claim, as well as the Brady claim, were outside the scope of Habeas review; (4) the claim of ineffective assistance of counsel was outside the scope of Habeas review, and lacked merit; (5) the finding in point four applied to the various attorneys the Defendant had, including pre-trial attorneys, the attorney of record at the time of trial, and any appellate attorneys; (6) Petitioner's claim that they were coerced into entering into the guilty plea was belied by the record; (7) Petitioner's claim that the Court abused its discretion by denying the Motion to Withdraw Guilty Plea, had already been ruled upon; (8) the Court of Appeals found that Petitioner brought their claim on direct appeal; (9) Petitioner failed to establish cumulative error; and (10) Petitioner was not entitled to an Evidentiary Hearing.

The State to prepare the written Order.

NDC

CLERK'S NOTE: A copy of this minute order was provided to the Petitioner via U.S. Mail: Denzel Dorsey #1099468 [High Desert State Prison P.O. Box 650 Indian Springs, NV 89070]. (KD 9/27/2021)

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated November 3, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 216.

DENZEL DORSEY,

Plaintiff(s),

vs.

BRIAN E. WILLIAMS,

Defendant(s),

Case No: A-21-839313-W

Dept. No: VI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 15 day of November 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk