EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

FILED
APR 18 2022
CLERK OF COURT

MICHAEL T. McLAUGHLIN;
APPELLANT

V.

CASE No. A-21-839820-W

STATE OF NEVADA,
WARDEN WILLIAM HUTCHINGS;
RESPONDENT

NOTICE OF APPEAL

COMES NOW, MICHAEL T. McLAUGHLIN, WITH A NOTICE OF APPEAL IN THE ABOVE-CAPTIONED CASE NUMBER AND THE DENIAL OF HIS WRIT OF HABEAS CORPUS (PETITION) WITHOUT AN EVIDENTIARY HEARING AT THE HEARING ON THE MOTION IN OPPOSITION WITH THE HEARING HELD ON 2/16/22 AND DENIED ON THE SAME DAY.

SIGNED THIS 6th DAY OF APRIL, 2022.

#83193
Michael McLaughlin
SDCC
P.O. BOX 208
INDIAN SPRINGS, NEVADA
89070

CERTIFICATE OF SERVICE

THE FOREGOING NOTICE OF APPEAL WAS SENT VIA U.S. MAIL THROUGH THE U.S. POSTAL SERVICE ON THE 7th DAY OF APRIL, 2022 TO THE FOLLOWING

CLARK COUNTY DISTRICT COURT
ATTN CLERK OF THE COURT
200 LEWIS AVENUE 3rd FL
LAS VEGAS, NEVADA 89155

THIS 6th DAY OF APRIL, 2022

#83193
Michael McLaughlin
SDCC
P.O. BOX 208
INDIAN SPRINGS, NEVADA 89070

AFFIRMATION

THE FOREGOING DOEN

☒ NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY INDIVIDUAL

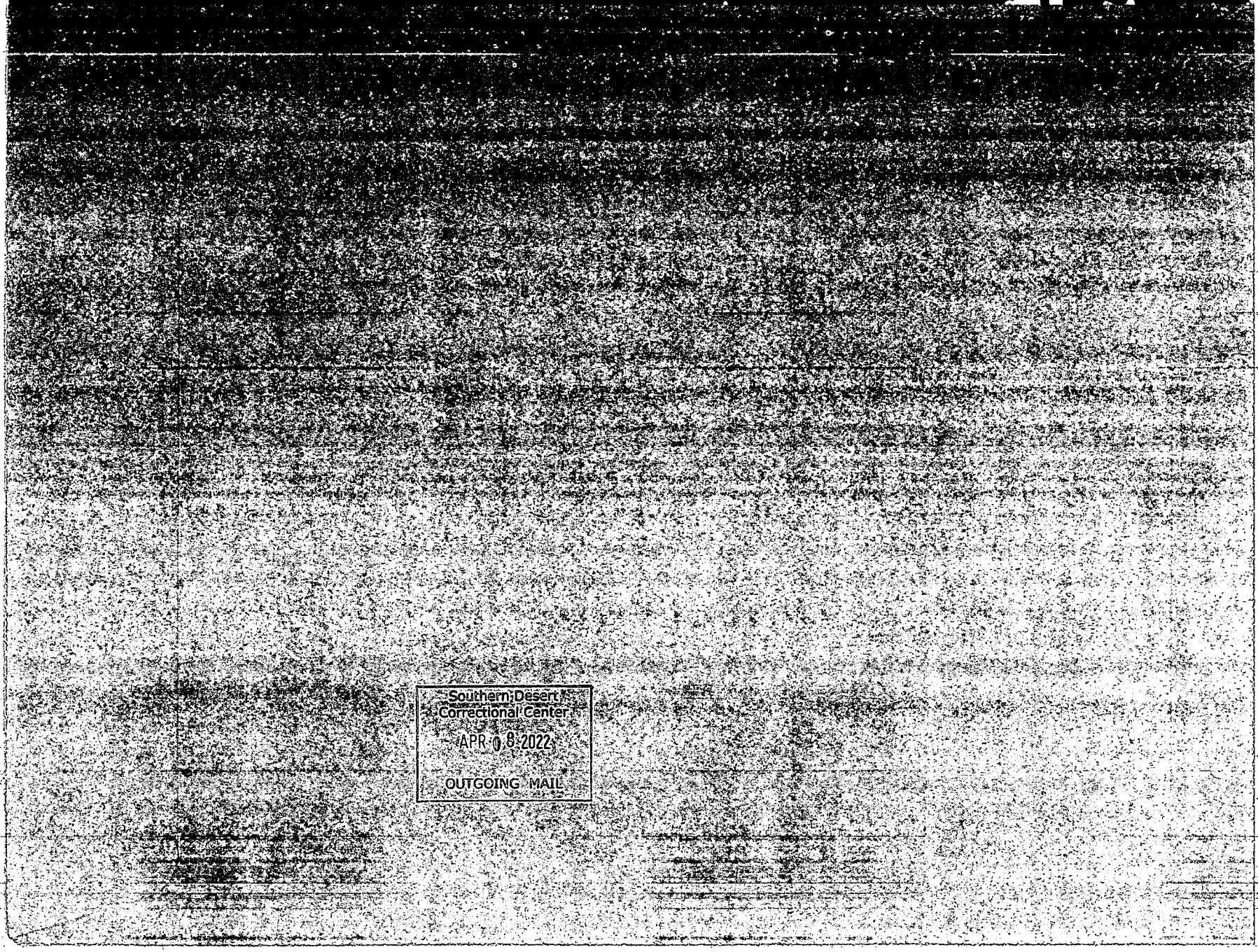
☐ DOES CONTAIN THE SOCIAL SECURITY NUMBER

MICHAEL McLAUGHLIN

michael mclaughlin

#83195

APPLICANT IN PROPER PERSON


Southern Desert
Correctional Center
APR 08 2022
OUTGOING MAIL

MICHAEL McLAUGHLIN #83193
SDCC
P.O. BOX 208
INDIAN SPRINGS, NEVADA
89070

B/S 2615 0510 CLASS MAIL
US POSTAGE $001.36
ZIP 89101
041M12254121

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
200 LEWIS AVE — 3RD FL
LAS VEGAS, NEVADA 89155

ASTA

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

MICHAEL T. MCLAUGHLIN,

Plaintiff(s),

vs.

STATE OF NEVADA; WARDEN J. HOWELL,

Defendant(s),

Case No: A-21-839220-W

Dept No: XXVIII

CASE APPEAL STATEMENT

1. Appellant(s): Michael McLaughlin

2. Judge: Ronald J. Israel

3. Appellant(s): Michael McLaughlin

Counsel:

Michael McLaughlin #83193
P.O. Box 208
Indian Springs, NV 89070

4. Respondent (s): State of Nevada; Warden J. Howell

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 10, 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 19 day of April 2022.

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: Michael McLaughlin

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-21-839220-W

Michael McLaughlin, Plaintiff(s)	§	Location:	**Department 28**
vs.	§	Judicial Officer:	**Israel, Ronald J.**
State of Nevada, Defendant(s)	§	Filed on:	**08/10/2021**
	§	Cross-Reference Case Number:	**A839220**

CASE INFORMATION

Related Cases
03C189119 (Writ Related Case)

Statistical Closures
02/16/2022 Summary Judgment

Case Type: **Writ of Habeas Corpus**

Case Status: **02/16/2022 Closed**

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	A-21-839220-W
Court	Department 28
Date Assigned	08/10/2021
Judicial Officer	Israel, Ronald J.

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**McLaughlin, Michael T**	**Pro Se**
Defendant	**State of Nevada**	**Wolfson, Steven B** *Retained* 702-671-2700(W)
	Warden J Howell	

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

08/10/2021 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff McLaughlin, Michael T
[1] Post Conviction

08/10/2021 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff McLaughlin, Michael T
[2] Post Conviction

08/12/2021 Order for Petition for Writ of Habeas Corpus
[3] Order For Petition For Writ Of Habeas Corpus

10/14/2021 Order for Production of Inmate
[4] Order For Production Of Inmate Michael McLaughlin, BAC #83193 - December 8, 2021

12/07/2021 Motion
Filed By: Plaintiff McLaughlin, Michael T
[5] Motion to File Amended Habeas Corpus Post Conviction Petition Regarding Illegal and Unconstitutional Sentence

01/13/2022 Response
[6] State's Opposition to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Motion to Dismiss Pursuant to the Doctrine of Laches

02/18/2022 Reply
Filed by: Plaintiff McLaughlin, Michael T
[7] Reply to State's Opposition to Petitioner's Writ of Habeas Corpus Petition (Post Conviction) and Their Motion to Dismiss Pursuant to the Doctrine of Laches

03/03/2022 Findings of Fact, Conclusions of Law and Order
[8] Findings Of Fact, Conclusions Of Law And Order

03/04/2022 Notice of Entry of Findings of Fact, Conclusions of Law
[9] Notice of Entry of Findings of Fact, Conclusions of Law and Order

04/18/2022 Notice of Appeal
[10] Notice of Appeal

04/19/2022 Case Appeal Statement
Case Appeal Statement

HEARINGS

10/13/2021 **Petition for Writ of Habeas Corpus** (12:00 PM) (Judicial Officer: Israel, Ronald J.)
10/13/2021, 12/08/2021, 02/16/2022
Hearing Date;
Matter Continued;
Denied;
Journal Entry Details:
Upon Court's inquiry, Plaintiff advised of his reply to State's motion to dismiss and added his showing of good cause. Colloquy regarding the petition being successive. Ms. Heap submitted. Court advised that this is the third petition and it has been fifteen years since the original Judgement of Conviction; the petition is procedurally time barred, there has been no showing of good cause to overcome the time bar and State pled Laches and no showing of good cause for the delay. COURT ORDERED, Petition DENIED. NDC;
Hearing Date;
Matter Continued;
Denied;
Journal Entry Details:
Deft. not present, Nevada Department of Corrections (NDC). COURT NOTED, Deft's. request to have counsel appointed was denied; this was a successive Petition. Upon Court's inquiry, Mr. Zadrowski stated the Post-Conviction team indicated they never received the Petition and requested forty-five (45) days to respond. COURT ORDERED, State's Response DUE 02.09.21, Deft's. Reply DUE 02.16.21, matter CONTINUED. CONTINUED TO: 02.16.21 11:00 A.M. CLERK'S NOTE: A copy of this minute order was mailed to Deft. (Michael McLaughlin 83193, High Desert State Prison, PO Box 650, Indian Springs, NV 89070). / sb 12.12.21 ;
Hearing Date;
Matter Continued;
Denied;

10/13/2021 **Status Check** (12:00 PM) (Judicial Officer: Israel, Ronald J.)
Status Check: Possible Appointment of Counsel Through The Office Of Appointed Counsel - Drew Christensen
Matter Heard; Status Check: Possible Appointment of Counsel Through The Office Of Appointed Counsel - Drew Christensen

10/13/2021 **All Pending Motions** (12:00 PM) (Judicial Officer: Israel, Ronald J.)
All Pending Motions (10/13/2021)
Matter Heard; All Pending Motions (10/13/2021)

Journal Entry Details:

STATUS CHECK: POSSIBLE APPOINTMENT OF COUNSEL THROUGH THE OFFICE OF APPOINTED COUNSEL - DREW CHRISTENSEN...PETITION FOR WRIT OF HABEAS CORPUS Deft./Petitioner MCLAUGHLIN not present, in custody in the Nevada Department of Corrections (NDC). Court noted there had been multiple Habeas Petitions and therefore the Court will not be appointing counsel. Court noted the prior petitions and file dates and the appeal that was filed in 2006. COURT ORDERED, Briefing Schedule SET for the pending Writ: State's Response by 11-10-21, Deft's Reply by 11-24-21 and Hearing SET. Court directed the State to prepare an order to transport the Deft. NDC 12/08/2021 11:00 AM PETITION FOR WRIT OF HABEAS CORPUS CLERK'S NOTE: A copy of this minute order was mailed to Michael McLaughlin, #83193, I/C Southern Desert Correctional Center (SDCC), PO BOX 208 Indian Springs, Nv, 89070. kt 10-14-21;

DISTRICT COURT CIVIL COVER SHEET

A-21-839220-W
Dept. 28

County, Nevada

Case No. .....
(Assigned by Clerk's Office)

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

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Michael McLaughlin	State of Nevada
Attorney (name/address/phone):	Attorney (name/address/phone):

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

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
■ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

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

August 10, 2021
Date

PREPARED BY CLERK
Signature of initiating party or representative

See other side for family-related case filings.

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL McLAUGHLIN
#0638112,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-839220-W
(03C189119)

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: February 16, 2022
TIME OF HEARING: 11:00 A.M.

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 16th day of February, 2022, the Petitioner being not present, not represented by counsel, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HILARY HEAP, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of petitioner, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On January 6, 2003, the State filed an Information charging MICHAEL TRACY MCLAUGHLIN (hereinafter "Petitioner") as follows: COUNTS 1-3 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 4 – Battery with Use of a Deadly Weapon (Felony – NRS 200.481); and COUNT 5 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165). On August 9, 2004, an Amended Information was filed charging Petitioner with the same offenses and giving notice that the State would seek habitual criminal treatment at sentencing.

A jury trial commenced on August 9, 2004. On August 13, 2004, the jury returned a verdict of guilty on all counts charged in the Amended Information.

On September 28, 2004, Petitioner was ordered to pay $6,190.88 restitution and sentenced to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 1 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon; Count 2 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon, to run consecutive to Count 1; Count 3 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon, to run consecutive to Count 2; Count 4 – a maximum term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, to run consecutive to Count 3; Count 5 – a maximum term of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months, to run concurrent to Count 4 with six hundred fifty-three (653) days credit for time served. The Judgment of Conviction was filed on October 6, 2004.

A Notice of Appeal was filed on November 4, 2004. On February 15, 2006, the Nevada Supreme Court affirmed Petitioner's conviction on direct appeal. Remittitur issued on March 14, 2006.

On April 12, 2005, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"), a Motion for Appointment of Counsel, and a Motion for an Evidentiary Hearing. Petitioner filed a Supplemental Petition for Writ of Habeas Corpus on December 27, 2006. On November 16, 2007, an evidentiary hearing was conducted in connection with Petitioner's First Petition. The Court denied Petitioner's First Petition on the same day. The Findings of Fact, Conclusions of Law and Order was filed on January 31, 2008. Petitioner filed a Notice of Appeal from the denial of his First Petition on February 20, 2008. On April 8, 2009, the Nevada Supreme Court issued an Order of Reversal and Remand, finding that the District Court abused its discretion in denying Petitioner's Motion for Appointment of Post-Conviction Counsel. Remittitur issued May 5, 2009.

Petitioner was appointed counsel on April 27, 2009. Court-appointed counsel filed a Supplemental Brief to Writ of Habeas Corpus on June 2, 2010. The State filed a Supplemental Response to Petitioner's Petition for Writ of Habeas Corpus on July 20, 2010. On October 1, 2010, a second evidentiary hearing was held. On October 28, 2010, the State filed a Supplement to Response to Petitioner's Petition for Writ of Habeas Corpus. Petitioner's Supplemental Brief to Writ of Habeas Corpus was denied on November 12, 2010. A Decision and Order was filed on January 11, 2011. On November 30, 2010, Petitioner filed a Notice of Appeal from the denial of his Petition for Writ of Habeas Corpus. On January 12, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on February 7, 2012.

Petitioner filed a second Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") on February 14, 2013. On April 1, 2013, the District Court denied Petitioner's Second Petition. The Findings of Fact, Conclusions of Law and Order was filed on June 12, 2013. On July 12, 2013, Petitioner filed a Notice of Appeal. On September 16, 2014, the Nevada Supreme Court affirmed the denial of Petitioner's Second Petition. Remittitur issued on October 13, 2014.

On May 12, 2015, Petitioner filed a Motion for Modification of Sentence. The State filed an Opposition on May 29, 2015. On June 3, 2015, the Court denied the Motion.

On August 10, 2021, Petitioner filed two (2) different Petitions for Writ of Habeas Corpus (Post-Conviction). The first of these filings will be referred to as "Third Petition." On December 7, 2021, Petitioner filed a Motion to File Amended Habeas Corpus Post-Conviction Petition (hereinafter "Motion"). The Motion contains the second filing from August 10, 2021, but adds a Ground Three. The second filing will be cited as part of the Motion.

Following a hearing on February 16, 2022, this Court finds and concludes as follows:

ANALYSIS

The instant Petition is both procedurally barred and denied on its merits.

I. THE THIRD PETITION AND MOTION ARE PROCEDURALLY BARRED

The Third Petition and Motion are untimely, successive, and abuses of the writ. Petitioner does not demonstrate good cause for failing to file the Third Petition and Motion in a timely manner or for not raising these claims in his first habeas petition.

A. The Third Petition and Motion Are Time-Barred.

The Third Petition is time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from

the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Petitioner had one year from the filing of his *original* Judgment of Conviction to file a timely petition. Absent a showing of good cause to excuse this delay, this Petition and Supplement must be denied.

Here, Remittitur issued and became final on March 14, 2006, and his Petition must have been filed within a year of that date. The Third Petition was filed on August 10, 2021, and the Motion was filed on December 7, 2021, over fourteen (14) years too late. As there has been no showing of good cause, the Third Petition and Motion are denied.

The Third Petition and Motion Are Successive.

NRS 34.810(2) reads:

A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are

alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Because the issues Petitioner raises in the Third Petition and the Motion could have been brought up on direct appeal or in his first habeas petition, they are denied.

B. Substantive Issues in the Third Petition and the Motion Are Waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was

> involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "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).

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant 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).

Petitioner alleges he was erroneously charged for attempted murder under several statutes rather than under one. Third Petition at 7. Petitioner proclaims his actual innocence based on defective charging documents. Motion at 6. Petitioner claims the alleged defect robbed the trial court of jurisdiction. Motion at 6. Petitioner alleges the enhancement to his sentence for using a deadly weapon in his attacks is unconstitutional. Motion at 8-B (an

unnumbered page following page 8-A). All these grounds could have been raised during Petitioner's direct appeal and are now waived.

Petitioner asserts his counsel was ineffective for failing to object to the charging documents. Motion at 8. This claim could have been raised during his first habeas petition and is now waived.

C. Application of the Procedural Bars Is Mandatory.

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

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

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

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 563, 307 P.3d at 324. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Because the Third Petition and the Motion are procedurally barred, they are both

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denied.

II. PETITIONER FAILS TO DEMONSTRATE GOOD CAUSE OR SUFFICIENT PREJUDICE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Dir., Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

"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 Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Further, a petitioner raising good cause to excuse procedural bars must do so within a

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

Additionally, in order to demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

Petitioner first asserts the COVID-19 pandemic caused an issue which could not have been raised earlier. Third Petition at 6 ("it couldn't have been raised then, it's a new issue pertaining to coronavirus"). The issue Petitioner alleges could not have been raised prior to COVID is that Petitioner was charged under multiple statutes for attempt murder, rather than under one statute. Third Petition at 7. Petitioner was charged in 2003, so the 2019 pandemic does not justify his delay in raising this issue.

To explain filing more than one year after Remittitur, Petitioner claims "actual innocence." Motion at 6. Petitioner "cannot rely on conclusory claims for relief but must plead and prove specific facts demonstrating good cause and actual prejudice." State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 684 (2003), as modified (June 9, 2003). Petitioner pleads no specific facts to establish his factual innocence. Because Petitioner cannot overcome the good cause requirement, this Court denies this Third Petition and Motion.

III. THE STATE HAS AFFIRMATIVELY PLED LACHES

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a

sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, significantly more than five (5) years have elapsed since Remittitur issued from Petitioner's direct appeal. The State would be severely prejudiced in retrying this case nineteen (19) years after the crime was committed. Petitioner has acquiesced in the existing conditions by not raising his claims on direct appeal or in his first habeas petition. Finally, Petitioner shows no good cause to excuse his delay in filing these claims. The State has pled laches and justice requires this Third Petition and the Motion be dismissed.

IV. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION

In his first ground for error, Petitioner asserts the trial court lacked jurisdiction over him because he was charged under an erroneous document. Motion at 7.

The Nevada court system has jurisdiction over any individual who commits any crime within this State's borders. NRS 175.010 states:

> Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United States, is liable to punishment by the laws

> of this state for a public offense committed therein, except where it is by law cognizable exclusively in the courts of the United States.

"There can be no conviction for or punishment of a crime without a formal and sufficient accusation; that, in the absence thereof, a court acquires no jurisdiction whatever, and if it assumes jurisdiction such trial and conviction would be a nullity". Williams v. Mun. Judge of City of Las Vegas, 85 Nev. 425, 429, 456 P.2d 440, 442 (1969). Where the charging document does not claim the public offense happened in the State of Nevada, the charging document fails to establish that Nevada courts have jurisdiction. Application of Alexander, 80 Nev. 354, 358, 393 P.2d 615, 617 (1964).

However, a charging document grants jurisdiction where it makes "a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case." Sheriff, Clark Cty. v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see also Watkins v. Sheriff, Clark Cty., 87 Nev. 233, 234–35, 484 P.2d 1086, 1087 (1971) (holding that a charging document can grant jurisdiction to the Court even when the language in the criminal complaint does not precisely match the language in the statute under which the defendant was charged). In this respect, Nevada is a notice pleading state. See Sanders v. Sheriff, 85 Nev. 179, 181-82, 451 P.2d 718, 720 (1969) (stating: "the criminal complaint is intended solely to put the defendant on formal written notice of the charge he must defend" when resolving whether a court had jurisdiction over a case).

Additionally, the charging document need not be artfully pled. In Levinson, this Court found a charging document that provided a date and location of the offense, as well as a statement that "the offense occurred while respondent was engaged in a lawful act (driving a car), and alleges that the offense occurred because respondent was driving in an unlawful manner (in excess of 100 miles per hour)", was sufficient. Levison, 95 Nev at 437-38, 596 P.2d at 233-34.

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Further, in State v. Jones, this Court stated:

> The United States Supreme Court has held that reversible error exists only where the variance between the charge and proof was such as to affect the substantial rights of the accused. Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The reason for this is that (1) the accused must be definitely informed as to the charges against him so that he can prepare for trial and will not be surprised by evidence produced, and (2) the accused must be protected against double jeopardy another charge for the same offense. See also Russell v. United States, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).
>
> This court is in agreement with this standard and has added that the indictment should be sufficiently definite to prevent the prosecutor from changing the theory of the case. Adler v. Sheriff, 92 Nev. 436, 440, 552 P.2d 334, 336 (1976); Simpson v. District Court, 88 Nev. 654, 660-61, 503 P.2d 1225, 1230 (1972). Also, we have looked to determine whether the challenge to the indictment was brought before trial or after trial and have said that reduced standards apply to the sufficiency of indictments challenged after trial in contrast to pre-trial challenges**.**

State v. Jones, 96 Nev. 71, 73–74, 605 P.2d 202, 204 (1980) (emphasis added).

This Court concluded in Jones that:

> The sufficiency of the indictment was challenged only after all the evidence was presented at trial. Additionally, a state statute provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. These factors indicate the application of a reduced standard toward the sufficiency of the indictment and, as such, we find that the variance between the crime charged and the proof adduced was immaterial. It did not affect the substantial rights of the respondent because it did not impair his ability to prepare his case and defend himself against the charge.

Jones, 96 Nev. at 76, 605 P.2d at 205–06.

This is the same standard adopted by the Ninth Circuit. See United States v. Gordon, 641 F.2d 1281, 1284 (9th Cir. 1981) (stating: "While correct citation to the relevant statute is always desirable, both the Federal Rules and the cases interpreting them make it clear that an error or omission is not necessarily fatal."); see also United States v. Clark, 416 F.2d 63 (9th

Cir. 1969) (upholding the district court's refusal to dismiss an indictment where appellant, who was accused of submitting a false travel voucher to the federal government, had been charged under 18 U.S.C. §287 instead of 18 U.S.C. § 1001, and stating: "The statutory citation is not, however, regarded as part of the indictment… We read Rule 7(c) to permit the citation of a statute on an indictment to be amended where, as here, the facts alleged will support such a charge."); Steinhart v. United States District Court for District of Nevada, 543 F.2d 69, 70 (9th Cir. 1976); United States v. Wuco, 535 F.2d 1200 (9th Cir. 1976), cert denied, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1979); United States v. Shipstead, 433 F.2d 368 (9th Cir. 1970).

Petitioner complains "the statute for homicide 200.030 was used when I did not commit a homicide." Third Petition at 7. Petitioner claims NRS 193.330 "does not define a criminal act," but merely outlines punishments for these non-crimes. Motion at 7, 7(b).

Because no statute, standing alone, criminalizes attempted murder, Petitioner believes attempted murder is not a crime. Id. Petitioner finds the attempt statute to be "clear and unambiguous, obvious to the trained as well as the untrained eye." Id. Petitioner ignores the "clear and unambiguous" wording of NRS 193.330, which criminalizes attempting to commit crimes in its first sentence: "An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." The statute then outlines punishments for attempts.

Under his interpretation of how Nevada's statutes ought to work, Petitioner contends the "District Court was without subject-matter jurisdiction due to a defective charging document." Motion at 7(a). "With no statute for 'attempt murder,' the information failed to charge a crime and thereby failed to invoke jurisdiction of the District Court." Motion at 7(e). Petitioner also appears to argue that the title of a statute must state everything within the statute so that the public is not required to actually read the statute. Motion at 7(c).

Petitioner fails to cite any authority that says statutes may not work in conjunction with other statutes to criminalize an act. He is unable to do so, as this is not how Nevada's criminal statutes work. Murder is defined in one statute, punished in another, enhanced if a deadly weapon is used, and reduced to an attempt crime if the victim does not die. Other statutes

increase punishment if a murder is committed against a protected person or under certain situations. Each statute is not required to stand alone, independent of the rest of the laws.

Petitioner was charged with three counts of Attempt Murder with Use of a Deadly Weapon. Amended Information, filed August 9, 2004, at 1. The counts were supported by citations to NRS 200.010, 200.030, 193.330, and 193.165. Id. Petitioner asserts these statutes do not define a "course of conduct made criminal by the Nevada legislature." Motion at 7(a).

NRS 200.010 defines murder under Nevada law. NRS 200.030 provides penalties for those who commit murder. NRS 193.330 says those who intend to commit a crime but fail to accomplish it are guilty of attempting to commit the crime. The statute provides penalties for these attempts. NRS 193.165 provides additional penalties for those who use deadly weapons during their criminal endeavors. When placed together in an Information, as they were here, these statutes make it illegal to try to kill people by stabbing them multiple times, even if the victims fail to die. Petitioner may not reinterpret Nevada law to make attempted murder legally permissible.

The Amended Information granted jurisdiction because it made "a definite statement of facts constituting the offense in order to adequately notify the accused of the charges." Levinson, 95 Nev. at 437, 596 P.2d at 233. This sufficed to put Petitioner on formal written notice of the charges against which he must defend. Sanders, 85 Nev. at 181-82, 451 P.2d at 720. Petitioner may not wait eighteen (18) years after he was charged to unilaterally decide the documents were insufficient. See Jones, 96 Nev. at 73–74, 605 P.2d at 204. Because the charging documents put Petitioner on notice of the charges against him, the Court had jurisdiction over him and this claim is denied.

V. PETITIONER'S ACTUAL INNOCENCE CLAIM FAILS

Petitioner claims he is innocent of attempted murder because such a crime does not exist under Nevada law. Motion at 7(a). "Petitioner McLaughlin hereby asserts his 'actual innocence' of the crime of 'attempt murder,' as the conduct has not been defined under the NRS by the legislature as criminal in nature." Motion at 7-G. Petitioner alleges "a fundamental miscarriage of justice, the conviction of an actually innocent man." Motion at 7-H.

Actual innocence means factual innocence, not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

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

Here, Petitioner alleges legal insufficiency, not factual innocence. He claims a miscarriage of justice because the State did not charge him under a single statute. Motion at 7-H. He does not allege a constitutional violation occurred, without which no reasonable juror would have found him guilty.

Factual innocence might exist if Petitioner had not brought a knife to the social services office, had not stabbed Kathryn Atkinson multiple times with his knife, had not lunged at Steven Glenn with his knife, and had not stabbed Susan Rhodes multiple times with his knife.

However, Petitioner did do these actions and more. He is not "actually" innocent of the crimes for which he was convicted. Petitioner never claims he did not plunge his knife repeatedly into the bodies of several people in an attempt to kill them.

Petitioner does not present any newly discovered facts. His claim of innocence is based on his belief that trying to kill someone is not contrary to Nevada law, not on a new fact that was never presented to the jury. Petitioner asserts no facts, that if true and not belied by the record, would show no reasonable juror would have convicted him. Therefore, this claim is denied.

VI. PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground Two, Petitioner asserts his trial counsel was ineffective for not objecting to the charging documents. Motion at 8.

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

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

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

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

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

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,

108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not

sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Petitioner asserts his attorney was ineffective for failing to realize that attempted murder is not a crime under Nevada law. Motion at 8. This was deficient performance that prejudiced Petitioner, in his opinion, "by allowing the State to bring criminal charges against him, for which he was tried and convicted but which do not in law define the act of 'attempt' itself as criminal." Motion at 8-8-A.

Since it is, in fact, against the law in Nevada to attempt to murder someone, it would have been futile for trial counsel to object to the charging document. Counsel is not required to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is denied.

VII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner asserts his claim of actual innocence entitles him to an evidentiary hearing "if he presents specific factual allegations that if true and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the 'new' evidence." Motion at 7-G. He contends this Court must hold an evidentiary hearing to resolve his claim. Id.

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
>
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

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

It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."**)**. Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Petitioner asserts no newly discovered facts that were not presented to the jury, so there is nothing for an evidentiary hearing to resolve. Petitioner's only contention is that he has

decided attempted murder is not illegal. This Court is able to evaluate this claim without expanding the record. Accordingly, Petitioner's request for an evidentiary hearing is denied.

VIII. THE FUGITIVE SUPPLEMENT IS STRICKEN

Petitioner filed the Motion to File Amended Habeas Corpus Post-Conviction Petition on December 7, 2021, while awaiting the court's ruling on his two (2) habeas petitions filed on August 10, 2021. Although the Motion "seek[s] leave to file an amended habeas corpus petition," Petitioner did not allow this Court to grant or deny his Motion before filing the amended petition. His decision to file the Motion together with the Proposed Amended Petition without leave of the Court and a judicial determination of good cause requires that this fugitive pleading be stricken from the record.

Chapter 34 allows a habeas petitioner to file a pro per petition without the assistance of a lawyer. NRS 34.724(1). A court may appoint an attorney for an indigent petitioner under the appropriate circumstances. NRS 34.750(1). Appointment of counsel is mandatory where a first petition challenges a sentence of death. NRS 34.820(1). Appointed counsel may supplement the pro per petition once within thirty days of appointment. NRS 34.750(3). After that, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Such leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]" Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006).

The strict nature of this process is justified by the Nevada Legislature's policy favoring the finality of convictions and the rapid resolution of habeas litigation. NRS 34.740 (requiring expeditious examination of habeas petitions by the judiciary); NRS 34.820(7) (requiring in capital habeas cases that judicial officers "render a decision within 60 days after submission of the matter for decision."); Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001) (the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions."); Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition").

This Court strikes Petitioner's Motion and Proposed Amended Petition because Petitioner failed to seek leave of the Court before filing the Amended Petition which added a third ground. Under NRS 34.750(5), a habeas petitioner can only supplement his petition *after* leave of court has been granted. The Nevada Supreme Court has said that leave can be granted only upon a showing of good cause, and that leave can be denied if the delay in raising a claim is not explained. Barnhart, 122 Nev. at 303-04, 130 P.3d at 652. A finding of good cause to expand the issues should be made "explicitly on the record" and should enumerate "the additional issues which are to be considered." Id. at 303, 130 P.3d at 652. In Barnhart, the Nevada Supreme Court affirmed a district court's decision to deny leave to expand the issues because "[c]ounsel for petitioner provided no reason why that claim *could* not have been pleaded in the supplemental petition." Id. at 304, 130 P.3d at 652 (emphasis added).

Here, on December 7, 2021, Petitioner filed a Motion to File Amended Habeas Corpus Post-Conviction Petition, together with the Proposed Amended Petition which added Ground Three. Petitioner did not receive leave of the Court before filing this Amended Petition. NRS 34.750(5). Petitioner raised one new ground, challenging the imposition of an equal and consecutive amount of time for the deadly weapon enhancement.

Petitioner failed to address why he filed the Amended Petition four (4) months after he filed his Third Petition, or why this claim was not raised on direct appeal or in his original Petition. This does not meet Barnhart's good cause standard. Cf. Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) ("To establish good cause, appellants must show that an *impediment external to the defense* prevented their compliance with the applicable procedural rule") (emphasis added).

Petitioner failed to show that an impediment external to the defense prevented him from bringing this new claim in his original Petition. See Barnhart, 122 Nev. at 304, 130 P.3d at 652. Because Petitioner fails to allege good cause in his Motion, it is impossible for this Court to make a finding of good cause to expand the issues, "explicitly on the record," and to enumerate "the additional issues which are to be considered." Barnhart, at 303, 130 P.3d at

652. As such, Petitioner's Motion fails to meet the Barnhart standard and this Court strikes Petitioner's Motion and Proposed Amended Petition.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction), Motion to File Amended Habeas Corpus Post-Conviction Petition, and Request for Evidentiary Hearing shall be, and they are, hereby denied.

Dated this 3rd day of March, 2022

Ronald J. Israel

A-21-839220-W

53A C9A F2AA 65F1
Ronald J. Israel JT
District Court Judge

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734

CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2022, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

MICHAEL TRACY MCLAUGHLIN, BAC #83193
SOUTHERN DESERT CORRECTIONAL CENTER
P. O. BOX 208
INDIAN SPRINGS, NEVADA 89070-0208

BY /s/ J. HAYES
Secretary for the District Attorney's Office

02FH1263X/TRP/sr/jh/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael McLaughlin, Plaintiff(s)	CASE NO: A-21-839220-W
vs.	DEPT. NO. Department 28
State of Nevada, Defendant(s)	

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: 3/3/2022

Dept 28 Law Clerk	dept28lc@clarkcountycourts.us

Electronically Filed
3/4/2022 1:49 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL MCLAUGHLIN,

Petitioner,

vs.

STATE OF NEVADA; ET AL.,

Respondent,

Case No: A-21-839220-W

Dept No: XXVIII

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

PLEASE TAKE NOTICE that on March 3, 2022, 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 March 4, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 4 day of March 2022, 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:
Michael McLaughlin # 83193
P.O. Box 208
Indian Springs, NV 89070

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL McLAUGHLIN
#0638112,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-839220-W
(03C189119)

DEPT NO: XXVIII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: February 16, 2022
TIME OF HEARING: 11:00 A.M.

THIS CAUSE having come on for hearing before the Honorable RONALD J. ISRAEL, District Judge, on the 16th day of February, 2022, the Petitioner being not present, not represented by counsel, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through HILARY HEAP, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of petitioner, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On January 6, 2003, the State filed an Information charging MICHAEL TRACY MCLAUGHLIN (hereinafter "Petitioner") as follows: COUNTS 1-3 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 4 – Battery with Use of a Deadly Weapon (Felony – NRS 200.481); and COUNT 5 – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060, 193.165). On August 9, 2004, an Amended Information was filed charging Petitioner with the same offenses and giving notice that the State would seek habitual criminal treatment at sentencing.

A jury trial commenced on August 9, 2004. On August 13, 2004, the jury returned a verdict of guilty on all counts charged in the Amended Information.

On September 28, 2004, Petitioner was ordered to pay $6,190.88 restitution and sentenced to the Nevada Department of Corrections (hereinafter "NDOC") as follows: Count 1 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon; Count 2 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon, to run consecutive to Count 1; Count 3 – a maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus an equal and consecutive maximum term of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon, to run consecutive to Count 2; Count 4 – a maximum term of one hundred twenty (120) months with a minimum parole eligibility of forty-eight (48) months, to run consecutive to Count 3; Count 5 – a maximum term of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months, to run concurrent to Count 4 with six hundred fifty-three (653) days credit for time served. The Judgment of Conviction was filed on October 6, 2004.

A Notice of Appeal was filed on November 4, 2004. On February 15, 2006, the Nevada Supreme Court affirmed Petitioner's conviction on direct appeal. Remittitur issued on March 14, 2006.

On April 12, 2005, Petitioner filed a pro per Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "First Petition"), a Motion for Appointment of Counsel, and a Motion for an Evidentiary Hearing. Petitioner filed a Supplemental Petition for Writ of Habeas Corpus on December 27, 2006. On November 16, 2007, an evidentiary hearing was conducted in connection with Petitioner's First Petition. The Court denied Petitioner's First Petition on the same day. The Findings of Fact, Conclusions of Law and Order was filed on January 31, 2008. Petitioner filed a Notice of Appeal from the denial of his First Petition on February 20, 2008. On April 8, 2009, the Nevada Supreme Court issued an Order of Reversal and Remand, finding that the District Court abused its discretion in denying Petitioner's Motion for Appointment of Post-Conviction Counsel. Remittitur issued May 5, 2009.

Petitioner was appointed counsel on April 27, 2009. Court-appointed counsel filed a Supplemental Brief to Writ of Habeas Corpus on June 2, 2010. The State filed a Supplemental Response to Petitioner's Petition for Writ of Habeas Corpus on July 20, 2010. On October 1, 2010, a second evidentiary hearing was held. On October 28, 2010, the State filed a Supplement to Response to Petitioner's Petition for Writ of Habeas Corpus. Petitioner's Supplemental Brief to Writ of Habeas Corpus was denied on November 12, 2010. A Decision and Order was filed on January 11, 2011. On November 30, 2010, Petitioner filed a Notice of Appeal from the denial of his Petition for Writ of Habeas Corpus. On January 12, 2012, the Nevada Supreme Court issued an Order of Affirmance. Remittitur issued on February 7, 2012.

Petitioner filed a second Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Second Petition") on February 14, 2013. On April 1, 2013, the District Court denied Petitioner's Second Petition. The Findings of Fact, Conclusions of Law and Order was filed on June 12, 2013. On July 12, 2013, Petitioner filed a Notice of Appeal. On September 16, 2014, the Nevada Supreme Court affirmed the denial of Petitioner's Second Petition. Remittitur issued on October 13, 2014.

On May 12, 2015, Petitioner filed a Motion for Modification of Sentence. The State filed an Opposition on May 29, 2015. On June 3, 2015, the Court denied the Motion.

On August 10, 2021, Petitioner filed two (2) different Petitions for Writ of Habeas Corpus (Post-Conviction). The first of these filings will be referred to as "Third Petition." On December 7, 2021, Petitioner filed a Motion to File Amended Habeas Corpus Post-Conviction Petition (hereinafter "Motion"). The Motion contains the second filing from August 10, 2021, but adds a Ground Three. The second filing will be cited as part of the Motion.

Following a hearing on February 16, 2022, this Court finds and concludes as follows:

ANALYSIS

The instant Petition is both procedurally barred and denied on its merits.

I. THE THIRD PETITION AND MOTION ARE PROCEDURALLY BARRED

The Third Petition and Motion are untimely, successive, and abuses of the writ. Petitioner does not demonstrate good cause for failing to file the Third Petition and Motion in a timely manner or for not raising these claims in his first habeas petition.

A. The Third Petition and Motion Are Time-Barred.

The Third Petition is time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from

the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Petitioner had one year from the filing of his *original* Judgment of Conviction to file a timely petition. Absent a showing of good cause to excuse this delay, this Petition and Supplement must be denied.

Here, Remittitur issued and became final on March 14, 2006, and his Petition must have been filed within a year of that date. The Third Petition was filed on August 10, 2021, and the Motion was filed on December 7, 2021, over fourteen (14) years too late. As there has been no showing of good cause, the Third Petition and Motion are denied.

The Third Petition and Motion Are Successive.

NRS 34.810(2) reads:

A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are

alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005).

Because the issues Petitioner raises in the Third Petition and the Motion could have been brought up on direct appeal or in his first habeas petition, they are denied.

B. Substantive Issues in the Third Petition and the Motion Are Waived.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was

> involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

The Nevada Supreme Court has held that "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).

Further, substantive claims are beyond the scope of habeas and waived. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Under NRS 34.810(3), a defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice. Where a defendant 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).

Petitioner alleges he was erroneously charged for attempted murder under several statutes rather than under one. Third Petition at 7. Petitioner proclaims his actual innocence based on defective charging documents. Motion at 6. Petitioner claims the alleged defect robbed the trial court of jurisdiction. Motion at 6. Petitioner alleges the enhancement to his sentence for using a deadly weapon in his attacks is unconstitutional. Motion at 8-B (an

unnumbered page following page 8-A). All these grounds could have been raised during Petitioner's direct appeal and are now waived.

Petitioner asserts his counsel was ineffective for failing to object to the charging documents. Motion at 8. This claim could have been raised during his first habeas petition and is now waived.

C. Application of the Procedural Bars Is Mandatory.

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

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

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

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 563, 307 P.3d at 324. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Because the Third Petition and the Motion are procedurally barred, they are both

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denied.

II. PETITIONER FAILS TO DEMONSTRATE GOOD CAUSE OR SUFFICIENT PREJUDICE TO OVERCOME THE PROCEDURAL BARS

To avoid procedural default under NRS 34.726 and NRS 34.810, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or comply with the statutory requirements. See Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Dir., Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

"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 Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

Further, a petitioner raising good cause to excuse procedural bars must do so within a

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

Additionally, in order to demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

Petitioner first asserts the COVID-19 pandemic caused an issue which could not have been raised earlier. Third Petition at 6 ("it couldn't have been raised then, it's a new issue pertaining to coronavirus"). The issue Petitioner alleges could not have been raised prior to COVID is that Petitioner was charged under multiple statutes for attempt murder, rather than under one statute. Third Petition at 7. Petitioner was charged in 2003, so the 2019 pandemic does not justify his delay in raising this issue.

To explain filing more than one year after Remittitur, Petitioner claims "actual innocence." Motion at 6. Petitioner "cannot rely on conclusory claims for relief but must plead and prove specific facts demonstrating good cause and actual prejudice." State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 684 (2003), as modified (June 9, 2003). Petitioner pleads no specific facts to establish his factual innocence. Because Petitioner cannot overcome the good cause requirement, this Court denies this Third Petition and Motion.

III. THE STATE HAS AFFIRMATIVELY PLED LACHES

Certain limitations exist on how long a defendant may wait to assert a post-conviction request for relief. Consideration of the equitable doctrine of laches is necessary in determining whether a defendant has shown 'manifest injustice' that would permit a modification of a

sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated: "Application of the doctrine to an individual case may require consideration of several factors, including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3) whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev. 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period exceeding five years [elapses] between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction…" The Nevada Supreme Court has observed, "[P]etitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the statute requires the State plead laches. NRS 34.800(2).

Here, significantly more than five (5) years have elapsed since Remittitur issued from Petitioner's direct appeal. The State would be severely prejudiced in retrying this case nineteen (19) years after the crime was committed. Petitioner has acquiesced in the existing conditions by not raising his claims on direct appeal or in his first habeas petition. Finally, Petitioner shows no good cause to excuse his delay in filing these claims. The State has pled laches and justice requires this Third Petition and the Motion be dismissed.

IV. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION

In his first ground for error, Petitioner asserts the trial court lacked jurisdiction over him because he was charged under an erroneous document. Motion at 7.

The Nevada court system has jurisdiction over any individual who commits any crime within this State's borders. NRS 175.010 states:

> Every person, whether an inhabitant of this state, or any other state, or of a territory or district of the United States, is liable to punishment by the laws

> of this state for a public offense committed therein, except where it is by law cognizable exclusively in the courts of the United States.

"There can be no conviction for or punishment of a crime without a formal and sufficient accusation; that, in the absence thereof, a court acquires no jurisdiction whatever, and if it assumes jurisdiction such trial and conviction would be a nullity". Williams v. Mun. Judge of City of Las Vegas, 85 Nev. 425, 429, 456 P.2d 440, 442 (1969). Where the charging document does not claim the public offense happened in the State of Nevada, the charging document fails to establish that Nevada courts have jurisdiction. Application of Alexander, 80 Nev. 354, 358, 393 P.2d 615, 617 (1964).

However, a charging document grants jurisdiction where it makes "a definite statement of facts constituting the offense in order to adequately notify the accused of the charges and to prevent the prosecution from circumventing the notice requirement by changing theories of the case." Sheriff, Clark Cty. v. Levinson, 95 Nev. 436, 437, 596 P.2d 232, 233 (1979); see also Watkins v. Sheriff, Clark Cty., 87 Nev. 233, 234–35, 484 P.2d 1086, 1087 (1971) (holding that a charging document can grant jurisdiction to the Court even when the language in the criminal complaint does not precisely match the language in the statute under which the defendant was charged). In this respect, Nevada is a notice pleading state. See Sanders v. Sheriff, 85 Nev. 179, 181-82, 451 P.2d 718, 720 (1969) (stating: "the criminal complaint is intended solely to put the defendant on formal written notice of the charge he must defend" when resolving whether a court had jurisdiction over a case).

Additionally, the charging document need not be artfully pled. In Levinson, this Court found a charging document that provided a date and location of the offense, as well as a statement that "the offense occurred while respondent was engaged in a lawful act (driving a car), and alleges that the offense occurred because respondent was driving in an unlawful manner (in excess of 100 miles per hour)", was sufficient. Levison, 95 Nev at 437-38, 596 P.2d at 233-34.

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Further, in State v. Jones, this Court stated:

> The United States Supreme Court has held that reversible error exists only where the variance between the charge and proof was such as to affect the substantial rights of the accused. Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). The reason for this is that (1) the accused must be definitely informed as to the charges against him so that he can prepare for trial and will not be surprised by evidence produced, and (2) the accused must be protected against double jeopardy another charge for the same offense. See also Russell v. United States, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).
>
> This court is in agreement with this standard and has added that the indictment should be sufficiently definite to prevent the prosecutor from changing the theory of the case. Adler v. Sheriff, 92 Nev. 436, 440, 552 P.2d 334, 336 (1976); Simpson v. District Court, 88 Nev. 654, 660-61, 503 P.2d 1225, 1230 (1972). Also, we have looked to determine whether the challenge to the indictment was brought before trial or after trial and have said that reduced standards apply to the sufficiency of indictments challenged after trial in contrast to pre-trial challenges**.**

State v. Jones, 96 Nev. 71, 73–74, 605 P.2d 202, 204 (1980) (emphasis added).

This Court concluded in Jones that:

> The sufficiency of the indictment was challenged only after all the evidence was presented at trial. Additionally, a state statute provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." NRS 178.598. These factors indicate the application of a reduced standard toward the sufficiency of the indictment and, as such, we find that the variance between the crime charged and the proof adduced was immaterial. It did not affect the substantial rights of the respondent because it did not impair his ability to prepare his case and defend himself against the charge.

Jones, 96 Nev. at 76, 605 P.2d at 205–06.

This is the same standard adopted by the Ninth Circuit. See United States v. Gordon, 641 F.2d 1281, 1284 (9th Cir. 1981) (stating: "While correct citation to the relevant statute is always desirable, both the Federal Rules and the cases interpreting them make it clear that an error or omission is not necessarily fatal."); see also United States v. Clark, 416 F.2d 63 (9th

Cir. 1969) (upholding the district court's refusal to dismiss an indictment where appellant, who was accused of submitting a false travel voucher to the federal government, had been charged under 18 U.S.C. §287 instead of 18 U.S.C. § 1001, and stating: "The statutory citation is not, however, regarded as part of the indictment… We read Rule 7(c) to permit the citation of a statute on an indictment to be amended where, as here, the facts alleged will support such a charge."); Steinhart v. United States District Court for District of Nevada, 543 F.2d 69, 70 (9th Cir. 1976); United States v. Wuco, 535 F.2d 1200 (9th Cir. 1976), cert denied, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1979); United States v. Shipstead, 433 F.2d 368 (9th Cir. 1970).

Petitioner complains "the statute for homicide 200.030 was used when I did not commit a homicide." Third Petition at 7. Petitioner claims NRS 193.330 "does not define a criminal act," but merely outlines punishments for these non-crimes. Motion at 7, 7(b).

Because no statute, standing alone, criminalizes attempted murder, Petitioner believes attempted murder is not a crime. Id. Petitioner finds the attempt statute to be "clear and unambiguous, obvious to the trained as well as the untrained eye." Id. Petitioner ignores the "clear and unambiguous" wording of NRS 193.330, which criminalizes attempting to commit crimes in its first sentence: "An act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime." The statute then outlines punishments for attempts.

Under his interpretation of how Nevada's statutes ought to work, Petitioner contends the "District Court was without subject-matter jurisdiction due to a defective charging document." Motion at 7(a). "With no statute for 'attempt murder,' the information failed to charge a crime and thereby failed to invoke jurisdiction of the District Court." Motion at 7(e). Petitioner also appears to argue that the title of a statute must state everything within the statute so that the public is not required to actually read the statute. Motion at 7(c).

Petitioner fails to cite any authority that says statutes may not work in conjunction with other statutes to criminalize an act. He is unable to do so, as this is not how Nevada's criminal statutes work. Murder is defined in one statute, punished in another, enhanced if a deadly weapon is used, and reduced to an attempt crime if the victim does not die. Other statutes

increase punishment if a murder is committed against a protected person or under certain situations. Each statute is not required to stand alone, independent of the rest of the laws.

Petitioner was charged with three counts of Attempt Murder with Use of a Deadly Weapon. Amended Information, filed August 9, 2004, at 1. The counts were supported by citations to NRS 200.010, 200.030, 193.330, and 193.165. Id. Petitioner asserts these statutes do not define a "course of conduct made criminal by the Nevada legislature." Motion at 7(a).

NRS 200.010 defines murder under Nevada law. NRS 200.030 provides penalties for those who commit murder. NRS 193.330 says those who intend to commit a crime but fail to accomplish it are guilty of attempting to commit the crime. The statute provides penalties for these attempts. NRS 193.165 provides additional penalties for those who use deadly weapons during their criminal endeavors. When placed together in an Information, as they were here, these statutes make it illegal to try to kill people by stabbing them multiple times, even if the victims fail to die. Petitioner may not reinterpret Nevada law to make attempted murder legally permissible.

The Amended Information granted jurisdiction because it made "a definite statement of facts constituting the offense in order to adequately notify the accused of the charges." Levinson, 95 Nev. at 437, 596 P.2d at 233. This sufficed to put Petitioner on formal written notice of the charges against which he must defend. Sanders, 85 Nev. at 181-82, 451 P.2d at 720. Petitioner may not wait eighteen (18) years after he was charged to unilaterally decide the documents were insufficient. See Jones, 96 Nev. at 73–74, 605 P.2d at 204. Because the charging documents put Petitioner on notice of the charges against him, the Court had jurisdiction over him and this claim is denied.

V. PETITIONER'S ACTUAL INNOCENCE CLAIM FAILS

Petitioner claims he is innocent of attempted murder because such a crime does not exist under Nevada law. Motion at 7(a). "Petitioner McLaughlin hereby asserts his 'actual innocence' of the crime of 'attempt murder,' as the conduct has not been defined under the NRS by the legislature as criminal in nature." Motion at 7-G. Petitioner alleges "a fundamental miscarriage of justice, the conviction of an actually innocent man." Motion at 7-H.

Actual innocence means factual innocence, not mere legal insufficiency. Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604, 1611 (1998); Sawyer v. Whitley, 505 U.S. 333, 338-39, 112 S.Ct. 2514, 2518-19 (1992). To establish actual innocence of a crime, a petitioner "must show that it is more likely than not that no reasonable juror would have convicted him absent a constitutional violation." Calderon v. Thompson, 523 U.S. 538, 560, 118 S. Ct. 1489, 1503 (1998) (emphasis added) (quoting Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861 (1995)). Actual innocence is a stringent standard designed to be applied only in the most extraordinary situations. Pellegrini, 117 Nev. at 876, 34 P.3d at 530.

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

Here, Petitioner alleges legal insufficiency, not factual innocence. He claims a miscarriage of justice because the State did not charge him under a single statute. Motion at 7-H. He does not allege a constitutional violation occurred, without which no reasonable juror would have found him guilty.

Factual innocence might exist if Petitioner had not brought a knife to the social services office, had not stabbed Kathryn Atkinson multiple times with his knife, had not lunged at Steven Glenn with his knife, and had not stabbed Susan Rhodes multiple times with his knife.

However, Petitioner did do these actions and more. He is not "actually" innocent of the crimes for which he was convicted. Petitioner never claims he did not plunge his knife repeatedly into the bodies of several people in an attempt to kill them.

Petitioner does not present any newly discovered facts. His claim of innocence is based on his belief that trying to kill someone is not contrary to Nevada law, not on a new fact that was never presented to the jury. Petitioner asserts no facts, that if true and not belied by the record, would show no reasonable juror would have convicted him. Therefore, this claim is denied.

VI. PETITIONER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

In Ground Two, Petitioner asserts his trial counsel was ineffective for not objecting to the charging documents. Motion at 8.

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

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

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

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

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

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State,

108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. at 1012, 103 P.3d at 33. Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not

sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Petitioner asserts his attorney was ineffective for failing to realize that attempted murder is not a crime under Nevada law. Motion at 8. This was deficient performance that prejudiced Petitioner, in his opinion, "by allowing the State to bring criminal charges against him, for which he was tried and convicted but which do not in law define the act of 'attempt' itself as criminal." Motion at 8-8-A.

Since it is, in fact, against the law in Nevada to attempt to murder someone, it would have been futile for trial counsel to object to the charging document. Counsel is not required to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this claim is denied.

VII. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Petitioner asserts his claim of actual innocence entitles him to an evidentiary hearing "if he presents specific factual allegations that if true and not belied by the record, would show that it is more likely than not that no reasonable juror would have convicted him beyond a reasonable doubt given the 'new' evidence." Motion at 7-G. He contends this Court must hold an evidentiary hearing to resolve his claim. Id.

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

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
>
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

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

It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing."**)**. Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Petitioner asserts no newly discovered facts that were not presented to the jury, so there is nothing for an evidentiary hearing to resolve. Petitioner's only contention is that he has

decided attempted murder is not illegal. This Court is able to evaluate this claim without expanding the record. Accordingly, Petitioner's request for an evidentiary hearing is denied.

VIII. THE FUGITIVE SUPPLEMENT IS STRICKEN

Petitioner filed the Motion to File Amended Habeas Corpus Post-Conviction Petition on December 7, 2021, while awaiting the court's ruling on his two (2) habeas petitions filed on August 10, 2021. Although the Motion "seek[s] leave to file an amended habeas corpus petition," Petitioner did not allow this Court to grant or deny his Motion before filing the amended petition. His decision to file the Motion together with the Proposed Amended Petition without leave of the Court and a judicial determination of good cause requires that this fugitive pleading be stricken from the record.

Chapter 34 allows a habeas petitioner to file a pro per petition without the assistance of a lawyer. NRS 34.724(1). A court may appoint an attorney for an indigent petitioner under the appropriate circumstances. NRS 34.750(1). Appointment of counsel is mandatory where a first petition challenges a sentence of death. NRS 34.820(1). Appointed counsel may supplement the pro per petition once within thirty days of appointment. NRS 34.750(3). After that, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Such leave should only be granted where "there is good cause to allow a petitioner to expand the issues previously pleaded[.]" Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006).

The strict nature of this process is justified by the Nevada Legislature's policy favoring the finality of convictions and the rapid resolution of habeas litigation. NRS 34.740 (requiring expeditious examination of habeas petitions by the judiciary); NRS 34.820(7) (requiring in capital habeas cases that judicial officers "render a decision within 60 days after submission of the matter for decision."); Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001) (the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions."); Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition").

This Court strikes Petitioner's Motion and Proposed Amended Petition because Petitioner failed to seek leave of the Court before filing the Amended Petition which added a third ground. Under NRS 34.750(5), a habeas petitioner can only supplement his petition *after* leave of court has been granted. The Nevada Supreme Court has said that leave can be granted only upon a showing of good cause, and that leave can be denied if the delay in raising a claim is not explained. Barnhart, 122 Nev. at 303-04, 130 P.3d at 652. A finding of good cause to expand the issues should be made "explicitly on the record" and should enumerate "the additional issues which are to be considered." Id. at 303, 130 P.3d at 652. In Barnhart, the Nevada Supreme Court affirmed a district court's decision to deny leave to expand the issues because "[c]ounsel for petitioner provided no reason why that claim *could* not have been pleaded in the supplemental petition." Id. at 304, 130 P.3d at 652 (emphasis added).

Here, on December 7, 2021, Petitioner filed a Motion to File Amended Habeas Corpus Post-Conviction Petition, together with the Proposed Amended Petition which added Ground Three. Petitioner did not receive leave of the Court before filing this Amended Petition. NRS 34.750(5). Petitioner raised one new ground, challenging the imposition of an equal and consecutive amount of time for the deadly weapon enhancement.

Petitioner failed to address why he filed the Amended Petition four (4) months after he filed his Third Petition, or why this claim was not raised on direct appeal or in his original Petition. This does not meet Barnhart's good cause standard. Cf. Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) ("To establish good cause, appellants must show that an *impediment external to the defense* prevented their compliance with the applicable procedural rule") (emphasis added).

Petitioner failed to show that an impediment external to the defense prevented him from bringing this new claim in his original Petition. See Barnhart, 122 Nev. at 304, 130 P.3d at 652. Because Petitioner fails to allege good cause in his Motion, it is impossible for this Court to make a finding of good cause to expand the issues, "explicitly on the record," and to enumerate "the additional issues which are to be considered." Barnhart, at 303, 130 P.3d at

652. As such, Petitioner's Motion fails to meet the Barnhart standard and this Court strikes Petitioner's Motion and Proposed Amended Petition.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction), Motion to File Amended Habeas Corpus Post-Conviction Petition, and Request for Evidentiary Hearing shall be, and they are, hereby denied.

Dated this 3rd day of March, 2022

Ronald J. Israel

A-21-839220-W

53A C9A F2AA 65F1
Ronald J. Israel JT
District Court Judge

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

BY /s/ TALEEN PANDUKHT
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #05734

CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2022, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

MICHAEL TRACY MCLAUGHLIN, BAC #83193
SOUTHERN DESERT CORRECTIONAL CENTER
P. O. BOX 208
INDIAN SPRINGS, NEVADA 89070-0208

BY /s/ J. HAYES
Secretary for the District Attorney's Office

02FH1263X/TRP/sr/jh/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Michael McLaughlin, Plaintiff(s)	CASE NO: A-21-839220-W
vs.	DEPT. NO. Department 28
State of Nevada, Defendant(s)	

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: 3/3/2022

Dept 28 Law Clerk	dept28lc@clarkcountycourts.us

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**October 13, 2021**

A-21-839220-W Michael McLaughlin, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

October 13, 2021	**12:00 AM**	**All Pending Motions**	**All Pending Motions (10/13/2021)**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Kathy Thomas

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- STATUS CHECK: POSSIBLE APPOINTMENT OF COUNSEL THROUGH THE OFFICE OF APPOINTED COUNSEL - DREW CHRISTENSEN...PETITION FOR WRIT OF HABEAS CORPUS

Deft./Petitioner MCLAUGHLIN not present, in custody in the Nevada Department of Corrections (NDC). Court noted there had been multiple Habeas Petitions and therefore the Court will not be appointing counsel. Court noted the prior petitions and file dates and the appeal that was filed in 2006.

COURT ORDERED, Briefing Schedule SET for the pending Writ: State's Response by 11-10-21, Deft's Reply by 11-24-21 and Hearing SET. Court directed the State to prepare an order to transport the Deft.

NDC

12/08/2021 11:00 AM PETITION FOR WRIT OF HABEAS CORPUS

CLERK'S NOTE: A copy of this minute order was mailed to Michael McLaughlin, #83193, I/C

Southern Desert Correctional Center (SDCC), PO BOX 208 Indian Springs, Nv, 89070. kt 10-14-21

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 08, 2021**

A-21-839220-W Michael McLaughlin, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

December 08, 2021 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Shelley Boyle

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT: Zadrowski, Bernard B. Attorney

JOURNAL ENTRIES

- Deft. not present, Nevada Department of Corrections (NDC).

COURT NOTED, Deft's. request to have counsel appointed was denied; this was a successive Petition. Upon Court's inquiry, Mr. Zadrowski stated the Post-Conviction team indicated they never received the Petition and requested forty-five (45) days to respond. COURT ORDERED, State's Response DUE 02.09.21, Deft's. Reply DUE 02.16.21, matter CONTINUED.

CONTINUED TO: 02.16.21 11:00 A.M.

CLERK'S NOTE: A copy of this minute order was mailed to Deft. (Michael McLaughlin 83193, High Desert State Prison, PO Box 650, Indian Springs, NV 89070). / sb 12.12.21

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**February 16, 2022**

A-21-839220-W Michael McLaughlin, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

February 16, 2022 **11:00 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Israel, Ronald J. **COURTROOM:** RJC Courtroom 15C

COURT CLERK: Patia Cunningham

RECORDER: Judy Chappell

REPORTER:

PARTIES PRESENT:

Heap, Hilary	Attorney
McLaughlin, Michael T	Plaintiff

JOURNAL ENTRIES

- Upon Court's inquiry, Plaintiff advised of his reply to State's motion to dismiss and added his showing of good cause. Colloquy regarding the petition being successive. Ms. Heap submitted. Court advised that this is the third petition and it has been fifteen years since the original Judgement of Conviction; the petition is procedurally time barred, there has been no showing of good cause to overcome the time bar and State pled Laches and no showing of good cause for the delay. COURT ORDERED, Petition DENIED.

NDC

Certification of Copy

State of Nevada
County of Clark } **SS:**

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

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

MICHAEL T. MCLAUGHLIN,

Plaintiff(s),

vs.

STATE OF NEVADA; WARDEN J. HOWELL,

Defendant(s),

Case No: A-21-839220-W

Dept No: XXVIII

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 19 day of April 2022.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk