IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jun 30 2022 08:18 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CEDRIC LEROB JACKSON,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-22-849718-W

Docket No: 84790

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
CEDRIC JACKSON #1130512,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

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

A-22-849718-W Cedric Jackson, Plaintiff(s) vs. State of Nevada, Defendant(s)

INDEX

A-22-849718-W Cedric Jackson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

I N D E X

APET
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
terry.jackson.esq@gmail.com

Counsel for Defendant Cedric L. Jackson

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA,	A-22-849718-W
	CASE NO.: ~~A-20-817120-W~~
Plaintiff/ Respondent,	
v.	Case No.: 10-C-265339-1
CEDRIC L. JACKSON,	DEPT. NO.: **XXIV**
ID# 1130512	
Defendant/ Petitioner.	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Defendant/Petitioner, CEDRIC L. JACKSON, by and through counsel, Terrence M. Jackson, Esq., and moves the Court to enter an Order granting his AMENDED Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Post Conviction on the grounds that his sentence was wrongly enhanced.

Because the Court wrongly misapplied NRS 193.165, the Defendant received consecutive sentences totaling twelve (12) additional years for the weapons enhancement. This increased his total aggregate sentence in this case to a maximum of thirty-seven (37) years with a minimum sentence of 14 years. This sentence was an excessive and unjust sentence and should be set aside because it violated NRS 103.165 and the Eighth Amendment's cruel and unusual punishment clause.

This Petition is based upon the accompanying Points and Authorities and such further facts as will come before this Court on a hearing of this Petition.

DATED this 9th day of December, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

INTRODUCTION

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged Defendant Cedric Jackson by way of Information with ten counts: Count 1 - Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Count 2 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 3 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2c), Count 4 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 5 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 6 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 7 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 8 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.100, 200.030), Count 9 - Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285), and Count 10 - Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Defendant as follows: Count 1 - Second Degree Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50011) and Count 2 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031). That same day, Defendant pled guilty to both counts in the Amended Information.

Defendant appeared before the District Court on November 14, 2014, and was sentenced on Count 1 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years, plus a consecutive term of twelve (12) years with a minimum parole eligibility of four (4) years for the Use of a Deadly Weapon, and on Count 2 to a maximum of sixty (60) months with a minimum parole eligibility of 24 (twenty-four) months, he was sentenced also to a consecutive term of thirty (30) months with a minimum parole eligibility of twelve (12) months for the Use of a Deadly Weapon, Count 2 to run concurrent with Count 1. Defendant received 1,748 days credit for time served. The Judgment of Conviction was entered on November 21, 2014.

Defendant acknowledges he has previously unsuccessfully challenged the enhancement given pursuant to NRS 193.165. On June 22, 2016, Defendant filed a Motion to Modify and/or Correct His Sentence by filing a Motion to Set Aside an Illegal Sentence based upon Lack of Subject Matter Jurisdiction ("Motion to Modify") on June 22, 2016. The State filed its response to that motion on July 12, 2016. The District Court denied the motion July 13, 2016.

The Defendant also filed an original Petition for Writ of Habeas Corpus on January 6, 2017. That Writ was decided against the Defendant on January 25, 2017. The District Court, in its original Finding of Facts dated March 7, 2017, ruled that the Defendant's Writ was procedurally barred, citing NRS 34.726(1), claiming Defendant had alleged **no** good cause for any delay of that Petition. The District Court also alleged that the issues the Defendant raised in that Petition should have been raised on direct appeal and the failure to raise those issues on direct appeal was a waiver of any such claims. *See,* Findings of Fact dated July 21, 2017. (p. 3-5) The Defendant appealed that decision of the District Court and it was affirmed on February 12, 2018, by the Supreme Court.

Shortly after the Nevada Supreme Court affirmed the decision, Defendant became aware of the recent United States Supreme Court opinions in cases *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) and *Montgomery v. Louisiana,* 577 U.S. __, 136 S.Ct. 718 (2016). (*See, Pro Per* Motion for Appointment of Counsel, dated June 27, 2018) These Supreme Court opinions gave him good cause to again challenge his conviction, as they gave him grounds to overcome any procedural bars even despite the past Court rulings holding these claims were barred.

The State filed a Response to Defendant's *Pro Per* Petition and request for counsel on June

26, 2018. The Court denied that Motion on June 27, 2018 and filed an Order on July 17, 2018. On May 25, 2020, Defendant then filed a *Pro Per* Habeas Petition for Mandamus. The State replied to the Petition on June 4, 2020.

On or about June 15, 2020, Defendant's family retained attorney, Terrence M. Jackson, to assist Cedric Jackson to again file Supplemental legal Authorities to show why his sentence should now be modified and why any legal challenge to his sentence should not be procedurally barred.

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO A CONSECUTIVE SENTENCE OF TWELVE (12) YEARS FOR THE WEAPON ENHANCEMENT.

Prior to 2007, the sentencing enhancement under NRS 193.165, for use of a deadly weapon was a consecutive statutory enhancement that was applied automatically. The law was however changed by the legislature in 2007, when the new law, AB 510, specifically removed the automatic consecutive enhancement required by NRS 196.165.

The legislative history of AB 510 made clear that this was done in part to reduce prisoner population. The question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge.

It is respectfully submitted that the District Court erred in sentencing the Defendant to an aggregate sentence of thirty-seven (37) years, which included twelve (12) years for the enhancement for the Use of a Deadly Weapon. Defendant's guilty plea had been accepted on September 17, 2014, and Cedric Jackson was adjudged guilty on November 19, 2014, of second degree murder with use of a weapon, NRS 200.010, 200.030, 193.330, 193.165. He was sentenced under the old law and received a ten (10) to twenty-five (25) year sentence plus an additional consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement, resulting in a total aggregate sentence of thirty-seven (37) years. The District Court gave a concurrent sentence of two (2) to five (5) years plus an enhancement of twelve (12) to thirty (30) months for the deadly weapon enhancement on count 2.

The changes in NRS 193.165 establish that the District Court abused its discretion by automatically granting the enhancement for the use of a deadly weapon under NRS 193.165. The Court's automatic decision on the weapon enhancement did not properly consider all the necessary factors at sentencing in granting the enhancement. Because of this major error in sentencing Defendant was substantially prejudiced. Defendant received an excessive and unjust sentence which violated the Eighth Amendment.

II.

THE APPLICATION OF AMENDMENTS TO NRS 193.165 MUST BE HELD TO BE RETROACTIVE BECAUSE OF UNITED STATES SUPREME COURT DECISIONS OF *WELCH V. UNITED STATES*, ___ U.S. ___, 136 S.CT. 1257, 194 L.ED.2D 387 (2016) AND *MONTGOMERY V. LOUISIANA*, 577 U.S. ___, 136 S.CT. 718 (2016).

In 2007 the Nevada State legislature enacted AB 510, which made a substantial change to Nevada criminal law regarding sentencing of any individual charged with offenses involving the use of deadly weapons. The effect of AB 510 was to change the previous automatic sentencing enhancement for offenses involving a weapon to a discretionary enhancement. AB 510 also required the Court to specifically enumerate the factors considered before giving an enhancement to a sentence. *See, Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

The Nevada Supreme Court in *State v. Second Judicial District Court,* 124 Nev. 564, 188 P.3d 1078 (2008) (*Pullin*) initially held that the 2007 amendments to NRS 193.165 would not be applied retroactively, saying the statutory change was not of constitutional dimensions. *Id.* 571 The Nevada Supreme Court concluded that because the legislature had not expressly stated its intent to make the statutory amendment retroactive, it ordered the District Court to resentence the defendant consistent with the old law which required an automatic enhancement of the sentence.

It is respectfully submitted that the United States Supreme Court's recent decisions on retroactivity in *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), and *Montgomery v. Louisiana,* 577 U.S. ___, 136 S.Ct. 718 (2016), created a constitutional requirement that such a major substantive statutory change must be given a retroactive effect. It is clear the ruling in *Welch v. United States* requires the Nevada Supreme Court's *Pullin* decision of non-retroactivity

be reversed. In *Welch, supra,* the Supreme Court in discussing the retroactivity of *Johnson v. United States*, 576 U.S. ___ (2015), a case which held the residual clause of the Armed Career Criminal Act was void for vagueness, stated:

> "The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. *See Chaidez v. United States,* 568 U.S. ___, ___, n. 16, 133 S.Ct. 1103, 1113, n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota,* 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague,* as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana,* 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra,* at 307, 311, 109 S.Ct. 1060. Second, new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d415 (1990); see *Teague, supra,* at 311-313, 109 S.Ct. 1060. (Emphasis added)
>
> It is undisputed that *Johnson* announced a new rule. See *Teague, supra,* at 301, 109 S.Ct. 1060 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). The question here is whether

that new rule falls within one of the two categories that have retroactive effect under *Teague*. The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules. *Welch* and the United States contend instead that *Johnson* falls into the first category because it announced a substantive rule.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519 [136 S.Ct. 1265] (Emphasis added) "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by statute beyond the State's power to punish." *Id.*, at 351-352, 124 S.Ct. 2519 (citation omitted); see *Montgomery, supra,* at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519 (Emphasis added)

. . .

Defendant respectfully submits the changes enacted in NRS 193.165 by AB 510 were clearly "substantive" changes in criminal sentencing which directly altered the actual punishment the defendant would likely receive in this case and that therefore the statutory changes of NRS 193.165 must be applied retroactively to Defendant's sentence.

III.

THE AGGREGATE SENTENCE OF THIRTY-SEVEN (37) YEARS WAS EXCESSIVE AND VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. *Strickland v. Washington,* 466 U.S. 668 (1984) requires effective advocacy at every critical stage of a criminal proceeding. *See, Sanborn v. State,* 107 Nev. 399 (1991)

It is respectfully submitted defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, *see Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence, In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment.

Although Cedric L. Jackson has been convicted of multiple serious charges, it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation.

It is respectfully submitted that the sentence imposed by this Court was improper because the Court gave no consideration whatever to any mitigating circumstances in Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) Mitigating circumstances in the Defendant's background were not given appropriate weight in determining a just punishment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportional to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). (Emphasis added) In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983) It is respectfully submitted Defendant's excessive sentence was the result of Defendant's counsel's ineffectiveness at sentencing. The case should therefore be reversed because of this clear violation of *Strickland v. Washington.*

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *see United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. Consider *Weems, supra,* where the Court stated: . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to 'shock the conscience.'

Defendant submits the punishment he received in this case was far in excess of a fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and his lack of zealous advocacy at sentencing and post sentencing. Because the sentence in this case was 'shocking to the conscience,' it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause.

IV.

DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE PROCEDURALLY BARRED.

A. Defendant can Demonstrate Good Cause and Prejudice for any Delay.

Defendant submits his claim, although beyond statutory time bar of NRS 34.726, was filed within a 'reasonable time' after the basis for the claim became evident. In *Rippo v. State,* 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussed procedural bars and the need for finality in criminal cases. In *Rippo, supra,* the Nevada Supreme Court explained the circumstances of when procedural default would be excused, stating:

> *Rippo's* petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two (2) components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

> The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem,* 119 Nev. at 621, 81 P.3d at 525; *Hathaway,* 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem,* 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway,* 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

...

Defendant respectfully submits that in this case as opposed to *Rippo*, he can demonstrate good cause for the delay in this case. First, Defendant's delay in this case was not intentional. The delay resulted principally because of the major change of case law regarding application of NRS 193.165 and its retroactive application.

The change in law from the Supreme Court opinion in *Montgomery* and *Welch* provided Defendant Supreme Court opinions directly supporting new constitutional law which the State of Nevada must apply. This case law was not reasonably available at the time of Defendant's default. These new United States Supreme Court decisions clearly provide good cause for overcoming the procedural bars of NRS 34.726, NRS 34.810. *See, Rogers v. State,* 267 P.3d 802, 803 (Nev. 2011). These United States Supreme Court cases cited held that under similar circumstances, the law must be applied retroactively. Therefore, it is respectfully submitted, this Honorable Court must consider this Petition and its underlying claims on the merits.

There are other equitable factors in this case clearly outweigh the State's interests in finality and the protection against "stale" claims. In this case, because the Defendant's sentence is fundamentally unfair and 'manifestly unjust' it must be set aside.

An evidentiary hearing will also establish there existed numerous impediments which prevented Defendant from completing a timely habeas corpus petition. An evidentiary hearing will show the prison Law Library is less than adequate for extensive legal research and provides minimal training for prisoners. *See, Easterwood v. Champion,* 213 F.3d 1321 (10th Cir.2000), *Ray v. Lamport,* 465 F.3d 964 (9th Cir.2006), *Williamson v. Word,* 110 F.3d 1508 (10th Cir.1997).

Considering the totality of these factors, the equitable grounds to allow Defendant to proceed with this Petition supercede any procedural bars.

B. Applying Procedural Bars to Prohibit the Habeas Petition in this Case Would Result in a Fundamental Miscarriage of Justice.

Although the statutory provisions of the Nevada Revised Statutes appear at first glance to restrict the application of habeas corpus relief in this case because it may be untimely, there have always been important exceptions to this procedural bar.

> NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second* or *successive petition must be dismissed* if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."
>
> However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden,* 114 Nev. 956, 959, 964 P.2d 785, 787.
>
> Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State,* 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). *See, State v. Bennett,* 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden,* 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

Defendant respectfully submits considering the facts and law, any procedural default should be excused because it would deny him the opportunity to raise the issue of his wrongful extended incarceration based upon improper sentencing to a consecutive sentence for use of a deadly weapon

which was unjust under the facts and law.

V.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND TO PROVE HIS PETITION IS NOT PROCEDURALLY BARRED.

An evidentiary hearing will establish Defendant's counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing will establish the Defendant filed his *Pro Per* Mandamus Petition for appointment of counsel as soon as he became aware of the Supreme Court's cases of *Montgomery v. Louisiana, supra,* and *Welch v. United States, supra,* which changed the law regarding the retroactivity of AB 510.

An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). Id. 1331

. . .

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment,

> possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief."
>
> "Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions." *Id.* 1333 (Emphasis added)

. . .

Similarly, in *Hatley v. State,* 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing will also show conclusively there are sufficient facts to show that Defendant was denied a fair sentencing under NRS 193.165. The Defendant can show at an evidentiary hearing that he can overcome any procedural bars by showing good cause.

CONCLUSION

The consecutive sentence of twelve (12) years was in violation of NRS 193.165, as amended by AB 510. In the recent Nevada case of *State v. Second Jud. Dist., Pullin, supra,* the Nevada Supreme Court erred when it upheld a weapon enhancement, finding NRS 193.165, as amended, was not retroactive.

The United States Supreme Court has recently in *Montgomery, supra,* and *Welch, supra,* held that due process requires the changes to NRS 193.165 be applied retroactively. For these reasons, the Defendant should not have been procedurally barred when he sought to challenge his sentence enhancement.

Accordingly, Defendant respectfully submits his sentence and Judgment of Conviction should be reversed and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for use of a deadly weapon, or alternatively remand the case to District Court for the District

Court to state in writing the reasons why any consecutive sentence for the weapons enhancement is appropriate in this case.

In the remand, the District Court also must be advised to fully consider the totality of facts, including any possible mitigation, in order to determine a just and fair sentence, which is not excessive and is not in violation of the Eighth Amendment.

DATED this 9th day of December, 2021.

Respectfully submitted,

//s// Terrence M. Jackson

Nevada State Bar 000854

T: (702) 386-0001 / F: (702) 386-0085

Terry.jackson.esq@gmail.com

Counsel for Petitioner, *Cedric L. Jackson*

. . .

. . .

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and on the 9th day of December, I e-filed and served copy of the foregoing: Defendant/Petitioner's, Cedric L. Jackson's, AMENDED PETITION FOR WRIT OF HABEAS CORPUS to Department XXIV as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Defendant/Petitioner as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

CHAD N. LEXIS
Chief Deputy D. A. - Criminal
chad.lexis@clarkcountyda.com

Cedric L. Jackson
ID# 1130512
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

EXHIBIT 'A'

APET
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
terry.jackson.esq@gmail.com

Counsel for Defendant Cedric L. Jackson

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff/ Respondent, v. CEDRIC L. JACKSON, ID# 1130512 Defendant/ Petitioner.	CASE NO.: **10-C-265339-1** CASE NO.: A-20-817120-W DEPT. NO.: **X**

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Defendant/Petitioner, CEDRIC L. JACKSON, by and through counsel, Terrence M. Jackson, Esq., and moves the Court to enter an Order granting his AMENDED Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Post Conviction on the grounds that his sentence was wrongly enhanced.

Because the Court wrongly misapplied NRS 193.165, the Defendant received consecutive sentences totaling twelve (12) additional years for the weapons enhancement. This increased his total aggregate sentence in this case to a maximum of thirty-seven (37) years with a minimum sentence of 14 years. This sentence was an excessive and unjust sentence and should be set aside because it violated NRS 103.165 and the Eighth Amendment's cruel and unusual punishment clause.

This Petition is based upon the accompanying Points and Authorities and such further facts as will come before this Court on a hearing of this Petition.

DATED this 26th day of July, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

INTRODUCTION

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged Defendant Cedric Jackson by way of Information with ten counts: Count 1 - Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Count 2 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 3 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2c), Count 4 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 5 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 6 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 7 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 8 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.100, 200.030), Count 9 - Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285), and Count 10 - Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Defendant as follows: Count 1 - Second Degree Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50011) and Count 2 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031). That same day, Defendant pled guilty to both counts in the Amended Information.

Defendant appeared before the District Court on November 14, 2014, and was sentenced on Count 1 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years, plus a consecutive term of twelve (12)years with a minimum parole eligibility of four (4) years for the Use of a Deadly Weapon, and on Count 2 to a maximum of sixty (60) months with a minimum parole eligibility of 24 (twenty-four) months, he was sentenced also to a consecutive term of thirty (30) months with a minimum parole eligibility of twelve (12) months for the Use of a Deadly Weapon, Count 2 to run concurrent with Count 1. Defendant received 1,748 days credit for time served. The Judgment of Conviction was entered on November 21, 2014.

Defendant acknowledges he has previously unsuccessfully challenged the enhancement given pursuant to NRS 193.165. On June 22, 2016, Defendant filed a Motion to Modify and/or Correct His Sentence by filing a Motion to Set Aside an Illegal Sentence based upon Lack of Subject Matter Jurisdiction ("Motion to Modify") on June 22, 2016. The State filed its response to that motion on July 12, 2016. The District Court denied the motion July 13, 2016.

The Defendant also filed an original Petition for Writ of Habeas Corpus on January 6, 2017. That Writ was decided against the Defendant on January 25, 2017. The District Court, in its original Finding of Facts dated March 7, 2017, ruled that the Defendant's Writ was procedurally barred, citing NRS 34.726(1), claiming Defendant had alleged **no** good cause for any delay of that Petition.

The District Court also alleged that the issues the Defendant raised in that Petition should have been raised on direct appeal and the failure to raise those issues on direct appeal was a waiver of any such claims. *See,* Findings of Fact dated July 21, 2017. (p. 3-5) The Defendant appealed that decision of the District Court and it was affirmed on February 12, 2018, by the Supreme Court.

Shortly after the Nevada Supreme Court affirmed the decision, Defendant became aware of the recent United States Supreme Court opinions in cases *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) and *Montgomery v. Louisiana,* 577 U.S. __ , 136 S.Ct. 718 (2016). (*See, Pro Per* Motion for Appointment of Counsel, dated June 27, 2018) These Supreme Court opinions gave him good cause to again challenge his conviction, as they gave him grounds to overcome any procedural bars even despite the past Court rulings holding these claims were barred.

The State filed a Response to Defendant's *Pro Per* Petition and request for counsel on June 26, 2018. The Court denied that Motion on June 27, 2018 and filed an Order on July 17, 2018. On May 25, 2020, Defendant then filed a *Pro Per* Habeas Petition for Mandamus. The State replied to the Petition on June 4, 2020.

On or about June 15, 2020, Defendant's family retained attorney, Terrence M. Jackson, to assist Cedric Jackson to again file Supplemental legal Authorities to show why his sentence should now be modified and why any legal challenge to his sentence should not be procedurally barred. This

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO A CONSECUTIVE SENTENCE OF TWELVE (12) YEARS FOR THE WEAPON ENHANCEMENT.

Prior to 2007, the sentencing enhancement under NRS 193.165, for use of a deadly weapon was a consecutive statutory enhancement that was applied automatically. The law was however changed by the legislature in 2007, when the new law, AB 510, specifically removed the automatic consecutive enhancement required by NRS 196.165.

The legislative history of AB 510 made clear that this was done in part to reduce prisoner population. The question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge.

It is respectfully submitted that the District Court erred in sentencing the Defendant to an aggregate sentence of thirty-seven (37) years, which included twelve (12) years for the enhancement for the Use of a Deadly Weapon. Defendant's guilty plea had been accepted on September 17, 2014, and Cedric Jackson was adjudged guilty on November 19, 2014, of second degree murder with use of a weapon, NRS 200.010, 200.030, 193.330, 193.165. He was sentenced under the old law and received a ten (10) to twenty-five (25) year sentence plus an additional consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement, resulting in a total aggregate sentence of thirty-seven (37) years. The District Court gave a concurrent sentence of two (2) to five (5) years plus an enhancement of twelve (12) to thirty (30) months for the deadly weapon enhancement on count 2.

The changes in NRS 193.165 establish that the District Court abused its discretion by automatically granting the enhancement for the use of a deadly weapon under NRS 193.165. The Court's automatic decision on the weapon enhancement did not properly consider all the necessary factors at sentencing in granting the enhancement. Because of this major error in sentencing Defendant was substantially prejudiced. Defendant received an excessive and unjust sentence which

violated the Eighth Amendment.

II.

THE APPLICATION OF AMENDMENTS TO NRS 193.165 MUST BE HELD TO BE RETROACTIVE BECAUSE OF UNITED STATES SUPREME COURT DECISIONS OF *WELCH V. UNITED STATES*, ___ U.S. ___ , 136 S.CT. 1257, 194 L.ED.2D 387 (2016) AND *MONTGOMERY V. LOUISIANA*, 577 U.S. ___ , 136 S.CT. 718 (2016).

In 2007 the Nevada State legislature enacted AB 510, which made a substantial change to Nevada criminal law regarding sentencing of any individual charged with offenses involving the use of deadly weapons. The effect of AB 510 was to change the previous automatic sentencing enhancement for offenses involving a weapon to a discretionary enhancement. AB 510 also required the Court to specifically enumerate the factors considered before giving an enhancement to a sentence. *See, Mendoza-Lopez v. State*, 125 Nev. 634, 218 P.3d 501 (2009).

The Nevada Supreme Court in *State v. Second Judicial District Court*, 124 Nev. 564, 188 P.3d 1078 (2008) (*Pullin*) initially held that the 2007 amendments to NRS 193.165 would not be applied retroactively, saying the statutory change was not of constitutional dimensions. *Id.* 571 The Nevada Supreme Court concluded that because the legislature had not expressly stated its intent to make the statutory amendment retroactive, it ordered the District Court to resentence the defendant consistent with the old law which required an automatic enhancement of the sentence.

It is respectfully submitted that the United States Supreme Court's recent decisions on retroactivity in *Welch v. United States*, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), created a constitutional requirement that such a major substantive statutory change must be given a retroactive effect. It is clear the ruling

in *Welch v. United States* requires the Nevada Supreme Court's *Pullin* decision of non-retroactivity be reversed. In *Welch, supra,* the Supreme Court in discussing the retroactivity of *Johnson v. United States*, 576 U.S. ___ (2015), a case which held the residual clause of the Armed Career Criminal Act was void for vagueness, stated:

> "The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. *See Chaidez v. United States,* 568 U.S. ___, ___, n. 16, 133 S.Ct. 1103, 1113, n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota,* 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague,* as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana,* 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra,* at 307, 311, 109 S.Ct. 1060. Second, new "watershed rules of

criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d415 (1990); see *Teague, supra,* at 311-313, 109 S.Ct. 1060. (Emphasis added)

It is undisputed that *Johnson* announced a new rule. See *Teague, supra,* at 301, 109 S.Ct. 1060 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). The question here is whether that new rule falls within one of the two categories that have retroactive effect under *Teague.* The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules. *Welch* and the United States contend instead that *Johnson* falls into the first category because it announced a substantive rule.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro,* 542 U.S., at 353, 124 S.Ct. 2519 [136 S.Ct. 1265] (Emphasis added) "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by statute beyond the State's power to punish." *Id.*, at 351-352, 124 S.Ct. 2519 (citation omitted); see *Montgomery, supra,* at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been

acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519 (Emphasis added)

. . .

Defendant respectfully submits the changes enacted in NRS 193.165 by AB 510 were clearly "substantive" changes in criminal sentencing which directly altered the actual punishment the defendant would likely receive in this case and that therefore the statutory changes of NRS 193.165 must be applied retroactively to Defendant's sentence.

III.

THE AGGREGATE SENTENCE OF THIRTY-SEVEN (37) YEARS WAS EXCESSIVE AND VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. *Strickland v. Washington,* 466 U.S. 668 (1984) requires effective advocacy at every critical stage of a criminal proceeding. *See, Sanborn v. State,* 107 Nev. 399 (1991)

It is respectfully submitted defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, *see Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment.

Although Cedric L. Jackson has been convicted of multiple serious charges, it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation.

It is respectfully submitted that the sentence imposed by this Court was improper because the Court gave no consideration whatever to any mitigating circumstances in Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) Mitigating circumstances in the Defendant's background were not given appropriate weight in determining a just punishment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportional to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). (Emphasis added) In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983) It is respectfully submitted Defendant's excessive sentence was the result of Defendant's counsel's ineffectiveness at sentencing. The case should therefore be reversed because of this clear violation of *Strickland v. Washington.*

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *see United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment

within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. Consider *Weems, supra,* where the Court stated: . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to 'shock the conscience.'

Defendant submits the punishment he received in this case was far in excess of a fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and his lack of zealous advocacy at sentencing and post sentencing. Because the sentence in this case was 'shocking to the conscience,' it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause.

IV.

DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE PROCEDURALLY BARRED.

A. Defendant can Demonstrate Good Cause and Prejudice for any Delay.

Defendant submits his claim, although beyond statutory time bar of NRS 34.726, was filed within a 'reasonable time' after the basis for the claim became evident. In *Rippo v. State,* 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussed procedural bars and the need for finality in criminal cases. In *Rippo, supra,* the Nevada Supreme Court explained the circumstances of when procedural default would be excused, stating:

> *Rippo's* petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good

cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two (2) components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem,* 119 Nev. at 621, 81 P.3d at 525; *Hathaway,* 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem,* 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway,* 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

...

Defendant respectfully submits that in this case as opposed to *Rippo*, he can demonstrate good cause for the delay in this case. First, Defendant's delay in this case was not intentional. The delay resulted principally because of the major change of case law regarding application of NRS 193.165 and its retroactive application.

The change in law from the Supreme Court opinion in *Montgomery* and *Welch* provided Defendant Supreme Court opinions directly supporting new constitutional law which the State of Nevada must apply. This case law was not reasonably available at the time of Defendant's default. These new United States Supreme Court decisions clearly provide good cause for overcoming the procedural bars of NRS 34.726, NRS 34.810. *See, Rogers v. State,* 267 P.3d 802, 803 (Nev. 2011). These United States Supreme Court cases cited held that under similar circumstances, the law must be applied retroactively. Therefore, it is respectfully submitted, this Honorable Court must consider

this Petition and its underlying claims on the merits.

There are other equitable factors in this case clearly outweigh the State's interests in finality and the protection against "stale" claims. In this case, because the Defendant's sentence is fundamentally unfair and 'manifestly unjust' it must be set aside.

An evidentiary hearing will also establish there existed numerous impediments which prevented Defendant from completing a timely habeas corpus petition. An evidentiary hearing will show the prison Law Library is less than adequate for extensive legal research and provides minimal training for prisoners. *See, Easterwood v. Champion,* 213 F.3d 1321 (10th Cir.2000), *Ray v. Lamport,* 465 F.3d 964 (9th Cir.2006), *Williamson v. Word,* 110 F.3d 1508 (10th Cir.1997). Considering the totality of these factors, the equitable grounds to allow Defendant to proceed with this Petition supercede any procedural bars.

B. Applying Procedural Bars to Prohibit the Habeas Petition in this Case Would Result in a Fundamental Miscarriage of Justice.

Although the statutory provisions of the Nevada Revised Statutes appear at first glance to restrict the application of habeas corpus relief in this case because it may be untimely, there have always been important exceptions to this procedural bar.

> NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second* or

successive petition must be dismissed if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."

However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden,* 114 Nev. 956, 959, 964 P.2d 785, 787.

Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State,* 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). *See, State v. Bennett,* 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden,* 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

Defendant respectfully submits considering the facts and law, any procedural default should be excused because it would deny him the opportunity to raise the issue of his wrongful extended incarceration based upon improper sentencing to a consecutive sentence for use of a deadly weapon which was unjust under the facts and law.

V.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND TO PROVE HIS PETITION IS NOT PROCEDURALLY BARRED.

An evidentiary hearing will establish Defendant's counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing will establish the Defendant filed his *Pro Per* Mandamus

Petition for appointment of counsel as soon as he became aware of the Supreme Court's cases of *Montgomery v. Louisiana, supra,* and *Welch v. United States, supra,* which changed the law regarding the retroactivity of AB 510.

An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). Id. 1331

. . .

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and

counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief."

"Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions." *Id.* 1333 (Emphasis added)

. . .

Similarly, in *Hatley v. State,* 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing will also show conclusively there are sufficient facts to show that Defendant was denied a fair sentencing under NRS 193.165. The Defendant can show at an evidentiary hearing that he can overcome any procedural bars by showing good cause.

CONCLUSION

The consecutive sentence of twelve (12) years was in violation of NRS 193.165, as amended by AB 510. In the recent Nevada case of *State v. Second Jud. Dist., Pullin, supra,* the Nevada Supreme Court erred when it upheld a weapon enhancement, finding NRS 193.165, as amended, was not retroactive.

The United States Supreme Court has recently in *Montgomery, supra,* and *Welch, supra,* held that due process requires the changes to NRS 193.165 be applied retroactively. For these reasons, the Defendant should not have been procedurally barred when he sought to challenge his sentence

enhancement.

Accordingly, Defendant respectfully submits his sentence and Judgment of Conviction should be reversed and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for use of a deadly weapon, or alternatively remand the case to District Court for the District Court to state in writing the reasons why any consecutive sentence for the weapons enhancement is appropriate in this case.

In the remand, the District Court also must be advised to fully consider the totality of facts, including any possible mitigation, in order to determine a just and fair sentence, which is not excessive and is not in violation of the Eighth Amendment.

DATED this 26th day of July, 2021.

Respectfully submitted,

//s// Terrence M. Jackson

Nevada State Bar 000854
T: (702) 386-0001 / F: (702) 386-0085
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

. . .

. . .

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and on the 26th day of July, I e-filed and served copy of the foregoing: Defendant/Petitioner's, Cedric L. Jackson's, AMENDED PETITION FOR WRIT OF HABEAS CORPUS as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Defendant/Petitioner as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

CHAD N. LEXIS
Chief Deputy D. A. - Criminal
chad.lexis@clarkcountyda.com

Cedric L. Jackson
ID# 1130512
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

APET
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
terry.jackson.esq@gmail.com

Counsel for Defendant Cedric L. Jackson

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff/ Respondent, v. CEDRIC L. JACKSON, ID# 1130512 Defendant/ Petitioner.	A-22-849718-W CASE NO.: ~~A-20-817120-W~~ Case No.: 10-C-265339-1 DEPT. NO.: **XXIV**

SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS or alternatively MOTION TO MODIFY SENTENCE BASED UPON CHANGES IN SUPREME COURT LAW and CHANGES IN NEVADA REVISED STATUTE 193.165

COMES NOW the Defendant/Petitioner, CEDRIC L. JACKSON, by and through counsel, Terrence M. Jackson, Esq., and moves the Court to enter an Order granting his Second Amended Petition or alternatively Motion to Modify Sentence and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Post Conviction on the grounds that his sentence was wrongly enhanced.

Because the Court wrongly misapplied NRS 193.165, the Defendant received consecutive sentences totaling twelve (12) additional years for the weapons enhancement. This increased his total aggregate sentence in this case to a maximum of thirty-seven (37) years with a minimum sentence of 14 years. This sentence was an excessive and unjust sentence and should be set aside because it violated NRS 103.165 and the Eighth Amendment's cruel and unusual punishment clause.

. . .

This Petition or Motion to Modify Sentence is based upon the accompanying Points and Authorities and such further facts as will come before this Court on a hearing of this Petition or Motion to Modify Sentence.

DATED this 7th day of March, 2022.

Respectfully submitted,

/s/ Terrence M. Jackson
TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

INTRODUCTION

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged Defendant Cedric Jackson by way of Information with ten counts: Count 1 - Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Count 2 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 3 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2c), Count 4 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 5 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 6 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 7 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 8 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.100, 200.030), Count 9 - Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285), and Count 10 - Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Defendant as follows: Count 1 - Second Degree Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50011) and Count 2 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031). That same day, Defendant pled guilty to both counts in the Amended Information.

Defendant appeared before the District Court on November 14, 2014, and was sentenced on Count 1 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years, plus a consecutive term of twelve (12) years with a minimum parole eligibility of four (4) years for the Use of a Deadly Weapon, and on Count 2 to a maximum of sixty (60) months with a minimum parole eligibility of 24 (twenty-four) months, he was sentenced also to a consecutive term of thirty (30) months with a minimum parole eligibility of twelve (12) months for the Use of a Deadly Weapon, Count 2 to run concurrent with Count 1. Defendant received 1,748 days credit for time served. The Judgment of Conviction was entered on November 21, 2014.

Defendant acknowledges he has previously unsuccessfully challenged the enhancement given pursuant to NRS 193.165. On June 22, 2016, Defendant filed a Motion to Modify and/or Correct His Sentence by filing a Motion to Set Aside an Illegal Sentence based upon Lack of Subject Matter Jurisdiction ("Motion to Modify") on June 22, 2016. The State filed its response to that motion on July 12, 2016. The District Court denied the motion July 13, 2016.

The Defendant also filed an original Petition for Writ of Habeas Corpus on January 6, 2017. That Writ was decided against the Defendant on January 25, 2017. The District Court, in its original Finding of Facts dated March 7, 2017, ruled that the Defendant's Writ was procedurally barred, citing NRS 34.726(1), claiming Defendant had alleged **no** good cause for any delay of that Petition. The District Court also alleged that the issues the Defendant raised in that Petition should have been raised on direct appeal and the failure to raise those issues on direct appeal was a waiver of any such claims. *See,* Findings of Fact dated July 21, 2017. (p. 3-5) The Defendant appealed that decision of the District Court and it was affirmed on February 12, 2018, by the Supreme Court.

Shortly after the Nevada Supreme Court affirmed the decision, Defendant became aware of the recent United States Supreme Court opinions in cases *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) and *Montgomery v. Louisiana,* 577 U.S. __, 136 S.Ct. 718 (2016). (*See, Pro Per* Motion for Appointment of Counsel, dated June 27, 2018) These Supreme Court opinions gave him good cause to again challenge his conviction, as they gave him grounds to overcome any procedural bars even despite the past Court rulings holding these claims were barred.

The State filed a Response to Defendant's *Pro Per* Petition and request for counsel on June

26, 2018. The Court denied that Motion on June 27, 2018 and filed an Order on July 17, 2018. On May 25, 2020, Defendant then filed a *Pro Per* Habeas Petition for Mandamus. The State replied to the Petition on June 4, 2020.

On or about June 15, 2020, Defendant's family retained attorney, Terrence M. Jackson, to assist Cedric Jackson to again file Supplemental legal Authorities to show why his sentence should now be modified and why any legal challenge to his sentence should not be procedurally barred.

After the Defendant initially filed an Amended Petition on December 9, 2021, the Court never heard argument on the Petition because the judicial assistant in Department 24 assumed that the Defendant's Petition had been dismissed and he could file no further pleadings. Defendant respectfully requests a full judicial hearing on the merits of this Petition because the facts will show the law is now clear that his imprisonment is illegal as it violates his rights under the United States Constitution, United States Supreme Court law and the law of the Nevada Revised Statutes. Recent changes in the law regarding imprisonment make this clear.

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO A CONSECUTIVE SENTENCE OF TWELVE (12) YEARS FOR THE WEAPON ENHANCEMENT.

Prior to 2007, the sentencing enhancement under NRS 193.165, for use of a deadly weapon was a consecutive statutory enhancement that was applied automatically. The law was however changed by the legislature in 2007, when the new law, AB 510, specifically removed the automatic consecutive enhancement required by NRS 196.165.

The legislative history of AB 510 made clear that this was done in part to reduce prisoner population. The question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge.

It is respectfully submitted that the District Court erred in sentencing the Defendant to an aggregate sentence of thirty-seven (37) years, which included twelve (12) years for the enhancement for the Use of a Deadly Weapon. Defendant's guilty plea had been accepted on September 17, 2014,

and Cedric Jackson was adjudged guilty on November 19, 2014, of second degree murder with use of a weapon, NRS 200.010, 200.030, 193.330, 193.165. He was sentenced under the old law and received a ten (10) to twenty-five (25) year sentence plus an additional consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement, resulting in a total aggregate sentence of thirty-seven (37) years. The District Court gave a concurrent sentence of two (2) to five (5) years plus an enhancement of twelve (12) to thirty (30) months for the deadly weapon enhancement on count 2.

The changes in NRS 193.165 establish that the District Court abused its discretion by automatically granting the enhancement for the use of a deadly weapon under NRS 193.165. The Court's automatic decision on the weapon enhancement did not properly consider all the necessary factors at sentencing in granting the enhancement. Because of this major error in sentencing Defendant was substantially prejudiced. Defendant received an excessive and unjust sentence which violated the Eighth Amendment.

II.

THE APPLICATION OF AMENDMENTS TO NRS 193.165 MUST BE HELD TO BE RETROACTIVE BECAUSE OF UNITED STATES SUPREME COURT DECISIONS OF *WELCH V. UNITED STATES,* ___ U.S. ___ , 136 S.CT. 1257, 194 L.ED.2D 387 (2016) AND *MONTGOMERY V. LOUISIANA,* 577 U.S. ___ , 136 S.CT. 718 (2016).

In 2007 the Nevada State legislature enacted AB 510, which made a substantial change to Nevada criminal law regarding sentencing of any individual charged with offenses involving the use of deadly weapons. The effect of AB 510 was to change the previous automatic sentencing enhancement for offenses involving a weapon to a discretionary enhancement. AB 510 also required the Court to specifically enumerate the factors considered before giving an enhancement to a sentence. *See, Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

The Nevada Supreme Court in *State v. Second Judicial District Court,* 124 Nev. 564, 188 P.3d 1078 (2008) (*Pullin*) initially held that the 2007 amendments to NRS 193.165 would not be applied retroactively, saying the statutory change was not of constitutional dimensions. *Id.* 571 The Nevada Supreme Court concluded that because the legislature had not expressly stated its intent to

make the statutory amendment retroactive, it ordered the District Court to resentence the defendant consistent with the old law which required an automatic enhancement of the sentence.

It is respectfully submitted that the United States Supreme Court's recent decisions on retroactivity in *Welch v. United States*, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), created a constitutional requirement that such a major substantive statutory change must be given a retroactive effect. It is clear the ruling in *Welch v. United States* requires the Nevada Supreme Court's *Pullin* decision of non-retroactivity be reversed. In *Welch, supra*, the Supreme Court in discussing the retroactivity of *Johnson v. United States*, 576 U.S. ___ (2015), a case which held the residual clause of the Armed Career Criminal Act was void for vagueness, stated:

> "The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States*, 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. *See Chaidez v. United States*, 568 U.S. ___, ___, n. 16, 133 S.Ct. 1103, 1113, n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota*, 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague*, as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin*, 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana*, 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague*,

supra, at 307, 311, 109 S.Ct. 1060. Second, new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d415 (1990); see *Teague, supra,* at 311-313, 109 S.Ct. 1060. (Emphasis added)

It is undisputed that *Johnson* announced a new rule. See *Teague, supra,* at 301, 109 S.Ct. 1060 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). The question here is whether that new rule falls within one of the two categories that have retroactive effect under *Teague*. The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules. *Welch* and the United States contend instead that *Johnson* falls into the first category because it announced a substantive rule.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro,* 542 U.S., at 353, 124 S.Ct. 2519 [136 S.Ct. 1265] (Emphasis added) "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by statute beyond the State's power to punish." *Id.*, at 351-352, 124 S.Ct. 2519 (citation omitted); see *Montgomery, supra,* at ___ , 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Schriro,* 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519 (Emphasis added)

. . .

Defendant respectfully submits the changes enacted in NRS 193.165 by AB 510 were clearly "substantive" changes in criminal sentencing which directly altered the actual punishment the defendant would likely receive in this case and that therefore the statutory changes of NRS 193.165 must be applied retroactively to Defendant's sentence. The changes in this law should apply

retroactively to Defendant.

III.

THE AGGREGATE SENTENCE OF THIRTY-SEVEN (37) YEARS WAS EXCESSIVE AND VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. *Strickland v. Washington,* 466 U.S. 668 (1984) requires effective advocacy at every critical stage of a criminal proceeding. *See, Sanborn v. State,* 107 Nev. 399 (1991)

It is respectfully submitted defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, *see Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment.

Although Cedric L. Jackson has been convicted of multiple serious charges, it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation.

It is respectfully submitted that the sentence imposed by this Court was improper because the Court gave no consideration whatever to any mitigating circumstances in Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) Mitigating circumstances in the Defendant's background were not given appropriate weight in determining a just punishment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and

proportional to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). (Emphasis added) In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983) It is respectfully submitted Defendant's excessive sentence was the result of Defendant's counsel's ineffectiveness at sentencing. The case should therefore be reversed because of this clear violation of *Strickland v. Washington.* Alternatively, the Court should modify Jackson's sentence to reflect the changes in the law.

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *see United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. Consider *Weems, supra,* where the Court stated: . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to 'shock the conscience.'

Defendant submits the punishment he received in this case was far in excess of a fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and his lack of zealous advocacy at sentencing and post sentencing. Because the sentence in this case was 'shocking to the conscience,' it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause.

IV.

DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE PROCEDURALLY BARRED.

A. Defendant can Demonstrate Good Cause and Prejudice for any Delay.

. . .

Defendant submits his claim, although beyond statutory time bar of NRS 34.726, was filed within a 'reasonable time' after the basis for the claim became evident. In *Rippo v. State,* 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussed procedural bars and the need for finality in criminal cases. In *Rippo, supra,* the Nevada Supreme Court explained the circumstances of when procedural default would be excused, stating:

> *Rippo's* petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two (2) components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*
>
> The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem,* 119 Nev. at 621, 81 P.3d at 525; *Hathaway,* 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem,* 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway,* 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

. . .

Defendant respectfully submits that in this case as opposed to *Rippo*, he can demonstrate good cause for the delay in this case. First, Defendant's delay in this case was not intentional. The delay resulted principally because of the major change of case law regarding application of NRS 193.165 and its retroactive application.

The change in law from the Supreme Court opinion in *Montgomery* and *Welch* provided Defendant Supreme Court opinions directly supporting new constitutional law which the State of Nevada must apply. This case law was not reasonably available at the time of Defendant's default. These new United States Supreme Court decisions clearly provide good cause for overcoming the procedural bars of NRS 34.726, NRS 34.810. *See, Rogers v. State,* 267 P.3d 802, 803 (Nev. 2011). These United States Supreme Court cases cited held that under similar circumstances, the law must be applied retroactively. Therefore, it is respectfully submitted, this Honorable Court must consider

this Petition and its underlying claims on the merits.

There are other equitable factors in this case clearly outweigh the State's interests in finality and the protection against "stale" claims. In this case, because the Defendant's sentence is fundamentally unfair and 'manifestly unjust' it must be set aside.

An evidentiary hearing will also establish there existed numerous impediments which prevented Defendant from completing a timely habeas corpus petition. An evidentiary hearing will show the prison Law Library is less than adequate for extensive legal research and provides minimal training for prisoners. *See, Easterwood v. Champion,* 213 F.3d 1321 (10th Cir.2000), *Ray v. Lamport,* 465 F.3d 964 (9th Cir.2006), *Williamson v. Word,* 110 F.3d 1508 (10th Cir.1997). Considering the totality of these factors, the equitable grounds to allow Defendant to proceed with this Petition supercede any procedural bars.

B. Applying Procedural Bars to Prohibit the Habeas Petition in this Case Would Result in a Fundamental Miscarriage of Justice.

Although the statutory provisions of the Nevada Revised Statutes appear at first glance to restrict the application of habeas corpus relief in this case because it may be untimely, there have always been important exceptions to this procedural bar.

> NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second* or *successive petition must be dismissed* if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."
>
> However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established

where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden,* 114 Nev. 956, 959, 964 P.2d 785, 787.

Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State,* 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). *See, State v. Bennett,* 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden,* 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

. . .

Defendant respectfully submits considering the facts and law, any procedural default should be excused because it would deny him the opportunity to raise the issue of his wrongful extended incarceration based upon improper sentencing to a consecutive sentence for use of a deadly weapon which was unjust under the facts and law.

V.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND TO PROVE HIS PETITION IS NOT PROCEDURALLY BARRED.

An evidentiary hearing will establish Defendant's counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing will establish the Defendant filed his *Pro Per* Mandamus Petition for appointment of counsel as soon as he became aware of the Supreme Court's cases of *Montgomery v. Louisiana, supra,* and *Welch v. United States, supra,* which changed the law regarding the retroactivity of AB 510.

An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

. . .

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). Id. 1331

. . .

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief."
>
> "Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions." Id. 1333 (Emphasis added)

. . .

Similarly, in *Hatley v. State,* 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. Id. 216 (Emphasis added) The evidentiary hearing will also show conclusively there are sufficient facts to show that Defendant was denied a fair sentencing under NRS 193.165. The Defendant can show at an evidentiary hearing that he can overcome any procedural bars by showing good cause.

. . .

CONCLUSION

The consecutive sentence of twelve (12) years was in violation of NRS 193.165, as amended by AB 510. In the recent Nevada case of *State v. Second Jud. Dist., Pullin, supra,* the Nevada Supreme Court erred when it upheld a weapon enhancement, finding NRS 193.165, as amended, was not retroactive.

The United States Supreme Court has recently in *Montgomery, supra,* and *Welch, supra,* held that due process requires the changes to NRS 193.165 be applied retroactively. For these reasons, the Defendant should not have been procedurally barred when he sought to challenge his sentence enhancement.

Accordingly, Defendant respectfully submits his sentence and Judgment of Conviction should be reversed and the case should be remanded to District Court for re-sentencing. The District Court should alternatively consider modifying Defendant's sentence to eliminate the consecutive enhancement given for use of a deadly weapon.

In modifying the sentence, the District Court should consider all facts, including any possible mitigation, in order to determine a just and fair sentence, which is not excessive and is not in violation of the Eighth Amendment.

DATED this 7th day of March, 2022.

Respectfully submitted,
//s// Terrence M. Jackson
Nevada State Bar 000854
T: (702) 386-0001 / F: (702) 386-0085
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

. . .

. . .

. . .

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and on the 7th day of March, 2022, I e-filed and served copy of the foregoing: Defendant/Petitioner's, Cedric L. Jackson's, SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS or alternatively MOTION TO MODIFY SENTENCE to Department XXIV as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Defendant/Petitioner as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

CHAD N. LEXIS
Chief Deputy D. A. - Criminal
Motions@clarkcountyda.com

Cedric L. Jackson
ID# 1130512
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

EXHIBIT 'A'

Amended Petition for Writ of Habeas Corpus

Filed December 9, 2021 in EJDC dept. 24

APET
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
terry.jackson.esq@gmail.com

Counsel for Defendant Cedric L. Jackson

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

STATE OF NEVADA, Plaintiff/ Respondent, v. CEDRIC L. JACKSON, ID# 1130512 Defendant/ Petitioner.	CASE NO.: **A-20-817120-W** Case No.: 10-C-265339-1 DEPT. NO.: **XXIV**

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Defendant/Petitioner, CEDRIC L. JACKSON, by and through counsel, Terrence M. Jackson, Esq., and moves the Court to enter an Order granting his AMENDED Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Post Conviction on the grounds that his sentence was wrongly enhanced.

Because the Court wrongly misapplied NRS 193.165, the Defendant received consecutive sentences totaling twelve (12) additional years for the weapons enhancement. This increased his total aggregate sentence in this case to a maximum of thirty-seven (37) years with a minimum sentence of 14 years. This sentence was an excessive and unjust sentence and should be set aside because it violated NRS 103.165 and the Eighth Amendment's cruel and unusual punishment clause.

This Petition is based upon the accompanying Points and Authorities and such further facts as will come before this Court on a hearing of this Petition.

DATED this 9th day of December, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

INTRODUCTION

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged Defendant Cedric Jackson by way of Information with ten counts: Count 1 - Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Count 2 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 3 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2c), Count 4 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 5 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 6 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 7 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 8 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.100, 200.030), Count 9 - Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285), and Count 10 - Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Defendant as follows: Count 1 - Second Degree Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50011) and Count 2 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031). That same day, Defendant pled guilty to both counts in the Amended Information.

Defendant appeared before the District Court on November 14, 2014, and was sentenced on Count 1 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years, plus a consecutive term of twelve (12) years with a minimum parole eligibility of four (4) years for the Use of a Deadly Weapon, and on Count 2 to a maximum of sixty (60) months with a minimum parole eligibility of 24 (twenty-four) months, he was sentenced also to a consecutive term of thirty (30) months with a minimum parole eligibility of twelve (12) months for the Use of a Deadly Weapon, Count 2 to run concurrent with Count 1. Defendant received 1,748 days credit for time served. The Judgment of Conviction was entered on November 21, 2014.

Defendant acknowledges he has previously unsuccessfully challenged the enhancement given pursuant to NRS 193.165. On June 22, 2016, Defendant filed a Motion to Modify and/or Correct His Sentence by filing a Motion to Set Aside an Illegal Sentence based upon Lack of Subject Matter Jurisdiction ("Motion to Modify") on June 22, 2016. The State filed its response to that motion on July 12, 2016. The District Court denied the motion July 13, 2016.

The Defendant also filed an original Petition for Writ of Habeas Corpus on January 6, 2017. That Writ was decided against the Defendant on January 25, 2017. The District Court, in its original Finding of Facts dated March 7, 2017, ruled that the Defendant's Writ was procedurally barred, citing NRS 34.726(1), claiming Defendant had alleged no good cause for any delay of that Petition. The District Court also alleged that the issues the Defendant raised in that Petition should have been raised on direct appeal and the failure to raise those issues on direct appeal was a waiver of any such claims. *See,* Findings of Fact dated July 21, 2017. (p. 3-5) The Defendant appealed that decision of the District Court and it was affirmed on February 12, 2018, by the Supreme Court.

Shortly after the Nevada Supreme Court affirmed the decision, Defendant became aware of the recent United States Supreme Court opinions in cases *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) and *Montgomery v. Louisiana,* 577 U.S. __, 136 S.Ct. 718 (2016). (*See, Pro Per* Motion for Appointment of Counsel, dated June 27, 2018) These Supreme Court opinions gave him good cause to again challenge his conviction, as they gave him grounds to overcome any procedural bars even despite the past Court rulings holding these claims were barred.

The State filed a Response to Defendant's *Pro Per* Petition and request for counsel on June

26, 2018. The Court denied that Motion on June 27, 2018 and filed an Order on July 17, 2018. On May 25, 2020, Defendant then filed a *Pro Per* Habeas Petition for Mandamus. The State replied to the Petition on June 4, 2020.

On or about June 15, 2020, Defendant's family retained attorney, Terrence M. Jackson, to assist Cedric Jackson to again file Supplemental legal Authorities to show why his sentence should now be modified and why any legal challenge to his sentence should not be procedurally barred.

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO A CONSECUTIVE SENTENCE OF TWELVE (12) YEARS FOR THE WEAPON ENHANCEMENT.

Prior to 2007, the sentencing enhancement under NRS 193.165, for use of a deadly weapon was a consecutive statutory enhancement that was applied automatically. The law was however changed by the legislature in 2007, when the new law, AB 510, specifically removed the automatic consecutive enhancement required by NRS 196.165.

The legislative history of AB 510 made clear that this was done in part to reduce prisoner population. The question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge.

It is respectfully submitted that the District Court erred in sentencing the Defendant to an aggregate sentence of thirty-seven (37) years, which included twelve (12) years for the enhancement for the Use of a Deadly Weapon. Defendant's guilty plea had been accepted on September 17, 2014, and Cedric Jackson was adjudged guilty on November 19, 2014, of second degree murder with use of a weapon, NRS 200.010, 200.030, 193.330, 193.165. He was sentenced under the old law and received a ten (10) to twenty-five (25) year sentence plus an additional consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement, resulting in a total aggregate sentence of thirty-seven (37) years. The District Court gave a concurrent sentence of two (2) to five (5) years plus an enhancement of twelve (12) to thirty (30) months for the deadly weapon enhancement on count 2.

The changes in NRS 193.165 establish that the District Court abused its discretion by automatically granting the enhancement for the use of a deadly weapon under NRS 193.165. The Court's automatic decision on the weapon enhancement did not properly consider all the necessary factors at sentencing in granting the enhancement. Because of this major error in sentencing Defendant was substantially prejudiced. Defendant received an excessive and unjust sentence which violated the Eighth Amendment.

II.

THE APPLICATION OF AMENDMENTS TO NRS 193.165 MUST BE HELD TO BE RETROACTIVE BECAUSE OF UNITED STATES SUPREME COURT DECISIONS OF *WELCH V. UNITED STATES*, ___ U.S. ___, 136 S.CT. 1257, 194 L.ED.2D 387 (2016) AND *MONTGOMERY V. LOUISIANA*, 577 U.S. ___, 136 S.CT. 718 (2016).

In 2007 the Nevada State legislature enacted AB 510, which made a substantial change to Nevada criminal law regarding sentencing of any individual charged with offenses involving the use of deadly weapons. The effect of AB 510 was to change the previous automatic sentencing enhancement for offenses involving a weapon to a discretionary enhancement. AB 510 also required the Court to specifically enumerate the factors considered before giving an enhancement to a sentence. *See, Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

The Nevada Supreme Court in *State v. Second Judicial District Court,* 124 Nev. 564, 188 P.3d 1078 (2008) (*Pullin*) initially held that the 2007 amendments to NRS 193.165 would not be applied retroactively, saying the statutory change was not of constitutional dimensions. *Id.* 571 The Nevada Supreme Court concluded that because the legislature had not expressly stated its intent to make the statutory amendment retroactive, it ordered the District Court to resentence the defendant consistent with the old law which required an automatic enhancement of the sentence.

It is respectfully submitted that the United States Supreme Court's recent decisions on retroactivity in *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), and *Montgomery v. Louisiana,* 577 U.S. ___, 136 S.Ct. 718 (2016), created a constitutional requirement that such a major substantive statutory change must be given a retroactive effect. It is clear the ruling in *Welch v. United States* requires the Nevada Supreme Court's *Pullin* decision of non-retroactivity

be reversed. In *Welch, supra,* the Supreme Court in discussing the retroactivity of *Johnson v. United States,* 576 U.S. ___ (2015), a case which held the residual clause of the Armed Career Criminal Act was void for vagueness, stated:

> "The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. *See Chaidez v. United States,* 568 U.S. ___, ___, n. 16, 133 S.Ct. 1103, 1113, n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota,* 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague,* as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana,* 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra,* at 307, 311, 109 S.Ct. 1060. Second, new "watershed rules of criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d415 (1990); see *Teague, supra,* at 311-313, 109 S.Ct. 1060. (Emphasis added)
>
> It is undisputed that *Johnson* announced a new rule. See *Teague, supra,* at 301, 109 S.Ct. 1060 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). The question here is whether

that new rule falls within one of the two categories that have retroactive effect under *Teague*. The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules. *Welch* and the United States contend instead that *Johnson* falls into the first category because it announced a substantive rule.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519 [136 S.Ct. 1265] (Emphasis added) "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by statute beyond the State's power to punish." *Id.*, at 351-352, 124 S.Ct. 2519 (citation omitted); see *Montgomery, supra*, at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519 (Emphasis added)

. . .

Defendant respectfully submits the changes enacted in NRS 193.165 by AB 510 were clearly "substantive" changes in criminal sentencing which directly altered the actual punishment the defendant would likely receive in this case and that therefore the statutory changes of NRS 193.165 must be applied retroactively to Defendant's sentence.

III.

THE AGGREGATE SENTENCE OF THIRTY-SEVEN (37) YEARS WAS EXCESSIVE AND VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. *Strickland v. Washington*, 466 U.S. 668 (1984) requires effective advocacy at every critical stage of a criminal proceeding. *See, Sanborn v. State*, 107 Nev. 399 (1991)

It is respectfully submitted defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, *see Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment.

Although Cedric L. Jackson has been convicted of multiple serious charges, it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation.

It is respectfully submitted that the sentence imposed by this Court was improper because the Court gave no consideration whatever to any mitigating circumstances in Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) Mitigating circumstances in the Defendant's background were not given appropriate weight in determining a just punishment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportional to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). (Emphasis added) In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983) It is respectfully submitted Defendant's excessive sentence was the result of Defendant's counsel's ineffectiveness at sentencing. The case should therefore be reversed because of this clear violation of *Strickland v. Washington.*

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *see United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. Consider *Weems, supra,* where the Court stated: . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to 'shock the conscience.'

Defendant submits the punishment he received in this case was far in excess of a fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and his lack of zealous advocacy at sentencing and post sentencing. Because the sentence in this case was 'shocking to the conscience,' it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause.

IV.

DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE PROCEDURALLY BARRED.

A. Defendant can Demonstrate Good Cause and Prejudice for any Delay.

Defendant submits his claim, although beyond statutory time bar of NRS 34.726, was filed within a 'reasonable time' after the basis for the claim became evident. In *Rippo v. State,* 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussed procedural bars and the need for finality in criminal cases. In *Rippo, supra,* the Nevada Supreme Court explained the circumstances of when procedural default would be excused, stating:

> *Rippo's* petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two (2) components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

> The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem*, 119 Nev. at 621, 81 P.3d at 525; *Hathaway*, 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem*, 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway*, 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

...

Defendant respectfully submits that in this case as opposed to *Rippo*, he can demonstrate good cause for the delay in this case. First, Defendant's delay in this case was not intentional. The delay resulted principally because of the major change of case law regarding application of NRS 193.165 and its retroactive application.

The change in law from the Supreme Court opinion in *Montgomery* and *Welch* provided Defendant Supreme Court opinions directly supporting new constitutional law which the State of Nevada must apply. This case law was not reasonably available at the time of Defendant's default. These new United States Supreme Court decisions clearly provide good cause for overcoming the procedural bars of NRS 34.726, NRS 34.810. *See, Rogers v. State*, 267 P.3d 802, 803 (Nev. 2011). These United States Supreme Court cases cited held that under similar circumstances, the law must be applied retroactively. Therefore, it is respectfully submitted, this Honorable Court must consider this Petition and its underlying claims on the merits.

There are other equitable factors in this case clearly outweigh the State's interests in finality and the protection against "stale" claims. In this case, because the Defendant's sentence is fundamentally unfair and 'manifestly unjust' it must be set aside.

An evidentiary hearing will also establish there existed numerous impediments which prevented Defendant from completing a timely habeas corpus petition. An evidentiary hearing will show the prison Law Library is less than adequate for extensive legal research and provides minimal training for prisoners. *See, Easterwood v. Champion*, 213 F.3d 1321 (10th Cir.2000), *Ray v. Lamport*, 465 F.3d 964 (9th Cir.2006), *Williamson v. Word*, 110 F.3d 1508 (10th Cir.1997).

Considering the totality of these factors, the equitable grounds to allow Defendant to proceed with this Petition supercede any procedural bars.

B. Applying Procedural Bars to Prohibit the Habeas Petition in this Case Would Result in a Fundamental Miscarriage of Justice.

Although the statutory provisions of the Nevada Revised Statutes appear at first glance to restrict the application of habeas corpus relief in this case because it may be untimely, there have always been important exceptions to this procedural bar.

> NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second* or *successive petition must be dismissed* if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."
>
> However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden,* 114 Nev. 956, 959, 964 P.2d 785, 787.
>
> Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State,* 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). *See, State v. Bennett,* 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden,* 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

Defendant respectfully submits considering the facts and law, any procedural default should be excused because it would deny him the opportunity to raise the issue of his wrongful extended incarceration based upon improper sentencing to a consecutive sentence for use of a deadly weapon

which was unjust under the facts and law.

V.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND TO PROVE HIS PETITION IS NOT PROCEDURALLY BARRED.

An evidentiary hearing will establish Defendant's counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing will establish the Defendant filed his *Pro Per* Mandamus Petition for appointment of counsel as soon as he became aware of the Supreme Court's cases of *Montgomery v. Louisiana, supra,* and *Welch v. United States, supra,* which changed the law regarding the retroactivity of AB 510.

An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331

. . .

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment,

> possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and counsel's failure prejudiced appellant. *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.*, 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief."
>
> "Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions." *Id.* 1333 (Emphasis added)

. . .

Similarly, in *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing will also show conclusively there are sufficient facts to show that Defendant was denied a fair sentencing under NRS 193.165. The Defendant can show at an evidentiary hearing that he can overcome any procedural bars by showing good cause.

CONCLUSION

The consecutive sentence of twelve (12) years was in violation of NRS 193.165, as amended by AB 510. In the recent Nevada case of *State v. Second Jud. Dist., Pullin, supra,* the Nevada Supreme Court erred when it upheld a weapon enhancement, finding NRS 193.165, as amended, was not retroactive.

The United States Supreme Court has recently in *Montgomery, supra,* and *Welch, supra,* held that due process requires the changes to NRS 193.165 be applied retroactively. For these reasons, the Defendant should not have been procedurally barred when he sought to challenge his sentence enhancement.

Accordingly, Defendant respectfully submits his sentence and Judgment of Conviction should be reversed and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for use of a deadly weapon, or alternatively remand the case to District Court for the District

Court to state in writing the reasons why any consecutive sentence for the weapons enhancement is appropriate in this case.

In the remand, the District Court also must be advised to fully consider the totality of facts, including any possible mitigation, in order to determine a just and fair sentence, which is not excessive and is not in violation of the Eighth Amendment.

DATED this 9th day of December, 2021.

Respectfully submitted,

//s// Terrence M. Jackson

Nevada State Bar 000854

T: (702) 386-0001 / F: (702) 386-0085

Terry.jackson.esq@gmail.com

Counsel for Petitioner, *Cedric L. Jackson*

. . .

. . .

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and on the 9th day of December, I e-filed and served copy of the foregoing: Defendant/Petitioner's, Cedric L. Jackson's, AMENDED PETITION FOR WRIT OF HABEAS CORPUS to Department XXIV as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Defendant/Petitioner as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

CHAD N. LEXIS
Chief Deputy D. A. - Criminal
chad.lexis@clarkcountyda.com

Cedric L. Jackson
ID# 1130512
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

EXHIBIT 'B'

Amended Petition for Writ of Habeas Corpus

Filed July 26, 2021 in EJDC dept. 10

APET
TERRENCE M. JACKSON, ESQ.
Nevada Bar No. 00854
Law Office of Terrence M. Jackson
624 South Ninth Street
Las Vegas, NV 89101
T: 702-386-0001 / F: 702-386-0085
terry.jackson.esq@gmail.com

Counsel for Defendant Cedric L. Jackson

IN THE EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA,	
Plaintiff/ Respondent,	CASE NO.: **10-C-265339-1**
v.	CASE NO.: A-20-817120-W
CEDRIC L. JACKSON,	DEPT. NO.: X
ID# 1130512	
Defendant/ Petitioner.	

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the Defendant/Petitioner, CEDRIC L. JACKSON, by and through counsel, Terrence M. Jackson, Esq., and moves the Court to enter an Order granting his AMENDED Petition and Supplemental Points and Authorities in support of Defendant's Petition for Writ of Post Conviction on the grounds that his sentence was wrongly enhanced.

Because the Court wrongly misapplied NRS 193.165, the Defendant received consecutive sentences totaling twelve (12) additional years for the weapons enhancement. This increased his total aggregate sentence in this case to a maximum of thirty-seven (37) years with a minimum sentence of 14 years. This sentence was an excessive and unjust sentence and should be set aside because it violated NRS 103.165 and the Eighth Amendment's cruel and unusual punishment clause.

This Petition is based upon the accompanying Points and Authorities and such further facts as will come before this Court on a hearing of this Petition.

DATED this 26th day of July, 2021.

Respectfully submitted,

/s/ Terrence M. Jackson

TERRENCE M. JACKSON, ESQUIRE
Nevada State Bar 000854
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

INTRODUCTION

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged Defendant Cedric Jackson by way of Information with ten counts: Count 1 - Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.165), Count 2 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 3 - Battery With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony - NRS 200.481.2c), Count 4 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 5 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 6 - Attempt Murder With Use of a Deadly Weapon (Felony - NRS 200.010, 200.030, 193.330, 193.165), Count 7 - Assault With a Deadly Weapon (Felony - NRS 200.471), Count 8 - Conspiracy to Commit Murder (Felony - NRS 199.480, 200.100, 200.030), Count 9 - Discharging Firearm At or Into Structure, Vehicle, Aircraft, or Watercraft (Felony - NRS 202.285), and Count 10 - Discharging Firearm Out of Motor Vehicle (Felony - NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Defendant as follows: Count 1 - Second Degree Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165 - NOC 50011) and Count 2 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165 - NOC 50031). That same day, Defendant pled guilty to both counts in the Amended Information.

Defendant appeared before the District Court on November 14, 2014, and was sentenced on Count 1 to a maximum of twenty-five (25) years with a minimum parole eligibility of ten (10) years, plus a consecutive term of twelve (12)years with a minimum parole eligibility of four (4) years for the Use of a Deadly Weapon, and on Count 2 to a maximum of sixty (60) months with a minimum parole eligibility of 24 (twenty-four) months, he was sentenced also to a consecutive term of thirty (30) months with a minimum parole eligibility of twelve (12) months for the Use of a Deadly Weapon, Count 2 to run concurrent with Count 1. Defendant received 1,748 days credit for time served. The Judgment of Conviction was entered on November 21, 2014.

Defendant acknowledges he has previously unsuccessfully challenged the enhancement given pursuant to NRS 193.165. On June 22, 2016, Defendant filed a Motion to Modify and/or Correct His Sentence by filing a Motion to Set Aside an Illegal Sentence based upon Lack of Subject Matter Jurisdiction ("Motion to Modify") on June 22, 2016. The State filed its response to that motion on July 12, 2016. The District Court denied the motion July 13, 2016.

The Defendant also filed an original Petition for Writ of Habeas Corpus on January 6, 2017. That Writ was decided against the Defendant on January 25, 2017. The District Court, in its original Finding of Facts dated March 7, 2017, ruled that the Defendant's Writ was procedurally barred, citing NRS 34.726(1), claiming Defendant had alleged no good cause for any delay of that Petition.

The District Court also alleged that the issues the Defendant raised in that Petition should have been raised on direct appeal and the failure to raise those issues on direct appeal was a waiver of any such claims. *See,* Findings of Fact dated July 21, 2017. (p. 3-5) The Defendant appealed that decision of the District Court and it was affirmed on February 12, 2018, by the Supreme Court.

Shortly after the Nevada Supreme Court affirmed the decision, Defendant became aware of the recent United States Supreme Court opinions in cases *Welch v. United States,* ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016) and *Montgomery v. Louisiana,* 577 U.S. __, 136 S.Ct. 718 (2016). (*See, Pro Per* Motion for Appointment of Counsel, dated June 27, 2018) These Supreme Court opinions gave him good cause to again challenge his conviction, as they gave him grounds to overcome any procedural bars even despite the past Court rulings holding these claims were barred.

The State filed a Response to Defendant's *Pro Per* Petition and request for counsel on June 26, 2018. The Court denied that Motion on June 27, 2018 and filed an Order on July 17, 2018. On May 25, 2020, Defendant then filed a *Pro Per* Habeas Petition for Mandamus. The State replied to the Petition on June 4, 2020.

On or about June 15, 2020, Defendant's family retained attorney, Terrence M. Jackson, to assist Cedric Jackson to again file Supplemental legal Authorities to show why his sentence should now be modified and why any legal challenge to his sentence should not be procedurally barred. This

ARGUMENT

I.

THE DISTRICT COURT ERRED WHEN IT SENTENCED THE DEFENDANT TO A CONSECUTIVE SENTENCE OF TWELVE (12) YEARS FOR THE WEAPON ENHANCEMENT.

Prior to 2007, the sentencing enhancement under NRS 193.165, for use of a deadly weapon was a consecutive statutory enhancement that was applied automatically. The law was however changed by the legislature in 2007, when the new law, AB 510, specifically removed the automatic consecutive enhancement required by NRS 196.165.

The legislative history of AB 510 made clear that this was done in part to reduce prisoner population. The question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge.

It is respectfully submitted that the District Court erred in sentencing the Defendant to an aggregate sentence of thirty-seven (37) years, which included twelve (12) years for the enhancement for the Use of a Deadly Weapon. Defendant's guilty plea had been accepted on September 17, 2014, and Cedric Jackson was adjudged guilty on November 19, 2014, of second degree murder with use of a weapon, NRS 200.010, 200.030, 193.330, 193.165. He was sentenced under the old law and received a ten (10) to twenty-five (25) year sentence plus an additional consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement, resulting in a total aggregate sentence of thirty-seven (37) years. The District Court gave a concurrent sentence of two (2) to five (5) years plus an enhancement of twelve (12) to thirty (30) months for the deadly weapon enhancement on count 2.

The changes in NRS 193.165 establish that the District Court abused its discretion by automatically granting the enhancement for the use of a deadly weapon under NRS 193.165. The Court's automatic decision on the weapon enhancement did not properly consider all the necessary factors at sentencing in granting the enhancement. Because of this major error in sentencing Defendant was substantially prejudiced. Defendant received an excessive and unjust sentence which

violated the Eighth Amendment.

II.

THE APPLICATION OF AMENDMENTS TO NRS 193.165 MUST BE HELD TO BE RETROACTIVE BECAUSE OF UNITED STATES SUPREME COURT DECISIONS OF *WELCH V. UNITED STATES*, ___ U.S. ___, 136 S.CT. 1257, 194 L.ED.2D 387 (2016) AND *MONTGOMERY V. LOUISIANA*, 577 U.S. ___, 136 S.CT. 718 (2016).

In 2007 the Nevada State legislature enacted AB 510, which made a substantial change to Nevada criminal law regarding sentencing of any individual charged with offenses involving the use of deadly weapons. The effect of AB 510 was to change the previous automatic sentencing enhancement for offenses involving a weapon to a discretionary enhancement. AB 510 also required the Court to specifically enumerate the factors considered before giving an enhancement to a sentence. *See, Mendoza-Lopez v. State*, 125 Nev. 634, 218 P.3d 501 (2009).

The Nevada Supreme Court in *State v. Second Judicial District Court*, 124 Nev. 564, 188 P.3d 1078 (2008) (*Pullin*) initially held that the 2007 amendments to NRS 193.165 would not be applied retroactively, saying the statutory change was not of constitutional dimensions. *Id.* 571 The Nevada Supreme Court concluded that because the legislature had not expressly stated its intent to make the statutory amendment retroactive, it ordered the District Court to resentence the defendant consistent with the old law which required an automatic enhancement of the sentence.

It is respectfully submitted that the United States Supreme Court's recent decisions on retroactivity in *Welch v. United States*, ___ U.S. ___, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), and *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718 (2016), created a constitutional requirement that such a major substantive statutory change must be given a retroactive effect. It is clear the ruling

in *Welch v. United States* requires the Nevada Supreme Court's *Pullin* decision of non-retroactivity be reversed. In *Welch, supra,* the Supreme Court in discussing the retroactivity of *Johnson v. United States*, 576 U.S. ___ (2015), a case which held the residual clause of the Armed Career Criminal Act was void for vagueness, stated:

> "The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). That opinion in turn drew on the approach outlined by the second Justice Harlan in his separate opinions in *Mackey v. United States,* 401 U.S. 667, 91 S.Ct. 1160, 28 L.Ed.2d 404 (1971), and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969). The parties here assume that the *Teague* framework applies in a federal collateral challenge to a federal conviction as it does in a federal collateral challenge to a state conviction, and we proceed on that assumption. *See Chaidez v. United States,* 568 U.S. ___, ___, n. 16, 133 S.Ct. 1103, 1113, n. 16, 185 L.Ed.2d 149 (2013); *Danforth v. Minnesota,* 552 U.S. 264, 269, n. 4, 128 S.Ct. 1029, 169 L.Ed.2d 859 (2008).
>
> Under *Teague,* as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana,* 577 U.S. ___, ___, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra,* at 307, 311, 109 S.Ct. 1060. Second, new "watershed rules of

criminal procedure," which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d415 (1990); see *Teague, supra*, at 311-313, 109 S.Ct. 1060. (Emphasis added)

It is undisputed that *Johnson* announced a new rule. See *Teague, supra*, at 301, 109 S.Ct. 1060 ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final"). The question here is whether that new rule falls within one of the two categories that have retroactive effect under *Teague*. The parties agree that *Johnson* does not fall into the limited second category for watershed procedural rules. *Welch* and the United States contend instead that *Johnson* falls into the first category because it announced a substantive rule.

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro*, 542 U.S., at 353, 124 S.Ct. 2519 [136 S.Ct. 1265] (Emphasis added) "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by statute beyond the State's power to punish." *Id.*, at 351-352, 124 S.Ct. 2519 (citation omitted); see *Montgomery, supra*, at ___, 136 S.Ct. at 728. Procedural rules, by contrast, "regulate only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353, 124 S.Ct. 2519. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Ibid.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been

acquitted otherwise." *Id.* at 352, 124 S.Ct. 2519 (Emphasis added)

. . .

Defendant respectfully submits the changes enacted in NRS 193.165 by AB 510 were clearly "substantive" changes in criminal sentencing which directly altered the actual punishment the defendant would likely receive in this case and that therefore the statutory changes of NRS 193.165 must be applied retroactively to Defendant's sentence.

III.

THE AGGREGATE SENTENCE OF THIRTY-SEVEN (37) YEARS WAS EXCESSIVE AND VIOLATED THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. *Strickland v. Washington,* 466 U.S. 668 (1984) requires effective advocacy at every critical stage of a criminal proceeding. *See, Sanborn v. State,* 107 Nev. 399 (1991)

It is respectfully submitted defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, *see Mendoza-Lopez v. State,* 125 Nev. 634, 218 P.3d 501 (2009).

A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment.

Although Cedric L. Jackson has been convicted of multiple serious charges, it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation.

It is respectfully submitted that the sentence imposed by this Court was improper because the Court gave no consideration whatever to any mitigating circumstances in Defendant's background. *See, Miller v. Alabama,* 567 U.S. 460, 132 S.Ct. 2455 (2012) Mitigating circumstances in the Defendant's background were not given appropriate weight in determining a just punishment.

"[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments follows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportional to [the] offense.' " *Kennedy v. Louisiana,* 128 S.Ct. 2541, 2649 (2008) (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910)). (Emphasis added) In analyzing whether a sentence is cruel and unusual punishment, a court must first make: "a threshold determination whether the sentence imposed is grossly disproportionate to the offense committed." The court then considers "the gravity of the offense and the harshness of the penalty." *Solem v. Helm,* 463 U.S. 277, 290-91 (1983) It is respectfully submitted Defendant's excessive sentence was the result of Defendant's counsel's ineffectiveness at sentencing. The case should therefore be reversed because of this clear violation of *Strickland v. Washington.*

Defendant acknowledges that any sentence within statutory limits is generally considered neither excessive or cruel and unusual. *Glegola v. State,* 110 Nev. 344, 348 (1994), *see United States v. Moriarty,* 429 F.3d 1012, 1024 (11th Cir.2005). Defendant however submits that a punishment

within statutory guidelines may nevertheless, in rare cases, be so harsh it exceeds the limits of the Constitution. Consider *Weems, supra,* where the Court stated: . . . "[E]ven if the minimum penalty . . . had been imposed, it would have been repugnant to the [constitutional prohibition against cruel and unusual punishments]. *Id.* 382 (Emphasis added) *See also, Chavez v. State,* 125 Nev. 328, 348 (2009), which held a punishment may be unconstitutional or a sentence be considered so unreasonably disproportionate as to 'shock the conscience.'

Defendant submits the punishment he received in this case was far in excess of a fair or reasonable sentence. This sentence was a direct result of counsel's ineffectiveness and his lack of zealous advocacy at sentencing and post sentencing. Because the sentence in this case was 'shocking to the conscience,' it was unconstitutional and in violation of the Eighth Amendment's cruel and unusual punishment clause.

IV.

DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS SHOULD NOT BE PROCEDURALLY BARRED.

A. Defendant can Demonstrate Good Cause and Prejudice for any Delay.

Defendant submits his claim, although beyond statutory time bar of NRS 34.726, was filed within a 'reasonable time' after the basis for the claim became evident. In *Rippo v. State,* 122 Nev. 1086, 368 P.3d 729 (2016), the Nevada Supreme Court discussed procedural bars and the need for finality in criminal cases. In *Rippo, supra,* the Nevada Supreme Court explained the circumstances of when procedural default would be excused, stating:

> *Rippo's* petition was not filed within that time period. To excuse the delay in filing the petition, *Rippo* had to demonstrate good

cause for the delay. NRS 34.726(1). A showing of good cause for the delay has two (2) components: (1) that the delay was not the petitioner's fault and (2) that "dismissal of the petition as untimely will unduly prejudice the petitioner." *Id.*

The first component of the cause standard under NRS 34.726(1) requires a showing that "an impediment external to the defense" prevented the petitioner from filing the petition within the time constraints provided by the statute. *Clem,* 119 Nev. at 621, 81 P.3d at 525; *Hathaway,* 119 Nev. at 252, 71 P.3d at 506. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of any default." *Clem,* 119 Nev. at 621, 81 P.3d at 525; *see also Hathaway,* 119 Nev. at 252, 71 P.3d at 506. (Emphasis added)

...

Defendant respectfully submits that in this case as opposed to *Rippo,* he can demonstrate good cause for the delay in this case. First, Defendant's delay in this case was not intentional. The delay resulted principally because of the major change of case law regarding application of NRS 193.165 and its retroactive application.

The change in law from the Supreme Court opinion in *Montgomery* and *Welch* provided Defendant Supreme Court opinions directly supporting new constitutional law which the State of Nevada must apply. This case law was not reasonably available at the time of Defendant's default. These new United States Supreme Court decisions clearly provide good cause for overcoming the procedural bars of NRS 34.726, NRS 34.810. *See, Rogers v. State,* 267 P.3d 802, 803 (Nev. 2011). These United States Supreme Court cases cited held that under similar circumstances, the law must be applied retroactively. Therefore, it is respectfully submitted, this Honorable Court must consider

this Petition and its underlying claims on the merits.

There are other equitable factors in this case clearly outweigh the State's interests in finality and the protection against "stale" claims. In this case, because the Defendant's sentence is fundamentally unfair and 'manifestly unjust' it must be set aside.

An evidentiary hearing will also establish there existed numerous impediments which prevented Defendant from completing a timely habeas corpus petition. An evidentiary hearing will show the prison Law Library is less than adequate for extensive legal research and provides minimal training for prisoners. *See, Easterwood v. Champion,* 213 F.3d 1321 (10th Cir.2000), *Ray v. Lamport,* 465 F.3d 964 (9th Cir.2006), *Williamson v. Word,* 110 F.3d 1508 (10th Cir.1997). Considering the totality of these factors, the equitable grounds to allow Defendant to proceed with this Petition supercede any procedural bars.

B. Applying Procedural Bars to Prohibit the Habeas Petition in this Case Would Result in a Fundamental Miscarriage of Justice.

Although the statutory provisions of the Nevada Revised Statutes appear at first glance to restrict the application of habeas corpus relief in this case because it may be untimely, there have always been important exceptions to this procedural bar.

> NRS 34.726(1) provides that a post-conviction habeas petition challenging the validity of a judgment of conviction must be filed within one year after this court issues the remittitur from a timely direct appeal. NRS 34.810(1)(b) provides that a post-conviction habeas petition must be dismissed where the defendant's conviction was the result of a trial and his claims could have been raised either before the trial court, on direct appeal in a previous petition, or in any other proceeding. And NRS 34.810(2) provides that a *second* or

successive petition must be dismissed if the defendant fails to allege new or different grounds and the prior petition was decided on its merits or if the defendant's failure to assert those grounds in the prior petition constituted an "abuse of the writ."

However, procedure default will be excused if the petitioner established both good cause for the default and prejudice. NRS 34.726(1), NRS 38.810(3). Good cause for failing to file a timely petition or raise a claim in a previous proceeding may be established where the factual or legal basis for the claim was not necessarily available. *Harris v. Warden,* 114 Nev. 956, 959, 964 P.2d 785, 787.

Even absent a showing of good cause, this court will consider a claim if the petitioner can demonstrate that applying procedural bars would result in a fundamental miscarriage of justice. *Bejarano v. State,* 131 Nev. ___, 146 P.3d 265, 270 (Nev. 2006). *See, State v. Bennett,* 119 Nev. 589, 597-98, 81 P.2d 1, 7 (2003), *Leslie v. Warden,* 118 Nev. 773, 780, 59 P.3d 440, 445 (2002). (Emphasis added)

Defendant respectfully submits considering the facts and law, any procedural default should be excused because it would deny him the opportunity to raise the issue of his wrongful extended incarceration based upon improper sentencing to a consecutive sentence for use of a deadly weapon which was unjust under the facts and law.

V.

DEFENDANT IS ENTITLED TO AN EVIDENTIARY HEARING TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND* AND TO PROVE HIS PETITION IS NOT PROCEDURALLY BARRED.

An evidentiary hearing will establish Defendant's counsel was ineffective under *Strickland* in numerous ways. An evidentiary hearing will establish the Defendant filed his *Pro Per* Mandamus

Petition for appointment of counsel as soon as he became aware of the Supreme Court's cases of *Montgomery v. Louisiana, supra,* and *Welch v. United States, supra,* which changed the law regarding the retroactivity of AB 510.

An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted.

In *Marshall v. State,* 110 Nev. 1328, 885 P.2d 603 (1994), the Nevada Supreme Court reversed *Marshall's* conviction because he was denied an evidentiary hearing on post-conviction. The Court there stated:

> "When a petition for post-conviction relief raises claims supported by specific factual allegations which, if true, would entitle the petitioner to relief, the petitioner is entitled to an evidentiary hearing unless those claims are repelled by the record." *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984). *Id.* 1331

. . .

Although the court rejected many of *Marshall's* claims as meritless, it found the issue of insufficiency of the evidence presented to the grand jury supporting the possession or controlled substance charge to have merit and reversed those counts stating:

> "At most, the state presented evidence that appellant frequented an apartment that was rented to his brother and that appellant stored some of his personal belongings in the apartment. This evidence is not sufficient to establish that appellant, rather than one of the numerous other persons who frequented the apartment, possessed the cocaine and the marijuana the police found. Appellate counsel was ineffective for failing to raise this issue on appeal and

counsel's failure prejudiced appellant. *Warden v. Lyons,* 100 Nev. 430, 683 P.2d 504 (1984), *cert. den.,* 471 U.S. 1004 (1985). The district court erred in refusing to provide appellant an evidentiary hearing on this issue and in denying appellant relief."

"Because the record on appeal establishes that appellant was improperly convicted of the possession charges, we reverse appellant's judgment of conviction on these charges and we vacate the sentences imposed with respect to those convictions." *Id.* 1333 (Emphasis added)

. . .

Similarly, in *Hatley v. State,* 100 Nev. 214, 678 P.2d 1160 (1984), the Supreme Court reversed and remanded for an evidentiary hearing because the defendant had alleged facts in his petition, which, if true, would entitle him to relief. *Id.* 216 (Emphasis added) The evidentiary hearing will also show conclusively there are sufficient facts to show that Defendant was denied a fair sentencing under NRS 193.165. The Defendant can show at an evidentiary hearing that he can overcome any procedural bars by showing good cause.

CONCLUSION

The consecutive sentence of twelve (12) years was in violation of NRS 193.165, as amended by AB 510. In the recent Nevada case of *State v. Second Jud. Dist., Pullin, supra,* the Nevada Supreme Court erred when it upheld a weapon enhancement, finding NRS 193.165, as amended, was not retroactive.

The United States Supreme Court has recently in *Montgomery, supra,* and *Welch, supra,* held that due process requires the changes to NRS 193.165 be applied retroactively. For these reasons, the Defendant should not have been procedurally barred when he sought to challenge his sentence

enhancement.

Accordingly, Defendant respectfully submits his sentence and Judgment of Conviction should be reversed and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for use of a deadly weapon, or alternatively remand the case to District Court for the District Court to state in writing the reasons why any consecutive sentence for the weapons enhancement is appropriate in this case.

In the remand, the District Court also must be advised to fully consider the totality of facts, including any possible mitigation, in order to determine a just and fair sentence, which is not excessive and is not in violation of the Eighth Amendment.

DATED this 26th day of July, 2021.

Respectfully submitted,

//s// Terrence M. Jackson
Nevada State Bar 000854
T: (702) 386-0001 / F: (702) 386-0085
Terry.jackson.esq@gmail.com
Counsel for Petitioner, *Cedric L. Jackson*

. . .

. . .

CERTIFICATE OF SERVICE

I hereby certify that I am an assistant to Terrence M. Jackson, Esq., and on the 26th day of July, I e-filed and served copy of the foregoing: Defendant/Petitioner's, Cedric L. Jackson's, AMENDED PETITION FOR WRIT OF HABEAS CORPUS as follows:

[X] Via Electronic Service (CM/ECF) to the Eighth Judicial District Court and by United States first class mail to the Nevada Attorney General and Defendant/Petitioner as follows:

STEVEN B. WOLFSON
Clark County District Attorney
steven.wolfson@clarkcountyda.com

CHAD N. LEXIS
Chief Deputy D. A. - Criminal
chad.lexis@clarkcountyda.com

Cedric L. Jackson
ID# 1130512
Southern Desert Correctional Ctr.
Post Office Box 208
Indian Springs, NV 89070-0208

AARON D. FORD
Nevada Attorney General
100 North Carson Street
Carson City, Nevada 89701

By: */s/ Ila C. Wills*
Assistant to T. M. Jackson, Esq.

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Cedric Jackson, Plaintiff(s) vs. State of Nevada, Defendant(s)	Case No.: A-22-849718-W Department 10

NOTICE OF CHANGE OF CASE NUMBER AND DEPARTMENT REASSIGNMENT

NOTICE IS HEREBY GIVEN that pursuant to NRS 34.730 and the minute order dated March 15, 2022, the two Amended Petitions for Writ of Habeas Corpus filed into A-20-817120-W have been given case number A-22-849718-W and assigned to Judge Tierra Jones. PLEASE INCLUDE THE NEW CASE NUMBER ON ALL FUTURE FILINGS. Please be advised that the Second Amended Petition For Writ of Habeas Corpus, or alternatively, Motion to Modify Sentence Based Upon Changes in Supreme Court Law and Changes in Nevada Revised Statute 193.165 in the above-entitled matter is set for hearing as follows:

Date: May 04, 2022 **Time:** 8:30 AM

Location: RJC Courtroom 14B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Heather Kordenbrock
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Change of Case Number and Department Reassignment was electronically served to all registered users for case number A-20-817120-W in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Heather Kordenbrock
Deputy Clerk of the Court

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CEDRIC JACKSON, #1581340

Defendant.

CASE NO: A-22-849718-W
C-10-265339-1

DEPT NO: X

STATE'S RESPONSE AND MOTION TO STRIKE PROCEDURALLY BARRED AMENDED PETITION FOR WRIT OF HABEAS CORPUS, SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS, AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: MAY 4, 2022
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through TALEEN PANDUKHT, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Amended Petition for Writ of Habeas Corpus, Second Amended Petition for Writ Of Habeas Corpus, and Request for Evidentiary Hearing, and the State now moves to Strike the Amended Petition for Writ of Habeas Corpus, Second Amended Petition for Writ of Habeas Corpus, and Request for Evidentiary Hearing.

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On June 16, 2010, the State of Nevada charged CEDRIC JACKSON (hereinafter "Petitioner") by way of Information as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 3 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.481.2c); COUNT 4 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 5 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 7 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 8 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.100, 200.030); COUNT 9 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Felony – NRS 202.285); and COUNT 10 – Discharging Firearm Out of Motor Vehicle (Felony – NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Petitioner as follows: COUNT 1 – Second Degree Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50011) and COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165 – NOC 50031). That same day, Petitioner pled guilty to both counts in the Amended Information. The terms of the Guilty Plea Agreement (hereinafter "GPA") were as follows: "The Defendant's plea is conditional upon him receiving the following stipulated sentence. The parties jointly recommend a sentence of ten (10) to twenty-five (25) years as to Count 1 with a consecutive four (4) to twelve (12) years as to the deadly weapon enhancement. In addition, the parties stipulate to two (2) to five (5) years as to Count 2 with a consecutive twelve (12) to thirty (30) months sentence as to the deadly weapon enhancement. The parties stipulate that the sentences on each count will run concurrently to one another."

On November 19, 2014, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served.

The Judgment of Conviction was filed on November 21, 2014.

On June 22, 2016, Petitioner filed a Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction. The State filed its Response on July 12, 2016. The District Court denied the Motion on July 13, 2016.

On January 6, 2017, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "PWHC"). The State filed its Response on January 20, 2017. On January 25, 2017, the PWHC was denied. On February 13, 2017, Petitioner filed a Notice of Appeal. The Findings of Fact, Conclusions of Law and Order reflecting the Court's denial of the Petition was filed on March 7, 2017. On January 9, 2018, the Nevada Court of Appeals affirmed the District Court's denial of Petitioner's PWHC. Remittitur issued on February 5, 2018.

On June 5, 2018, Petitioner filed a Motion for the Appointment of Counsel. The State filed a Response on June 26, 2018. The Motion was denied on June 27, 2018.

On May 28, 2020, Petitioner filed a Petition for Writ of Mandamus. The State's Response was filed on June 4, 2020. On August 3, 2020, the Attorney General's Office filed a Motion to Dismiss the Petition for Writ of Mandamus, which was granted by the District Court on September 4, 2020. The Decision and Order was filed on September 28, 2020.

On December 9, 2021, Petitioner filed an Amended Petition for Writ of Habeas Corpus (hereinafter "APWHC") through retained counsel Terrence Jackson, Esq. According to the Petition, Mr. Jackson was retained on June 15, 2020. APWHC 4.

On March 7, 2022, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus or alternatively Motion to Modify Sentence Based Upon Changes in Supreme Court Law and Changes in Nevada Revised Statute 193.165 ("SAPWHC"). Petitioner asserts that the SAPWHC was filed because the APWHC was never set for argument. SAPWHC 4. Petitioner's SAPWHC is identical to the APWHC except for a paragraph explaining the reasoning for filing the SAPWHC.

On March 15, 2022, a Notice of Change of Case Number and Department Reassignment issued transferring this case from Department 24 to Department 10.

The State's Motion to Strike and Response to both Petitions now follows.

STATEMENT OF THE FACTS

The District Court relied on the following facts at sentencing:

> On January 31, 2010, officers of the Las Vegas Metropolitan Police Department responded to a report of a homicide. The first victim was found in front of a residence and it appeared he had been shot. Further examination of the body revealed he had been shot nine times. A second victim was also located who had been shot in the leg. This victim was uncooperative and refused to identify the suspects. Officers learned that both victims had been involved in an altercation at a local bar with two male subjects earlier. Witnesses told the officers that the victims had gotten into a fight with the two male subjects, later identified as Cedric Jackson and Prentice Coleman.
>
> One witness that was with the victims and was also shot at, told the officers that after the fight at the bar, Coleman and Jackson followed them and he observed Jackson and the deceased victim confront each other. Shortly thereafter the suspects began shooting at the victims and him. He stated he ran and hid behind a vehicle which the officers inspected and the rear window had been struck by gunfire. Witnesses positively identified the shooters as Cedric Jackson and Prentice Coleman.
>
> It was discovered that Cedric Jackson and Prentice Coleman were both on federal parole. After further investigation, officer located Cedric Jackson at the U.S. Parole and Probation office on February 5, 2010, where he was arrested and transported to the Clark County Detention Center and booked accordingly.

Presentence Investigation Report ("PSI") 5-6.

//

//

ARGUMENT

As an initial matter, Petitioners APWHC and SAPWHC are identical in substance, the only difference being a paragraph explaining the reasoning behind filing the SAPWHC after the APWHC, which is that no argument was set after the APWHC was filed. In both the APWHC and SAPWHC, Petitioner asserts six (6) grounds for relief:

1. The District Court erred when it sentenced Petitioner to a consecutive sentence of twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4.
2. The application of amendments in NRS 193.165 must be held to be retroactive based on two (2) 2016 US Supreme Court cases: Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). APWHC 5, SAPWHC 5.
3. The aggregate sentence of thirty-seven (37) years was excessive and cruel and unusual punishment and Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. APWHC 7, SAPWHC 8.
4. Petitioner's Post-Conviction Petition for Writ of Habeas Corpus should not be procedurally barred based on Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) as these two (2) cases are new constitutional law and were not reasonably available at the time of Petitioner's default, therefore this constitutes good cause to overcome the procedural bar. APWHC 9, SAPWHC 9.
5. Petitioner is entitled to an evidentiary hearing to show ineffective assistance of counsel and to prove his Petition is not procedurally barred. APWHC 12, SAPWHC 12.
6. Petitioner requests that the case be remanded to District Court for re-sentencing to eliminate the consecutive deadly weapon enhancement or for the District Court to state in writing the reasons why any consecutive sentence is appropriate. APWHC 13-14, SAPWHC 14.

//

Petitioner's APWHC and SAPWHC should be stricken as fugitive documents. Additionally, Petitioner's claims are procedurally barred, bare and naked, meritless, and therefore fail. The State now addresses each of Petitioner's claims.

I. THE STATE MOVES THIS COURT TO STRIKE PETITIONER'S AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND SECOND AMENDED PETITION FOR WRIT OF HABEAS CORPUS AS FUGITIVE SUPPLEMENTS.

Petitioner's decision to file an Amended Petition for Writ of Habeas Corpus and a Second Amended Petition for Writ of Habeas Corpus without leave of the Court and a judicial determination of good cause requires that these fugitive pleadings 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").

Here, Petitioner filed a Pro Per Petition for Writ of Habeas Corpus ("PWHC") on January 6, 2017, which was denied by the District Court on January 25, 2017. The Court should now strike Petitioner's APWHC and SAPWHC because Petitioner failed to seek leave of the Court before filing both supplements. 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 v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). 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, Petitioner has not sought leave to amend his previous PWHC, the Court has not granted Petitioner leave to amend his previous PWHC, and the Court has not determined that there is 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.

Accordingly, this Court should Strike Petitioner's APWHC and SAPWHC as fugitive supplements.

II. PETITIONER'S PETITION IS PROCEDURALLY BARRED.

A. Petitioner's Petition is Time Barred.

The mandatory provision of NRS 34.726(1) states:

> 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 after 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. The delay is not the fault of the Petitioner; and
>
> B. The dismissal of the petition as untimely will unduly prejudice the Petitioner

Id. (Emphasis added).

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.

Here, Petitioner's Judgement of Conviction was filed on November 21, 2014. Petitioner therefore had until November 21, 2015 to file a post-conviction habeas petition. Petitioner did not file his APWHC until December 9, 2021 and did not file his SAPWHC until March 7, 2022. As such, in filing his APWHC, Petitioner missed the clear and unambiguous mandatory filing deadline by seven (7) years and eighteen (18) days, or 2,575 total days. The Court in Gonzales found a two (2) day delay to be impermissible, and therefore a 2,575-day delay is obviously also impermissible. It should be noted that the District Court has *already* found that Petitioner's previous PWHC filed on January 6, 2017 was determined to be time barred. See Findings of Fact, Conclusions of Law, and Order, filed March 7, 2017, 3. Obviously, that determination would not change with a Petition that was filed nearly five (5) years later.

Thus, absent a showing of good cause to excuse this delay, Petitioner's APWHC and SAPWHC must be dismissed.

B. Petitioner's Petition is Barred as Successive.

The controlling law regarding successive petitions, 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.

Id. (emphasis added).

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 Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner raises the exact same issues that he previously raised in both his Motion to Modify/Correct Illegal Sentence filed on June 22, 2016, and his PWHC filed on January 6, 2017. In both the Motion and Petition, Petitioner alleges that the District Court erred in improperly applying NRS 193.165 in imposing Petitioner's sentence for the Deadly Weapon enhancement. In response to the PWHC, the District Court specifically found that the same claims Petitioner raises here were already decided on the merits when Petitioner's Motion to Modify was denied. Findings of Fact, Conclusions of Law, and Order, filed March 7, 2017, 5-6. NRS 34.810(3); Lozada.

As such, Petitioner's APWHC and SAPWHC are successive and therefore must be dismissed.

C. The State Affirmatively Pleads 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, there is no inexcusable delay for seeking relief – especially because the facts show Petitioner's claim is without merit, as discussed in detail below. Additionally, the State is prejudiced by the length of time that has elapsed since Petitioner was sentenced (November 19, 2014), the Judgement of Conviction was filed (November 21, 2014), and Remittitur issued by the Nevada Supreme Court after Petitioner appealed the denial of his meritless PWHC (February 12, 2018). The State affirmatively pled laches as required by statute.

D. Petitioner's Claims One (1) and Two (2) Have Been Waived as They Were Not Brought on Direct Appeal.

The controlling statute on waiving post-conviction claims, 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.*

Id. (Emphasis added).

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).

Furthermore, 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).

Here, Petitioner's claims one (1) and two (2) allege that the District Court erred in applying NRS 193.165 as AB 510 imposed substantive changes that would have altered the punishment Petitioner would have received pursuant to Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). These claims do not challenge the guilty plea, nor do they allege ineffective assistance of counsel and as such, they are waived. These claims were appropriate only for direct appeal, and therefore inappropriate in the post-conviction habeas context. Franklin.

As such, Petitioner's claims one (1) and two (2) are considered waived and must be dismissed.

//

//

//

E. Application of the Procedural Bars are Mandatory

The Nevada Supreme Court has specifically found that the District Court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily disregard them. In Riker, the Court held that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored when properly raised by the State." 121 Nev. at 231–33, 112 P.3d at 1074–75. There, the Court reversed the District Court's decision not to bar the petitioner's untimely and successive petition:

> Given the untimely and successive nature of [petitioner's] petition, the district court had a duty imposed by law to consider whether any or all of [petitioner's] claims were barred under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of the case . . . [and] the court's failure to make this determination here constituted an arbitrary and unreasonable exercise of discretion.

Id. at 234, 112 P.3d at 1076. The Court justified this holding by noting that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180–81, 69 P.3d 676, 681–82 (2003) (holding that parties cannot stipulate to waive, ignore, or disregard the mandatory procedural default rules nor can they empower a court to disregard them).

In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the procedural default rules are mandatory when it reversed the District Court's grant of a post-conviction petition for writ of habeas corpus. See State v. Greene, 129 Nev. 559, 565–66, 307 P.3d 322, 326 (2013). There, the Court ruled that the petitioner's petition was untimely and successive, and that the petitioner failed to show good cause and actual prejudice. Id. Accordingly, the Court reversed the District Court and ordered the petitioner's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327.

Accordingly, this Court must dismiss Petitioner's APWHC and SAPWHC due to the procedural bars discussed above, absent a showing of both good cause and prejudice.

III. PETITIONER FAILS TO ESTABLISH GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS.

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

"To establish good cause, petitioners 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. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle

//

him to relief. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

A. The decisions in Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) do not constitute good cause to overcome the procedural bars.

Petitioner claims that the United States Supreme Court decisions in Welch and Montgomery create good cause for a delay in filing because these Supreme Court decisions were unavailable to Petitioner at the time of default. APWHC 5, 9; SAPWHC 6, 11. Petitioner's argument fails. Even if this Court were to find good cause because of these decisions, both cases were decided in 2016, and therefore they were absolutely available when Petitioner filed his original PWHC on January 6, 2017. *Petitioner even cited Montgomery in his original PWHC*, showing he was aware of the law of retroactivity, was able to research this case law, these decisions were reasonably available to Petitioner when he filed his original PWHC, and the failure to raise those claims was not an impediment external to the defense. PWHC 2. Additionally, as discussed in more detail below, Welch and Montgomery do not apply here, as there is no cogent argument for retroactively applying NRS 193.165 as changes in the law are not constitutional by nature.

Furthermore, even if this Court were to find good cause due to the decisions in Welch and Montgomery, and even if this Court were to overlook the fact that they were available to Petitioner when he filed his first PWHC, this still does not explain why Petitioner waited five (5) years after Welch and Montgomery were decided and four (4) years after Petitioner's original PWHC was denied to file an APWHC to raise these issues. Petitioner now attempts to manufacture good cause and cannot show that the delay in raising these claims is not his fault.

As such, the decisions in Welch and Montgomery do not constitute good cause for Petitioner's failure to comply with procedural requirements.

B. Petitioner's access to a law library does not constitute good cause to overcome procedural bars.

Petitioner claims that there is good cause to overcome procedural bars because the prison's "Law Library is less than adequate for extensive legal research and provides minimal training for prisoners." APWHC 10, SAPWHC 11. Petitioner's claims are bare and naked, belied by controlling case law, meritless, and therefore fail.

First, Petitioner's claims allege no specific facts that would constitute good cause, and thus this claim should be disregarded. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner fails to specifically allege how the prison's law library is inadequate and how a more adequate law library would have resulted in Petitioner adhering to the procedural bars.

Second, the United States Supreme Court has expressly rejected the argument that lack of access to a law library constitutes "actual injury" to an inmate. Lewis v. Casey, 518 U.S. 343, 348, 116 S.Ct. 2174, 2178 (1996) (defining "actual injury" to include "inability to meet a filing deadline or to present a claim."). The Lewis Court went on to explain that inmates do not have any "freestanding right to a law library or legal assistance" and concluded that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Id. at 351, 116 S.Ct. at 2180. Furthermore, the Nevada Supreme Court has rejected the argument that special arrangements should be made to permit the use of law library materials when an inmate's custodial status limits access to the law library. See Wilkie v. State, 98 Nev. 192, 194, 644 P.2d 508, 509 (1982).

Therefore, on its face, Petitioner's claim of limited access to the law library cannot constitute good cause sufficient to overcome the time-bar to the instant Petition. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178; Wilkie, 98 Nev. at 194, 644 P.2d at 509. Moreover, to the extent Petitioner is claiming that his lack of access to the law library somehow precluded his compliance with the filing deadline, that claim is belied by the fact that Petitioner was able to file his original PWHC in which he cites case law and performs legal analysis. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (habeas petitioners are not entitled to relief on "bare" and "naked" claims or those "belied or repelled by the record"). Therefore,

//

Petitioner demonstrably cannot show an "inability to meet [the] filing deadline" sufficient to overcome his procedural bar. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178.

Ultimately, as stated *supra*, under Lewis, Petitioner bears the burden of demonstrating that his access to the law library somehow interfered with Petitioner's meeting the filing deadline. 518 U.S. at 348, 116 S.Ct. at 2178. Petitioner does not make such a showing; as such, Petitioner cannot demonstrate good cause sufficient to overcome his procedural default.

Because both the United States Supreme Court and the Nevada Supreme Court have precluded relief on Petitioner's law library claim, Petitioner cannot show that access to a law library constitutes good cause to overcome the procedural bars.

Accordingly, Petitioner failed to show good cause to overcome the procedural bars, thus the Court need not continue its analysis. Both prongs of good cause and prejudice are required to overcome the procedural bar and therefore a failure to establish good cause means an analysis of prejudice is unnecessary and Petitioner's APWHC and SAPWHC must be dismissed. However, in the interest of being thorough, the State will address Petitioner's failure to establish the second prong, prejudice.

IV. PETITIONER FAILS TO ESTABLISH PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Petitioner cannot demonstrate the requisite prejudice necessary to ignore his procedural default because his underlying claims are bare, naked, belied by controlling case law and meritless.

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229,

//

1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A. Petitioner's Claims are barred by the law of the case and res judicata.

Petitioner argues that the District Court erred in imposing a consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4. Petitioner is incorrect, as discussed in detail below, however this issue has already been denied by the District Court and therefore it is precluded by the law of the case and res judicata.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In Petitioner's Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed on June 22, 2016, Petitioner argued:

> Pursuant to AB 300; NRS 195.165, the Defendant could not have received a sentence greater than, not less than 1-year and not more than 5 years [sic]. Therefore a 4-12 year enhanced would also be facially illegal upon that basis and must be vacated as a matter of law.

Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed June 22, 2016, 24.

The District Court considered Petitioner's argument and issued an Order denying Petitioner's Motion on August 8, 2016:

> IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, shall be, and is DENIED.

Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, filed August 8, 2016, 2.

Petitioner again raised this claim in his original PWHC (see Memorandum in Support of Petition for Writ of Habeas Corpus, filed January 6, 2017, 2-3), and the District Court held that these issues were barred:

> **This Court Has Already Adjudicated This Matter.**
> Even if this Court were to entertain this claim, it falls under the doctrine of *res judicata*. For an issue to fall under *res judicata*, it must have already been decided in a prior proceeding.
> ...
> When Defendant filed his Motion to Modify, he made the exact same claim that he brings here. This Court denied that motion. See Order Denying Defendant's Pro Per Motion to Appoint Counsel and Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction at 2. Because Defendant reiterates the same arguments here, using the exact same language from the Motion to Modify - see Petition Memorandum at 2-3 - the District Court previously ruled on the issue on the merits, and Defendant was a party in that case, the doctrine of res judicata applies here. Accordingly, this claim is denied.

Findings of Fact, Conclusions of Law, and Order, filed July 21, 2017, 5-6.

As such, the issue of whether the District Court correctly applied NRS 193.165 in sentencing Petitioner to a consecutive four (4) to twelve (12) years for a deadly weapon enhancement has already been adjudicated by this Court and thus this issue is barred by the law of the case and res judicata.

B. The District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for a deadly weapon enhancement.

//

Petitioner argues that the District Court erred in its application of NRS 193.165 by imposing "a consecutive sentence of twelve (12) years for the weapon enhancement." APWHC 4, SAPWHC 4. Petitioner's argument is incorrect and fails.

As an initial matter, Petitioner continuously refers only to maximum sentences throughout his Petition, which is a misrepresentation of the actual sentence imposed on Petitioner. As noted in the Statement of the Case above, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served. As such, Petitioner was sentenced to a consecutive four (4) to twelve (12) years for the deadly weapon enhancement, not simply twelve (12) years as argued by Petitioner.

It should also be noted that this sentence was identical to the parties' joint recommendation to the Court at sentencing. GPA 1. In addition to Petitioner explicitly agreeing to the unambiguous term that he would be sentenced to a consecutive four (4) to twelve (12) years for the deadly weapon enhancement, the plea agreement was also conditional, meaning the Petitioner consented to the terms of the agreement in such a way that if any of the terms of the agreement were not followed, Petitioner could have withdrawn from the agreement. Petitioner is now arguing that the District Court erred by both imposing the exact sentence the Petitioner agreed to and completely adhering to an agreement that Petitioner could have withdrawn from if the District Court had deviated in any way.

Aside from Petitioner's misrepresentation of the sentence imposed and failure to stand by his own negotiations, Petitioner's argument is also meritless and fails. As cited by Petitioner, the current version of NRS 193.165 went into effect on July 1, 2007. The date of

//

Petitioner's offense was January 31, 2010, and thus the current version of NRS 193.165 applied. NRS 193.165 reads as follows:

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

NRS 193.165. (Emphasis added).

Accordingly, despite Petitioner's argument that "the question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge," the District Court was *required* to impose a consecutive sentence for a deadly weapon enhancement because Petitioner pled guilty to two (2) crimes with use of a deadly weapon. APWHC 4; SAPWHC 4; GPA 1. The Court then properly imposed a consecutive four (4) to twelve (12) year consecutive sentence for the deadly weapon enhancement. This sentence was proper as it was between one (1) and twenty (20) years, it did not exceed the sentence imposed for the crime, and it ran consecutive to the sentence prescribed by statute for the crime. Therefore, the District Court properly adhered to the plain language of NRS 193.165.

Thus, the District Court did not err in sentencing Petitioner to a consecutive term of four (4) to twelve (12) years for the deadly weapon enhancement.

C. NRS 193.165 was properly applied to Petitioner's sentence as Welch and Montgomery do not apply.

Petitioner argues that "NRS 193.165 must be held to be retroactive because of United States Supreme Court Decisions of Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016)." APWHC 5, SAPWHC 5. Petitioner's argument is belied by controlling case law and statute, and therefore fails.

The Nevada Supreme Court has held that statutes are otherwise presumed to operate prospectively "unless they are so strong, clear, and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied." Holloway v. Barrett, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971). Further, "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988).

It is well established that, under Nevada law, the proper penalty for a criminal conviction is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. ("Pullin"), 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the time of the commission of the crime. Id. "[A] change of law does not invalidate a conviction obtained under an earlier law." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) (quoting Kleve v. Hill, 243 F.3d 1149, 1151 (9th Cir. 2011)).

Additionally, Petitioner misrepresents the holding in Pullin, which he relies on for the contention that NRS 193.165 should be applied retroactively. In that case, The Nevada Supreme Court ordered the District Court to resentence the Defendant because the date of the offense (September 2, 2006) was prior to the enactment of the new version of NRS 193.165 in July of 2007. The facts in this case are entirely different. Here, the date of offense was January 31, 2010, which was nearly three (3) years after the current version of NRS 195.163 went into effect. As cited above, NRS 193.165 contains no language that "clearly expresses the

//

legislative intent" to apply it retroactively. In fact, in Pullin, the Nevada Supreme Court specifically held that NRS 193.165 should not be applied retroactively:

> Further, we reject Pullin's contention that the retroactive application of the amendments to NRS 193.165 is appropriate here because NRS 193.165 is a procedural or remedial statute.

Id. at 1080.

Petitioner also argues that pursuant to Welch and Montgomery, which both create rules for retroactive application of some laws due to substantive constitutional changes, Pullin should be reversed. Again, Petitioner is incorrect. Pullin specifically addresses whether the changes made to NRS 193.165 were constitutional in nature.:

> Here, the amendments made to NRS 193.165 were not of constitutional dimension. The amendments did not alter any of the constitutional aspects of NRS 193.165, such as the requirement that a jury must find, or a defendant must admit to the fact that a deadly weapon was used in the commission of a crime. Instead, the amendments merely give the district court more discretion in determining the sentence. Thus, we decline to apply these amendments retroactively.

Id. at 1084.

As such, Welch and Montgomery do not apply, and NRS 193.165 is not applied retroactively. The date of the instant offense was January 31, 2010. The applicable version of NRS 193.165 which went into effect on July 1, 2007 controlled the District Court's requirement to impose a consecutive sentence for deadly weapon enhancement within the statutory limits, which is exactly what the District Court did.

Thus, the District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for the deadly weapon enhancement.

V. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Petitioner argues that "counsel was ineffective in not effectively advocating for a fairer and more just sentence." APWHC 7, SAPWHC 9. Petitioner's claim is bare, naked, meritless, and fails.

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

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

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

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

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

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

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

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

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

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

Additionally, Petitioner's claims are not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498,

502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]…Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

A. Petitioner's claims are bare, naked, and unsupported by specific facts.

Petitioner argues, "defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, see Mendoza-Lopez v. State, 125 Nev. 634, 218 P.3d 501 (2009). A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment." APWHC 8, SAPWHC 9. Petitioner's argument is bare and naked, meritless, and fails.

Not only are Petitioner's claims meritless, but they are also not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are

insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Here, Petitioner does not cite to a sentencing transcript or any other specific facts that provide any evidence whatsoever to support his assertions. Petitioner provides no evidence that counsel at sentencing failed to make arguments in favor of a lower sentence. Additionally, as explained above, the District Court was *required* to impose a consecutive sentence for the use of a deadly weapon. Therefore, an "aggressive" argument against a consecutive sentence would have been futile and belied by statute. Ennis. Counsel would have been entirely incorrect in advising his client that the change in NRS 193.165 that allowed Petitioner to challenge consecutive sentences.

Thus, Petitioner provides no specific facts that would warrant relief, and instead offers unsupported conclusory statements that even if true are belied by statute, and therefore his argument fails.

B. Petitioner's aggregate sentence is not excessive, cruel, or unusual, and it is therefore not a violation of the Eight Amendment of the Constitution.

Petitioner claims that counsel was ineffective at sentencing and therefore, "it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation." APWHC 8, SAPWHC 10. Petitioner's argument is meritless and fails.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the

sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Here, there are multiple issues with Petitioner's argument. First, as discussed above, Petitioner misrepresents the sentence imposed by the Court by stating that he was sentenced to thirty-seven (37) years. Petitioner was sentenced to an aggregate of fourteen (14) to thirty-seven (37) years for Second Degree Murder with Use of a Deadly Weapon and Attempt Murder with Use of a Deadly Weapon. Second, as Petitioner acknowledges multiple times in his Petition, the sentence imposed by the District Court was within the statutory limits, and therefore is not considered to be cruel and unusual. Allred. Finally, Petitioner argues that his sentence "shocks the conscience" and is not fair or reasonable. APWHC 9, SAPWHC 11. Petitioner is incorrect. An aggregate sentence within the statutory limits of fourteen (14) to thirty-seven (37) years does not shock the conscience for Petitioner's crime of shooting and killing a man after an argument while he was on federal parole.

As such, Petitioner has not been subjected to cruel and unusual punishment as a result of ineffective assistance of counsel, and therefore his claim fails.

//

VI. PETITIONER IS NOT ENTITLED TO AN EVIDENTAIRY HEARING.

Petitioner requests an evidentiary hearing "to establish Defendant's counsel was ineffective under Strickland in numerous ways. An evidentiary hearing will establish the Defendant filed his Pro Per Mandamus Petitioner for appointment of counsel as soon as he became aware of the Supreme Court's cases of Montgomery v. Louisiana, and Welch v. United States, which changed the law regarding the retroactivity of AB 510. An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted." APWHC 12, SAPWHC 14-15. Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are bare, naked, meritless, and therefore fail.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. *See* Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); *See also* Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A petitioner is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. *See* Harrington v. Richter, 562, U.S. 86, 105, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts

the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective State of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner's claims are suitable only for summary denial as Petitioner's APWHC and SAPWHC are fugitive documents, and Petitioner's claims are time-barred, barred as successive, barred by the law of the case and res judicata, waived, and meritless. The record as it stands is more than sufficient to resolve the Petitioner's allegations on procedural grounds and on the merits if the Court determines that is necessary. Additionally, Petitioner provides only conclusory statements unsupported by facts or the record and is not entitled to relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225.

As such, Petitioner's request for an evidentiary hearing should be denied.

VII. PETITIONER IS NOT ENTITLED TO A HEARING TO BE RE-SENTENCED.

Petitioner argues that his "sentence and Judgment of Conviction should be reversed, and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for use of a deadly weapon, or alternatively remand the case to District Court for the District Court to state in writing the reasons why any consecutive sentence for the weapons enhancement." APWHC 13-14, SAPWHC 16. Petitioner is not entitled to be resentenced.

First, the case would not need to be "remanded" to District Court. This case is currently in District Court. Second, the District Court is not required to state their findings as to a deadly weapon enhancement in writing. NRS 193.165(1)(e) states:

> 1. In determining the length of the additional penalty imposed, the court shall consider the following information:

//

(a) The facts and circumstances of the crime;

(b) The criminal history of the person;

(c) The impact of the crime on any victim;

(d) Any mitigating factors presented by the person; and

(e) Any other relevant information.

The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

Petitioner provides no evidence in the form of transcripts or any other specific facts that show the District Court failed to adhere to the statute and state the reasons for the length of the sentence for the deadly weapon enhancement on the record or that counsel failed to argue any mitigating factors. Petitioner also does not provide specific facts as to what mitigating factors existed that should have been argued, or how those mitigating factors would have changed the outcome of the case in any way. Instead, Petitioner provides unsupported conclusory statements. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As acknowledged by Petitioner, his sentence was within the statutory limits and the discretion of the Court, and therefore there is no cogent argument that would support a hearing to re-sentence Petitioner.

As such, Petitioner is not entitled to a hearing to be resentenced.

//

//

//

//

//

//

//

//

//

CONCLUSION

Based on the foregoing, the State respectfully requests Petitioner's Amended Petition for Writ of Habeas Corpus, Second Amended Petition for Writ of Habeas Corpus, request for an Evidentiary Hearing, and a request for a hearing to be resentenced should be stricken and/or denied.

DATED this 21st day of March, 2022.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #01565

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

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that service of State's Notice, was made this 21st day of March, 2022, by Electronic Filing to:

TERRENCE M. JACKSON, ESQ.
E-mail Address: terry.jackson.esq@gmail.com

/s/ DANIELLE SALAZAR
Secretary for the District Attorney's Office

TS/ds/GCU

Electronically Filed
05/24/2022
CLERK OF THE COURT

Cedric Jackson
In Propria Personam
Post Office Box 208, S.D.C.C.
Indian Springs, Nevada 89018

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

Cedric Jackson

Plaintiff,

vs.

State of Nevada

Defendant.

Case No. A-22-849718-W

Dept. No. 10

Docket _____

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN, That the Petitioner/Defendant, Cedric Jackson, in and through his proper person, hereby appeals to the Supreme Court of Nevada from the ORDER denying and/or dismissing the writ of habeas corpus

ruled on the 6 day of May, 20 22

Dated this 17 day of May, 20 22

Respectfully Submitted.

Cedric Jackson

RECEIVED
MAY 23 2022
CLERK OF THE COURT

CERTFICATE OF SERVICE BY MAILING

I, Cedric Jackson, hereby certify, pursuant to NRCP 5(b), that on this 17 day of May, 2022 I mailed a true and correct copy of the foregoing, "Notice of Appeal", by placing document in a sealed pre-postage paid envelope and deposited said envelope in the United State Mail addressed to the following:

Clerk of the Court
200 Lewis Ave 3rd floor
LV NV
89155

CC:FILE

DATED: this 17 day of May, 2022

Cedric Jackson #1130512
/In Propria Personam
Post Office Box 208,S.D.C.C.
Indian Springs, Nevada 89018
IN FORMA PAUPERIS:

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Motion of appeal
(Title of Document)

filed in District Court Case number A-22-849718-W

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

_____
Signature

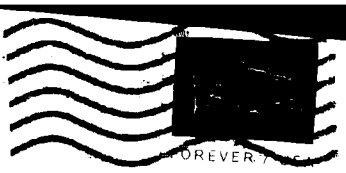
May 17, 2022
Date

Cedric Jackson
Print Name

_____
Title

Cedric Jackson #1130512
SDCC
P.O. Box 208
Indian Springs NV
89070

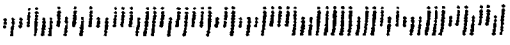
LAS VEGAS NV 890
18 MAY 2022 PM 3 L

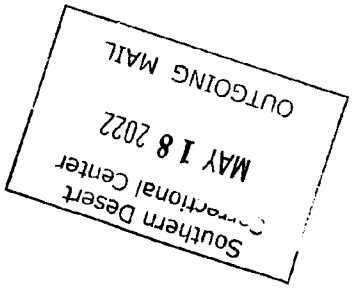


Clerk of the Court
200 Lewis Ave 3rd floor
LV NV 89155

Legal

89101-630000





Cedric Jackson, 1130512
Petitioner/In Propia Persona
Post Office Box 208, SDCC
Indian Springs, Nevada 89070-0208

IN THE 8th JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF Clark

Cedric Jackson,
Plaintiff,

vs.

State of Nevada,
Defendant.

CASE No. A-22-849718-W
DEPT. No. 10

DESIGNATION OF RECORD ON APPEAL

TO: clerk of the court

The above-named Plaintiff hereby designates the entire record of the above-entitled case, to include all the papers, documents, pleadings, and transcripts thereof, as and for the Record on Appeal.

DATED this 17th day of May, 2022.

RESPECTFULLY SUBMITTED BY:

Cedric Jackson #1130512
Plaintiff/In Propria Persona

Electronically Filed
5/25/2022 12:35 PM
Steven D. Grierson
CLERK OF THE COURT

ASTA

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

CEDRIC L. JACKSON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-22-849718-W

Dept No: X

CASE APPEAL STATEMENT

1. Appellant(s): Cedric Jackson

2. Judge: Tierra Jones

3. Appellant(s): Cedric Jackson

Counsel:

Cedric Jackson #1130512
P.O. Box 208
Indian Springs, NV 89070

4. Respondent (s): State of Nevada

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: March 14, 2022

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 25 day of May 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: Cedric Jackson

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

CEDRIC JACKSON
ID#1581340,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-22-849718-W
C-10-265339-1

DEPT NO: X

FINDINGS OF FACT, CONCLUSIONS OR LAW, AND ORDER

DATE OF HEARING: May 6, 2022
TIME OF HEARING: 10:45 a.m.

THIS CAUSE having been decided by the Honorable TIERRA JONES, District Judge, pursuant to a Minute Order issued on the 6th day of May 2022, both parties not being present, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact, conclusions of law and order.

//

//

//

//

//

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged CEDRIC JACKSON (hereinafter "Petitioner") by way of Information as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 3 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.481.2c); COUNT 4 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 5 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 7 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 8 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.100, 200.030); COUNT 9 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Felony – NRS 202.285); and COUNT 10 – Discharging Firearm Out of Motor Vehicle (Felony – NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Petitioner as follows: COUNT 1 – Second Degree Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50011) and COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165 – NOC 50031). That same day, Petitioner pled guilty to both counts in the Amended Information. The terms of the Guilty Plea Agreement (hereinafter "GPA") were as follows: "The Defendant's plea is conditional upon him receiving the following stipulated sentence. The parties jointly recommend a sentence of ten (10) to twenty-five (25) years as to Count 1 with a consecutive four (4) to twelve (12) years as to the deadly weapon enhancement. In addition, the parties stipulate to two (2) to five (5) years as to Count 2 with a consecutive twelve (12) to thirty (30) months sentence as to the deadly weapon enhancement. The parties stipulate that the sentences on each count will run concurrently to one another."

//

On November 19, 2014, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served.

The Judgment of Conviction was filed on November 21, 2014.

On June 22, 2016, Petitioner filed a Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction. The State filed its Response on July 12, 2016. The District Court denied the Motion on July 13, 2016.

On January 6, 2017, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "PWHC"). The State filed its Response on January 20, 2017. On January 25, 2017, the PWHC was denied. On February 13, 2017, Petitioner filed a Notice of Appeal. The Findings of Fact, Conclusions of Law and Order reflecting the Court's denial of the Petition was filed on March 7, 2017. On January 9, 2018, the Nevada Court of Appeals affirmed the District Court's denial of Petitioner's PWHC. Remittitur issued on February 5, 2018.

On June 5, 2018, Petitioner filed a Motion for the Appointment of Counsel. The State filed a Response on June 26, 2018. The Motion was denied on June 27, 2018.

On May 28, 2020, Petitioner filed a Petition for Writ of Mandamus. The State's Response was filed on June 4, 2020. On August 3, 2020, the Attorney General's Office filed a Motion to Dismiss the Petition for Writ of Mandamus, which was granted by the District Court on September 4, 2020. The Decision and Order was filed on September 28, 2020.

On December 9, 2021, Petitioner filed an Amended Petition for Writ of Habeas Corpus (hereinafter "APWHC") through retained counsel Terrence Jackson, Esq. According to the Petition, Mr. Jackson was retained on June 15, 2020. APWHC 4.

On March 7, 2022, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus or alternatively Motion to Modify Sentence Based Upon Changes in Supreme Court Law and Changes in Nevada Revised Statute 193.165 ("SAPWHC"). Petitioner asserts that the SAPWHC was filed because the APWHC was never set for argument. SAPWHC 4. Petitioner's SAPWHC is identical to the APWHC except for a paragraph explaining the reasoning for filing the SAPWHC.

On March 15, 2022, a Notice of Change of Case Number and Department Reassignment issued transferring this case from Department 24 to Department 10.

The State's Motion to Strike and Response to both Petitions was filed on March 21, 2022. On May 6, 2022, the Court issued a Minute Order denying the Amended and Second Amended Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing.

FACTUAL BACKGROUND

The District Court relied on the following facts at sentencing:

> On January 31, 2010, officers of the Las Vegas Metropolitan Police Department responded to a report of a homicide. The first victim was found in front of a residence and it appeared he had been shot. Further examination of the body revealed he had been shot nine times. A second victim was also located who had been shot in the leg. This victim was uncooperative and refused to identify the suspects. Officers learned that both victims had been involved in an altercation at a local bar with two male subjects earlier. Witnesses told the officers that the victims had gotten into a fight with the two male subjects, later identified as Cedric Jackson and Prentice Coleman.
>
> One witness that was with the victims and was also shot at, told the officers that after the fight at the bar, Coleman and Jackson followed them and he observed Jackson and the deceased victim confront each other. Shortly thereafter the suspects began shooting at the victims and him. He stated he ran and hid behind a vehicle which the officers inspected and the rear window had been struck by gunfire. Witnesses positively identified the shooters as Cedric Jackson and Prentice Coleman.
>
> It was discovered that Cedric Jackson and Prentice Coleman were both on federal parole. After further investigation, officer located Cedric Jackson at the U.S. Parole and Probation office on February 5, 2010, where he was arrested and transported to the Clark County Detention Center and booked accordingly.

Presentence Investigation Report ("PSI") 5-6.

ANALYSIS

As an initial matter, Petitioners APWHC and SAPWHC are identical in substance, the only difference being a paragraph explaining the reasoning behind filing the SAPWHC after the APWHC, which is that no argument was set after the APWHC was filed. In both the APWHC and SAPWHC, Petitioner asserts six (6) grounds for relief:

1. The District Court erred when it sentenced Petitioner to a consecutive sentence of twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4.
2. The application of amendments in NRS 193.165 must be held to be retroactive based on two (2) 2016 US Supreme Court cases: Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). APWHC 5, SAPWHC 5.
3. The aggregate sentence of thirty-seven (37) years was excessive and cruel and unusual punishment and Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. APWHC 7, SAPWHC 8.
4. Petitioner's Post-Conviction Petition for Writ of Habeas Corpus should not be procedurally barred based on Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) as these two (2) cases are new constitutional law and were not reasonably available at the time of Petitioner's default, therefore this constitutes good cause to overcome the procedural bar. APWHC 9, SAPWHC 9.
5. Petitioner is entitled to an evidentiary hearing to show ineffective assistance of counsel and to prove his Petition is not procedurally barred. APWHC 12, SAPWHC 12.
6. Petitioner requests that the case be remanded to District Court for re-sentencing to eliminate the consecutive deadly weapon enhancement or for the District Court to state in writing the reasons why any consecutive sentence is appropriate. APWHC 13-14, SAPWHC 14.

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. Petitioner's Petition is Time Barred.

The mandatory provision of NRS 34.726(1) states:

> 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 after 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. The delay is not the fault of the Petitioner; and
>
> B. The dismissal of the petition as untimely will unduly prejudice the Petitioner

Id. (Emphasis added).

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.

Here, Petitioner's Judgment of Conviction was filed on November 21, 2014. Petitioner therefore had until November 21, 2015 to file a post-conviction habeas petition. Petitioner did not file his APWHC until December 9, 2021 and did not file his SAPWHC until March 7, 2022. As such, in filing his APWHC, Petitioner missed the clear and unambiguous mandatory filing deadline by seven (7) years and eighteen (18) days, or 2,575 total days. The Court in Gonzales found a two (2) day delay to be impermissible, and therefore a 2,575-day delay is obviously also impermissible. It should be noted that the District Court has *already* found that Petitioner's previous PWHC filed on January 6, 2017 was determined to be time barred. See Findings of Fact, Conclusions of Law, and Order, filed March 7, 2017, 3. Obviously, that determination would not change with a Petition that was filed nearly five (5) years later.

Thus, absent a showing of good cause to excuse this delay, Petitioner's APWHC and SAPWHC are denied.

B. Petitioner's Petition is Barred as Successive.

The controlling law regarding successive petitions, 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.

Id. (emphasis added).

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 Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner raises the exact same issues that he previously raised in both his Motion to Modify/Correct Illegal Sentence filed on June 22, 2016, and his PWHC filed on January 6, 2017. In both the Motion and Petition, Petitioner alleges that the District Court erred in improperly applying NRS 193.165 in imposing Petitioner's sentence for the Deadly Weapon enhancement. In response to the PWHC, the District Court specifically found that the same claims Petitioner raises here were already decided on the merits when Petitioner's Motion to Modify was denied. Findings of Fact, Conclusions of Law, and Order filed March 7, 2017, 5-6. NRS 34.810(3); Lozada.

As such, Petitioner's APWHC and SAPWHC are successive and therefore are denied.

C. Application of the Procedural Bars are Mandatory.

The Nevada Supreme Court has specifically found that the District Court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily disregard them. In Riker, the Court held that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored when properly raised by the State." 121 Nev. at 231–33, 112 P.3d at 1074–75. There, the Court reversed the District Court's decision not to bar the petitioner's untimely and successive petition:

> Given the untimely and successive nature of [petitioner's] petition, the district court had a duty imposed by law to consider whether any or all of [petitioner's] claims were barred under NRS 34.726,

> NRS 34.810, NRS 34.800, or by the law of the case . . . [and] the court's failure to make this determination here constituted an arbitrary and unreasonable exercise of discretion.

Id. at 234, 112 P.3d at 1076. The Court justified this holding by noting that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180–81, 69 P.3d 676, 681–82 (2003) (holding that parties cannot stipulate to waive, ignore, or disregard the mandatory procedural default rules nor can they empower a court to disregard them).

In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the procedural default rules are mandatory when it reversed the District Court's grant of a post-conviction petition for writ of habeas corpus. See State v. Greene, 129 Nev. 559, 565–66, 307 P.3d 322, 326 (2013). There, the Court ruled that the petitioner's petition was untimely and successive, and that the petitioner failed to show good cause and actual prejudice. Id. Accordingly, the Court reversed the District Court and ordered the petitioner's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327.

Accordingly, this Court denies Petitioner's APWHC and SAPWHC due to the procedural bars discussed above, absent a showing of both good cause and prejudice.

II. PETITIONER FAILS TO ESTABLISH GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS

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

actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added).

"To establish good cause, petitioners 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. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

A. The decisions in Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) do not constitute good cause to overcome the procedural bars.

Petitioner claims that the United States Supreme Court decisions in Welch and Montgomery create good cause for a delay in filing because these Supreme Court decisions were unavailable to Petitioner at the time of default. APWHC 5, 9; SAPWHC 6, 11. Petitioner's argument fails. Even if this Court were to find good cause because of these decisions, both cases were decided in 2016, and therefore they were absolutely available when Petitioner filed his original PWHC on January 6, 2017. *Petitioner even cited Montgomery in*

his original PWHC, showing he was aware of the law of retroactivity, was able to research this case law, these decisions were reasonably available to Petitioner when he filed his original PWHC, and the failure to raise those claims was not an impediment external to the defense. PWHC 2. Additionally, as discussed in more detail below, Welch and Montgomery do not apply here, as there is no cogent argument for retroactively applying NRS 193.165 as changes in the law are not constitutional by nature.

Furthermore, even if this Court were to find good cause due to the decisions in Welch and Montgomery, and even if this Court were to overlook the fact that they were available to Petitioner when he filed his first PWHC, this still does not explain why Petitioner waited five (5) years after Welch and Montgomery were decided and four (4) years after Petitioner's original PWHC was denied to file an APWHC to raise these issues. Petitioner now attempts to manufacture good cause and cannot show that the delay in raising these claims is not his fault.

As such, the decisions in Welch and Montgomery do not constitute good cause for Petitioner's failure to comply with procedural requirements.

B. Petitioner's access to a law library does not constitute good cause to overcome procedural bars.

Petitioner claims that there is good cause to overcome procedural bars because the prison's "Law Library is less than adequate for extensive legal research and provides minimal training for prisoners." APWHC 10, SAPWHC 11. Petitioner's claims are bare and naked, belied by controlling case law, meritless, and therefore fail.

First, Petitioner's claims allege no specific facts that would constitute good cause, and thus this claim should be disregarded. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner fails to specifically allege how the prison's law library is inadequate and how a more adequate law library would have resulted in Petitioner adhering to the procedural bars.

Second, the United States Supreme Court has expressly rejected the argument that lack of access to a law library constitutes "actual injury" to an inmate. Lewis v. Casey, 518 U.S. 343, 348, 116 S.Ct. 2174, 2178 (1996) (defining "actual injury" to include "inability to meet

a filing deadline or to present a claim."). The Lewis Court went on to explain that inmates do not have any "freestanding right to a law library or legal assistance" and concluded that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Id. at 351, 116 S.Ct. at 2180. Furthermore, the Nevada Supreme Court has rejected the argument that special arrangements should be made to permit the use of law library materials when an inmate's custodial status limits access to the law library. See Wilkie v. State, 98 Nev. 192, 194, 644 P.2d 508, 509 (1982).

Therefore, on its face, Petitioner's claim of limited access to the law library cannot constitute good cause sufficient to overcome the time-bar to the instant Petition. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178; Wilkie, 98 Nev. at 194, 644 P.2d at 509. Moreover, to the extent Petitioner is claiming that his lack of access to the law library somehow precluded his compliance with the filing deadline, that claim is belied by the fact that Petitioner was able to file his original PWHC in which he cites case law and performs legal analysis. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (habeas petitioners are not entitled to relief on "bare" and "naked" claims or those "belied or repelled by the record"). Therefore, Petitioner demonstrably cannot show an "inability to meet [the] filing deadline" sufficient to overcome his procedural bar. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178.

Ultimately, as stated *supra*, under Lewis, Petitioner bears the burden of demonstrating that his access to the law library somehow interfered with Petitioner's meeting the filing deadline. 518 U.S. at 348, 116 S.Ct. at 2178. Petitioner does not make such a showing; as such, Petitioner cannot demonstrate good cause sufficient to overcome his procedural default.

Because both the United States Supreme Court and the Nevada Supreme Court have precluded relief on Petitioner's law library claim, Petitioner cannot show that access to a law library constitutes good cause to overcome the procedural bars.

Accordingly, Petitioner failed to show good cause to overcome the procedural bars.

//

//

III. PETITIONER FAILS TO ESTABLISH PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Petitioner cannot demonstrate the requisite prejudice necessary to ignore his procedural default because his underlying claims are bare, naked, belied by controlling case law and meritless.

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A. Petitioner's Claims are barred by the law of the case and res judicata.

Petitioner argues that the District Court erred in imposing a consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4. Petitioner is incorrect, as discussed in detail below, however this issue has already been denied by the District Court and therefore it is precluded by the law of the case and res judicata.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d

869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In Petitioner's Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed on June 22, 2016, Petitioner argued:

> Pursuant to AB 300; NRS 195.165, the Defendant could not have received a sentence greater than, not less than 1-year and not more than 5 years [sic]. Therefore a 4-12 year enhanced would also be facially illegal upon that basis and must be vacated as a matter of law.

Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed June 22, 2016, 24.

The District Court considered Petitioner's argument and issued an Order denying Petitioner's Motion on August 8, 2016:

> IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, shall be, and is DENIED.

Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, filed August 8, 2016, 2.

Petitioner again raised this claim in his original PWHC (see Memorandum in Support of Petition for Writ of Habeas Corpus, filed January 6, 2017, 2-3), and the District Court held that these issues were barred:

> **This Court Has Already Adjudicated This Matter.**
> Even if this Court were to entertain this claim, it falls under the doctrine of *res judicata*. For an issue to fall under *res judicata,* it must have already been decided in a prior proceeding.
> ...
> When Defendant filed his Motion to Modify, he made the exact same claim that he brings here. This Court denied that motion. See Order Denying Defendant's Pro Per Motion to Appoint Counsel and Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction at 2. Because

> Defendant reiterates the same arguments here, using the exact same language from the Motion to Modify - see Petition Memorandum at 2-3 - the District Court previously ruled on the issue on the merits, and Defendant was a party in that case, the doctrine of res judicata applies here. Accordingly, this claim is denied.

Findings of Fact, Conclusions of Law, and Order filed July 21, 2017, 5-6.

As such, the issue of whether the District Court correctly applied NRS 193.165 in sentencing Petitioner to a consecutive four (4) to twelve (12) years for a deadly weapon enhancement has already been adjudicated by this Court and thus this issue is barred by the law of the case and res judicata.

B. The District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for a deadly weapon enhancement.

Petitioner argues that the District Court erred in its application of NRS 193.165 by imposing "a consecutive sentence of twelve (12) years for the weapon enhancement." APWHC 4, SAPWHC 4. Petitioner's argument is incorrect and fails.

As an initial matter, Petitioner continuously refers only to maximum sentences throughout his Petition, which is a misrepresentation of the actual sentence imposed on Petitioner. As noted in the Procedural History above, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served. As such, Petitioner was sentenced to a consecutive four (4) to twelve (12) years for the deadly weapon enhancement, not simply twelve (12) years as argued by Petitioner.

It should also be noted that this sentence was identical to the parties' joint recommendation to the Court at sentencing. GPA 1. In addition to Petitioner explicitly agreeing to the unambiguous term that he would be sentenced to a consecutive four (4) to

twelve (12) years for the deadly weapon enhancement, the plea agreement was also conditional, meaning the Petitioner consented to the terms of the agreement in such a way that if any of the terms of the agreement were not followed, Petitioner could have withdrawn from the agreement. Petitioner is now arguing that the District Court erred by both imposing the exact sentence the Petitioner agreed to and completely adhering to an agreement that Petitioner could have withdrawn from if the District Court had deviated in any way.

Aside from Petitioner's misrepresentation of the sentence imposed and failure to stand by his own negotiations, Petitioner's argument is also meritless and fails. As cited by Petitioner, the current version of NRS 193.165 went into effect on July 1, 2007. The date of Petitioner's offense was January 31, 2010, and thus the current version of NRS 193.165 applied. NRS 193.165 reads as follows:

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

NRS 193.165. (Emphasis added).

Accordingly, despite Petitioner's argument that "the question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge," the District Court was *required* to impose a consecutive sentence for a deadly weapon enhancement because Petitioner pled guilty to two (2) crimes with use of a deadly weapon. APWHC 4; SAPWHC 4; GPA 1. The Court then properly imposed a consecutive four (4) to twelve (12) year consecutive sentence for the deadly weapon enhancement. This sentence was proper as it was between one (1) and twenty (20) years, it did not exceed the sentence imposed for the crime, and it ran consecutive to the sentence prescribed by statute for the crime. Therefore, the District Court properly adhered to the plain language of NRS 193.165.

Thus, the District Court did not err in sentencing Petitioner to a consecutive term of four (4) to twelve (12) years for the deadly weapon enhancement.

C. NRS 193.165 was properly applied to Petitioner's sentence as Welch and Montgomery do not apply.

Petitioner argues that "NRS 193.165 must be held to be retroactive because of United States Supreme Court Decisions of Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016)." APWHC 5, SAPWHC 5. Petitioner's argument is belied by controlling case law and statute, and therefore fails.

The Nevada Supreme Court has held that statutes are otherwise presumed to operate prospectively "unless they are so strong, clear, and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied." Holloway v. Barrett, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971). Further, "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988).

It is well established that, under Nevada law, the proper penalty for a criminal conviction is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. ("Pullin"), 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the

time of the commission of the crime. Id. "[A] change of law does not invalidate a conviction obtained under an earlier law." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) (quoting Kleve v. Hill, 243 F.3d 1149, 1151 (9th Cir. 2011)).

Additionally, Petitioner misrepresents the holding in Pullin, which he relies on for the contention that NRS 193.165 should be applied retroactively. In that case, The Nevada Supreme Court ordered the District Court to resentence the Defendant because the date of the offense (September 2, 2006) was prior to the enactment of the new version of NRS 193.165 in July of 2007. The facts in this case are entirely different. Here, the date of offense was January 31, 2010, which was nearly three (3) years after the current version of NRS 195.163 went into effect. As cited above, NRS 193.165 contains no language that "clearly expresses the legislative intent" to apply it retroactively. In fact, in Pullin, the Nevada Supreme Court specifically held that NRS 193.165 should not be applied retroactively:

> Further, we reject Pullin's contention that the retroactive application of the amendments to NRS 193.165 is appropriate here because NRS 193.165 is a procedural or remedial statute.

Id. at 1080.

Petitioner also argues that pursuant to Welch and Montgomery, which both create rules for retroactive application of some laws due to substantive constitutional changes, Pullin should be reversed. Again, Petitioner is incorrect. Pullin specifically addresses whether the changes made to NRS 193.165 were constitutional in nature:

> Here, the amendments made to NRS 193.165 were not of constitutional dimension. The amendments did not alter any of the constitutional aspects of NRS 193.165, such as the requirement that a jury must find, or a defendant must admit to the fact that a deadly weapon was used in the commission of a crime. Instead, the amendments merely give the district court more discretion in determining the sentence. Thus, we decline to apply these amendments retroactively.

Id. at 1084.

As such, Welch and Montgomery do not apply, and NRS 193.165 is not applied retroactively. The date of the instant offense was January 31, 2010. The applicable version of NRS 193.165 which went into effect on July 1, 2007 controlled the District Court's requirement to impose a consecutive sentence for deadly weapon enhancement within the statutory limits, which is exactly what the District Court did.

Thus, the District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for the deadly weapon enhancement.

IV. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues that "counsel was ineffective in not effectively advocating for a fairer and more just sentence." APWHC 7, SAPWHC 9. Petitioner's claim is bare, naked, meritless, and fails.

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

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

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

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

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

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

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

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

Additionally, Petitioner's claims are not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden

Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

A. Petitioner's claims are bare, naked, and unsupported by specific facts.

Petitioner argues, "defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, see Mendoza-Lopez v. State, 125 Nev. 634, 218 P.3d 501 (2009). A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment." APWHC 8, SAPWHC 9. Petitioner's argument is bare and naked, meritless, and fails.

Not only are Petitioner's claims meritless, but they are also not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions.

Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Here, Petitioner does not cite to a sentencing transcript or any other specific facts that provide any evidence whatsoever to support his assertions. Petitioner provides no evidence that counsel at sentencing failed to make arguments in favor of a lower sentence. Additionally, as explained above, the District Court was *required* to impose a consecutive sentence for the use of a deadly weapon. Therefore, an "aggressive" argument against a consecutive sentence would have been futile and belied by statute. Ennis. Counsel would have been entirely incorrect in advising his client that the change in NRS 193.165 that allowed Petitioner to challenge consecutive sentences.

Thus, Petitioner provides no specific facts that would warrant relief, and instead offers unsupported conclusory statements that even if true are belied by statute, and therefore his argument fails.

//

//

B. Petitioner's aggregate sentence is not excessive, cruel, or unusual, and it is therefore not a violation of the Eight Amendment of the Constitution.

Petitioner claims that counsel was ineffective at sentencing and therefore, "it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation." APWHC 8, SAPWHC 10. Petitioner's argument is meritless and fails.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

First, as discussed above, Petitioner misrepresents the sentence imposed by the Court by stating that he was sentenced to thirty-seven (37) years. Petitioner was sentenced to an

aggregate of fourteen (14) to thirty-seven (37) years for Second Degree Murder with Use of a Deadly Weapon and Attempt Murder with Use of a Deadly Weapon. Second, as Petitioner acknowledges multiple times in his Petition, the sentence imposed by the District Court was within the statutory limits, and therefore is not considered to be cruel and unusual. Allred. Finally, Petitioner argues that his sentence "shocks the conscience" and is not fair or reasonable. APWHC 9, SAPWHC 11. Petitioner is incorrect. An aggregate sentence within the statutory limits of fourteen (14) to thirty-seven (37) years does not shock the conscience for Petitioner's crime of shooting and killing a man after an argument while he was on federal parole.

As such, Petitioner has not been subjected to cruel and unusual punishment as a result of ineffective assistance of counsel, and therefore his claim fails.

V. PETITIONER IS NOT ENTITLED TO AN EVIDENTAIRY HEARING

Petitioner requests an evidentiary hearing "to establish Defendant's counsel was ineffective under Strickland in numerous ways. An evidentiary hearing will establish the Defendant filed his Pro Per Mandamus Petitioner for appointment of counsel as soon as he became aware of the Supreme Court's cases of Montgomery v. Louisiana, and Welch v. United States, which changed the law regarding the retroactivity of AB 510. An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted." APWHC 12, SAPWHC 14-15. Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are bare, naked, meritless, and therefore fail.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. *See* Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); *See also* Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A petitioner is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled

by the record. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. *See* Harrington v. Richter, 562, U.S. 86, 105, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective State of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner's claims are suitable only for summary denial as Petitioner's claims are time-barred, barred as successive, barred by the law of the case and res judicata, and meritless. The record as it stands is more than sufficient to resolve the Petitioner's allegations on procedural grounds and on the merits. Additionally, Petitioner provides only conclusory statements unsupported by facts or the record and is not entitled to relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As such, Petitioner's request for an evidentiary hearing is denied.

VI. PETITIONER IS NOT ENTITLED TO A HEARING TO BE RE-SENTENCED

Petitioner argues that his "sentence and Judgment of Conviction should be reversed, and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for

use of a deadly weapon, or alternatively remand the case to District Court for the District Court to state in writing the reasons why any consecutive sentence for the weapons enhancement." APWHC 13-14, SAPWHC 16. Petitioner is not entitled to be resentenced.

First, the case would not need to be "remanded" to District Court. This case is currently in District Court. Second, the District Court is not required to state their findings as to a deadly weapon enhancement in writing. NRS 193.165(1)(e) states:

> 1. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
>
> (b) The criminal history of the person;
>
> (c) The impact of the crime on any victim;
>
> (d) Any mitigating factors presented by the person; and
>
> (e) Any other relevant information.
>
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

Petitioner provides no evidence in the form of transcripts or any other specific facts that show the District Court failed to adhere to the statute and state the reasons for the length of the sentence for the deadly weapon enhancement on the record or that counsel failed to argue any mitigating factors. Petitioner also does not provide specific facts as to what mitigating factors existed that should have been argued, or how those mitigating factors would have changed the outcome of the case in any way. Instead, Petitioner provides unsupported conclusory statements. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As acknowledged by Petitioner, his sentence was within the statutory limits and the discretion of the Court, and therefore there is no cogent argument that would support a hearing to re-sentence Petitioner. As such, Petitioner is not entitled to a hearing to be resentenced.

//

//

//

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Amended and Second Amended Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Evidentiary Hearing shall be, and are, hereby denied.

Dated this 17th day of June, 2022

47B 0E4 DA19 DCBB
Tierra Jones
District Court Judge

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this ____ day of _____, 2022, by electronic transmission to:

TERRANCE M. JACKSON
Terry.jackson.esq@gmail.com

BY */s/ E. Del Padre*
E. DEL PADRE
Secretary for the District Attorney's Office

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cedric Jackson, Plaintiff(s)	CASE NO: A-22-849718-W
vs.	DEPT. NO. Department 10
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: 6/17/2022

Terrence Jackson	terry.jackson.esq@gmail.com
Dept 10 LC	dept10lc@clarkcountycourts.us

Electronically Filed
6/20/2022 12:19 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

CEDRIC JACKSON,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-22-849718-W

Dept No: X

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

PLEASE TAKE NOTICE that on June 17, 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 June 20, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 20 day of June 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:
Cedric Jackson # 1130512
P.O. Box 208
Indian Springs, NV 89070

Terrence M. Jackson, Esq.
624 S. Ninth St.
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #5734
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

CEDRIC JACKSON
ID#1581340,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-22-849718-W
C-10-265339-1

DEPT NO: X

FINDINGS OF FACT, CONCLUSIONS OR LAW, AND ORDER

DATE OF HEARING: May 6, 2022
TIME OF HEARING: 10:45 a.m.

THIS CAUSE having been decided by the Honorable TIERRA JONES, District Judge, pursuant to a Minute Order issued on the 6th day of May 2022, both parties not being present, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact, conclusions of law and order.

//

//

//

//

//

PROCEDURAL HISTORY

On June 16, 2010, the State of Nevada charged CEDRIC JACKSON (hereinafter "Petitioner") by way of Information as follows: COUNT 1 – Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165); COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 3 – Battery with Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Felony – NRS 200.481.2c); COUNT 4 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 5 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 6 – Attempt Murder with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.330, 193.165); COUNT 7 – Assault with a Deadly Weapon (Felony – NRS 200.471); COUNT 8 – Conspiracy to Commit Murder (Felony – NRS 199.480, 200.100, 200.030); COUNT 9 – Discharging Firearm at or into Structure, Vehicle, Aircraft, or Watercraft (Felony – NRS 202.285); and COUNT 10 – Discharging Firearm Out of Motor Vehicle (Felony – NRS 202.287).

On September 17, 2014, pursuant to negotiations, the State filed an Amended Information charging Petitioner as follows: COUNT 1 – Second Degree Murder with Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165 – NOC 50011) and COUNT 2 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165 – NOC 50031). That same day, Petitioner pled guilty to both counts in the Amended Information. The terms of the Guilty Plea Agreement (hereinafter "GPA") were as follows: "The Defendant's plea is conditional upon him receiving the following stipulated sentence. The parties jointly recommend a sentence of ten (10) to twenty-five (25) years as to Count 1 with a consecutive four (4) to twelve (12) years as to the deadly weapon enhancement. In addition, the parties stipulate to two (2) to five (5) years as to Count 2 with a consecutive twelve (12) to thirty (30) months sentence as to the deadly weapon enhancement. The parties stipulate that the sentences on each count will run concurrently to one another."

//

On November 19, 2014, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served.

The Judgment of Conviction was filed on November 21, 2014.

On June 22, 2016, Petitioner filed a Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction. The State filed its Response on July 12, 2016. The District Court denied the Motion on July 13, 2016.

On January 6, 2017, Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "PWHC"). The State filed its Response on January 20, 2017. On January 25, 2017, the PWHC was denied. On February 13, 2017, Petitioner filed a Notice of Appeal. The Findings of Fact, Conclusions of Law and Order reflecting the Court's denial of the Petition was filed on March 7, 2017. On January 9, 2018, the Nevada Court of Appeals affirmed the District Court's denial of Petitioner's PWHC. Remittitur issued on February 5, 2018.

On June 5, 2018, Petitioner filed a Motion for the Appointment of Counsel. The State filed a Response on June 26, 2018. The Motion was denied on June 27, 2018.

On May 28, 2020, Petitioner filed a Petition for Writ of Mandamus. The State's Response was filed on June 4, 2020. On August 3, 2020, the Attorney General's Office filed a Motion to Dismiss the Petition for Writ of Mandamus, which was granted by the District Court on September 4, 2020. The Decision and Order was filed on September 28, 2020.

On December 9, 2021, Petitioner filed an Amended Petition for Writ of Habeas Corpus (hereinafter "APWHC") through retained counsel Terrence Jackson, Esq. According to the Petition, Mr. Jackson was retained on June 15, 2020. APWHC 4.

On March 7, 2022, Petitioner filed a Second Amended Petition for Writ of Habeas Corpus or alternatively Motion to Modify Sentence Based Upon Changes in Supreme Court Law and Changes in Nevada Revised Statute 193.165 ("SAPWHC"). Petitioner asserts that the SAPWHC was filed because the APWHC was never set for argument. SAPWHC 4. Petitioner's SAPWHC is identical to the APWHC except for a paragraph explaining the reasoning for filing the SAPWHC.

On March 15, 2022, a Notice of Change of Case Number and Department Reassignment issued transferring this case from Department 24 to Department 10.

The State's Motion to Strike and Response to both Petitions was filed on March 21, 2022. On May 6, 2022, the Court issued a Minute Order denying the Amended and Second Amended Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing.

FACTUAL BACKGROUND

The District Court relied on the following facts at sentencing:

> On January 31, 2010, officers of the Las Vegas Metropolitan Police Department responded to a report of a homicide. The first victim was found in front of a residence and it appeared he had been shot. Further examination of the body revealed he had been shot nine times. A second victim was also located who had been shot in the leg. This victim was uncooperative and refused to identify the suspects. Officers learned that both victims had been involved in an altercation at a local bar with two male subjects earlier. Witnesses told the officers that the victims had gotten into a fight with the two male subjects, later identified as Cedric Jackson and Prentice Coleman.
>
> One witness that was with the victims and was also shot at, told the officers that after the fight at the bar, Coleman and Jackson followed them and he observed Jackson and the deceased victim confront each other. Shortly thereafter the suspects began shooting at the victims and him. He stated he ran and hid behind a vehicle which the officers inspected and the rear window had been struck by gunfire. Witnesses positively identified the shooters as Cedric Jackson and Prentice Coleman.
>
> It was discovered that Cedric Jackson and Prentice Coleman were both on federal parole. After further investigation, officer located Cedric Jackson at the U.S. Parole and Probation office on February 5, 2010, where he was arrested and transported to the Clark County Detention Center and booked accordingly.

Presentence Investigation Report ("PSI") 5-6.

ANALYSIS

As an initial matter, Petitioners APWHC and SAPWHC are identical in substance, the only difference being a paragraph explaining the reasoning behind filing the SAPWHC after the APWHC, which is that no argument was set after the APWHC was filed. In both the APWHC and SAPWHC, Petitioner asserts six (6) grounds for relief:

1. The District Court erred when it sentenced Petitioner to a consecutive sentence of twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4.
2. The application of amendments in NRS 193.165 must be held to be retroactive based on two (2) 2016 US Supreme Court cases: Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016). APWHC 5, SAPWHC 5.
3. The aggregate sentence of thirty-seven (37) years was excessive and cruel and unusual punishment and Defense counsel was ineffective in not effectively advocating for a fairer and more just sentence. APWHC 7, SAPWHC 8.
4. Petitioner's Post-Conviction Petition for Writ of Habeas Corpus should not be procedurally barred based on Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) as these two (2) cases are new constitutional law and were not reasonably available at the time of Petitioner's default, therefore this constitutes good cause to overcome the procedural bar. APWHC 9, SAPWHC 9.
5. Petitioner is entitled to an evidentiary hearing to show ineffective assistance of counsel and to prove his Petition is not procedurally barred. APWHC 12, SAPWHC 12.
6. Petitioner requests that the case be remanded to District Court for re-sentencing to eliminate the consecutive deadly weapon enhancement or for the District Court to state in writing the reasons why any consecutive sentence is appropriate. APWHC 13-14, SAPWHC 14.

I. PETITIONER'S PETITION IS PROCEDURALLY BARRED

A. Petitioner's Petition is Time Barred.

The mandatory provision of NRS 34.726(1) states:

> 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 after 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. The delay is not the fault of the Petitioner; and
>
> B. The dismissal of the petition as untimely will unduly prejudice the Petitioner

Id. (Emphasis added).

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.

Here, Petitioner's Judgment of Conviction was filed on November 21, 2014. Petitioner therefore had until November 21, 2015 to file a post-conviction habeas petition. Petitioner did not file his APWHC until December 9, 2021 and did not file his SAPWHC until March 7, 2022. As such, in filing his APWHC, Petitioner missed the clear and unambiguous mandatory filing deadline by seven (7) years and eighteen (18) days, or 2,575 total days. The Court in Gonzales found a two (2) day delay to be impermissible, and therefore a 2,575-day delay is obviously also impermissible. It should be noted that the District Court has *already* found that Petitioner's previous PWHC filed on January 6, 2017 was determined to be time barred. See Findings of Fact, Conclusions of Law, and Order, filed March 7, 2017, 3. Obviously, that determination would not change with a Petition that was filed nearly five (5) years later.

Thus, absent a showing of good cause to excuse this delay, Petitioner's APWHC and SAPWHC are denied.

B. Petitioner's Petition is Barred as Successive.

The controlling law regarding successive petitions, 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.

Id. (emphasis added).

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 Riker, 121 Nev. at 231, 112 P.3d at 1074.

Here, Petitioner raises the exact same issues that he previously raised in both his Motion to Modify/Correct Illegal Sentence filed on June 22, 2016, and his PWHC filed on January 6, 2017. In both the Motion and Petition, Petitioner alleges that the District Court erred in improperly applying NRS 193.165 in imposing Petitioner's sentence for the Deadly Weapon enhancement. In response to the PWHC, the District Court specifically found that the same claims Petitioner raises here were already decided on the merits when Petitioner's Motion to Modify was denied. Findings of Fact, Conclusions of Law, and Order filed March 7, 2017, 5-6. NRS 34.810(3); Lozada.

As such, Petitioner's APWHC and SAPWHC are successive and therefore are denied.

C. Application of the Procedural Bars are Mandatory.

The Nevada Supreme Court has specifically found that the District Court has a duty to consider whether the procedural bars apply to a post-conviction petition and not arbitrarily disregard them. In Riker, the Court held that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," and "cannot be ignored when properly raised by the State." 121 Nev. at 231–33, 112 P.3d at 1074–75. There, the Court reversed the District Court's decision not to bar the petitioner's untimely and successive petition:

> Given the untimely and successive nature of [petitioner's] petition, the district court had a duty imposed by law to consider whether any or all of [petitioner's] claims were barred under NRS 34.726,

> NRS 34.810, NRS 34.800, or by the law of the case . . . [and] the court's failure to make this determination here constituted an arbitrary and unreasonable exercise of discretion.

Id. at 234, 112 P.3d at 1076. The Court justified this holding by noting that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180–81, 69 P.3d 676, 681–82 (2003) (holding that parties cannot stipulate to waive, ignore, or disregard the mandatory procedural default rules nor can they empower a court to disregard them).

In State v. Greene, the Nevada Supreme Court reaffirmed its prior holdings that the procedural default rules are mandatory when it reversed the District Court's grant of a post-conviction petition for writ of habeas corpus. See State v. Greene, 129 Nev. 559, 565–66, 307 P.3d 322, 326 (2013). There, the Court ruled that the petitioner's petition was untimely and successive, and that the petitioner failed to show good cause and actual prejudice. Id. Accordingly, the Court reversed the District Court and ordered the petitioner's petition dismissed pursuant to the procedural bars. Id. at 567, 307 P.3d at 327.

Accordingly, this Court denies Petitioner's APWHC and SAPWHC due to the procedural bars discussed above, absent a showing of both good cause and prejudice.

II. PETITIONER FAILS TO ESTABLISH GOOD CAUSE TO OVERCOME THE PROCEDURAL BARS

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

actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001) (emphasis added).

"To establish good cause, petitioners 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. "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002)(citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

A. The decisions in Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016) do not constitute good cause to overcome the procedural bars.

Petitioner claims that the United States Supreme Court decisions in Welch and Montgomery create good cause for a delay in filing because these Supreme Court decisions were unavailable to Petitioner at the time of default. APWHC 5, 9; SAPWHC 6, 11. Petitioner's argument fails. Even if this Court were to find good cause because of these decisions, both cases were decided in 2016, and therefore they were absolutely available when Petitioner filed his original PWHC on January 6, 2017. *Petitioner even cited Montgomery in*

his original PWHC, showing he was aware of the law of retroactivity, was able to research this case law, these decisions were reasonably available to Petitioner when he filed his original PWHC, and the failure to raise those claims was not an impediment external to the defense. PWHC 2. Additionally, as discussed in more detail below, Welch and Montgomery do not apply here, as there is no cogent argument for retroactively applying NRS 193.165 as changes in the law are not constitutional by nature.

Furthermore, even if this Court were to find good cause due to the decisions in Welch and Montgomery, and even if this Court were to overlook the fact that they were available to Petitioner when he filed his first PWHC, this still does not explain why Petitioner waited five (5) years after Welch and Montgomery were decided and four (4) years after Petitioner's original PWHC was denied to file an APWHC to raise these issues. Petitioner now attempts to manufacture good cause and cannot show that the delay in raising these claims is not his fault.

As such, the decisions in Welch and Montgomery do not constitute good cause for Petitioner's failure to comply with procedural requirements.

B. Petitioner's access to a law library does not constitute good cause to overcome procedural bars.

Petitioner claims that there is good cause to overcome procedural bars because the prison's "Law Library is less than adequate for extensive legal research and provides minimal training for prisoners." APWHC 10, SAPWHC 11. Petitioner's claims are bare and naked, belied by controlling case law, meritless, and therefore fail.

First, Petitioner's claims allege no specific facts that would constitute good cause, and thus this claim should be disregarded. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Petitioner fails to specifically allege how the prison's law library is inadequate and how a more adequate law library would have resulted in Petitioner adhering to the procedural bars.

Second, the United States Supreme Court has expressly rejected the argument that lack of access to a law library constitutes "actual injury" to an inmate. Lewis v. Casey, 518 U.S. 343, 348, 116 S.Ct. 2174, 2178 (1996) (defining "actual injury" to include "inability to meet

a filing deadline or to present a claim."). The Lewis Court went on to explain that inmates do not have any "freestanding right to a law library or legal assistance" and concluded that "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Id. at 351, 116 S.Ct. at 2180. Furthermore, the Nevada Supreme Court has rejected the argument that special arrangements should be made to permit the use of law library materials when an inmate's custodial status limits access to the law library. See Wilkie v. State, 98 Nev. 192, 194, 644 P.2d 508, 509 (1982).

Therefore, on its face, Petitioner's claim of limited access to the law library cannot constitute good cause sufficient to overcome the time-bar to the instant Petition. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178; Wilkie, 98 Nev. at 194, 644 P.2d at 509. Moreover, to the extent Petitioner is claiming that his lack of access to the law library somehow precluded his compliance with the filing deadline, that claim is belied by the fact that Petitioner was able to file his original PWHC in which he cites case law and performs legal analysis. Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (habeas petitioners are not entitled to relief on "bare" and "naked" claims or those "belied or repelled by the record"). Therefore, Petitioner demonstrably cannot show an "inability to meet [the] filing deadline" sufficient to overcome his procedural bar. Lewis, 518 U.S. at 348, 116 S.Ct. at 2178.

Ultimately, as stated *supra*, under Lewis, Petitioner bears the burden of demonstrating that his access to the law library somehow interfered with Petitioner's meeting the filing deadline. 518 U.S. at 348, 116 S.Ct. at 2178. Petitioner does not make such a showing; as such, Petitioner cannot demonstrate good cause sufficient to overcome his procedural default.

Because both the United States Supreme Court and the Nevada Supreme Court have precluded relief on Petitioner's law library claim, Petitioner cannot show that access to a law library constitutes good cause to overcome the procedural bars.

Accordingly, Petitioner failed to show good cause to overcome the procedural bars.

//

//

III. PETITIONER FAILS TO ESTABLISH PREJUDICE TO OVERCOME THE PROCEDURAL BARS

Petitioner cannot demonstrate the requisite prejudice necessary to ignore his procedural default because his underlying claims are bare, naked, belied by controlling case law and meritless.

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

A. Petitioner's Claims are barred by the law of the case and res judicata.

Petitioner argues that the District Court erred in imposing a consecutive sentence of four (4) to twelve (12) years for the deadly weapon enhancement. APWHC 4, SAPWHC 4. Petitioner is incorrect, as discussed in detail below, however this issue has already been denied by the District Court and therefore it is precluded by the law of the case and res judicata.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d

869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

In Petitioner's Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed on June 22, 2016, Petitioner argued:

> Pursuant to AB 300; NRS 195.165, the Defendant could not have received a sentence greater than, not less than 1-year and not more than 5 years [sic]. Therefore a 4-12 year enhanced would also be facially illegal upon that basis and must be vacated as a matter of law.

Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction filed June 22, 2016, 24.

The District Court considered Petitioner's argument and issued an Order denying Petitioner's Motion on August 8, 2016:

> IT IS HEREBY ORDERED that the Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, shall be, and is DENIED.

Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction, filed August 8, 2016, 2.

Petitioner again raised this claim in his original PWHC (see Memorandum in Support of Petition for Writ of Habeas Corpus, filed January 6, 2017, 2-3), and the District Court held that these issues were barred:

> **This Court Has Already Adjudicated This Matter.**
> Even if this Court were to entertain this claim, it falls under the doctrine of *res judicata*. For an issue to fall under *res judicata,* it must have already been decided in a prior proceeding.
> ...
> When Defendant filed his Motion to Modify, he made the exact same claim that he brings here. This Court denied that motion. See Order Denying Defendant's Pro Per Motion to Appoint Counsel and Order Denying Defendant's Pro Per Motion to Modify and/or Correct by Setting Aside Illegal Sentence Based Upon Lack of Subject Matter Jurisdiction at 2. Because

> Defendant reiterates the same arguments here, using the exact same language from the Motion to Modify - see Petition Memorandum at 2-3 - the District Court previously ruled on the issue on the merits, and Defendant was a party in that case, the doctrine of res judicata applies here. Accordingly, this claim is denied.

Findings of Fact, Conclusions of Law, and Order filed July 21, 2017, 5-6.

As such, the issue of whether the District Court correctly applied NRS 193.165 in sentencing Petitioner to a consecutive four (4) to twelve (12) years for a deadly weapon enhancement has already been adjudicated by this Court and thus this issue is barred by the law of the case and res judicata.

B. The District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for a deadly weapon enhancement.

Petitioner argues that the District Court erred in its application of NRS 193.165 by imposing "a consecutive sentence of twelve (12) years for the weapon enhancement." APWHC 4, SAPWHC 4. Petitioner's argument is incorrect and fails.

As an initial matter, Petitioner continuously refers only to maximum sentences throughout his Petition, which is a misrepresentation of the actual sentence imposed on Petitioner. As noted in the Procedural History above, Petitioner was sentenced to COUNT 1 - a maximum of twenty-five (25) years and a minimum of ten (10) years in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive term of a minimum of four (4) years and a maximum of twelve (12) years for the use of a deadly weapon; and COUNT 2 - a maximum of sixty (60) months and a minimum of twenty-four (24) months in the NDOC, plus a consecutive term of a minimum of twelve (12) months and a maximum of thirty (30) months for the use of a deadly weapon, concurrent with COUNT 1, with one thousand seven hundred forty-eight (1,748) days credit for time served. As such, Petitioner was sentenced to a consecutive four (4) to twelve (12) years for the deadly weapon enhancement, not simply twelve (12) years as argued by Petitioner.

It should also be noted that this sentence was identical to the parties' joint recommendation to the Court at sentencing. GPA 1. In addition to Petitioner explicitly agreeing to the unambiguous term that he would be sentenced to a consecutive four (4) to

twelve (12) years for the deadly weapon enhancement, the plea agreement was also conditional, meaning the Petitioner consented to the terms of the agreement in such a way that if any of the terms of the agreement were not followed, Petitioner could have withdrawn from the agreement. Petitioner is now arguing that the District Court erred by both imposing the exact sentence the Petitioner agreed to and completely adhering to an agreement that Petitioner could have withdrawn from if the District Court had deviated in any way.

Aside from Petitioner's misrepresentation of the sentence imposed and failure to stand by his own negotiations, Petitioner's argument is also meritless and fails. As cited by Petitioner, the current version of NRS 193.165 went into effect on July 1, 2007. The date of Petitioner's offense was January 31, 2010, and thus the current version of NRS 193.165 applied. NRS 193.165 reads as follows:

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

NRS 193.165. (Emphasis added).

Accordingly, despite Petitioner's argument that "the question of whether any enhancement was appropriate was to be left to the reasonable discretion of the District Court Judge," the District Court was *required* to impose a consecutive sentence for a deadly weapon enhancement because Petitioner pled guilty to two (2) crimes with use of a deadly weapon. APWHC 4; SAPWHC 4; GPA 1. The Court then properly imposed a consecutive four (4) to twelve (12) year consecutive sentence for the deadly weapon enhancement. This sentence was proper as it was between one (1) and twenty (20) years, it did not exceed the sentence imposed for the crime, and it ran consecutive to the sentence prescribed by statute for the crime. Therefore, the District Court properly adhered to the plain language of NRS 193.165.

Thus, the District Court did not err in sentencing Petitioner to a consecutive term of four (4) to twelve (12) years for the deadly weapon enhancement.

C. NRS 193.165 was properly applied to Petitioner's sentence as Welch and Montgomery do not apply.

Petitioner argues that "NRS 193.165 must be held to be retroactive because of United States Supreme Court Decisions of Welch v. United States, 136 S.Ct. 1257 (2016) and Montgomery v. Louisiana, 136 S.Ct. 718 (2016)." APWHC 5, SAPWHC 5. Petitioner's argument is belied by controlling case law and statute, and therefore fails.

The Nevada Supreme Court has held that statutes are otherwise presumed to operate prospectively "unless they are so strong, clear, and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied." Holloway v. Barrett, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971). Further, "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." Allstate Ins. Co. v. Furgerson, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988).

It is well established that, under Nevada law, the proper penalty for a criminal conviction is the penalty in effect at the time of the commission of the offense and not the penalty in effect at the time of sentencing. State v. Second Judicial Dist. Ct. ("Pullin"), 124 Nev. 564, 567, 188 P.3d 1079, 1081 (2008). Unless the Legislature clearly expresses its intent to apply a law retroactively, Nevada law requires the application of the law in effect at the

time of the commission of the crime. Id. "[A] change of law does not invalidate a conviction obtained under an earlier law." Clem v. State, 119 Nev. 615, 623, 81 P.3d 521, 527 (2003) (quoting Kleve v. Hill, 243 F.3d 1149, 1151 (9th Cir. 2011)).

Additionally, Petitioner misrepresents the holding in Pullin, which he relies on for the contention that NRS 193.165 should be applied retroactively. In that case, The Nevada Supreme Court ordered the District Court to resentence the Defendant because the date of the offense (September 2, 2006) was prior to the enactment of the new version of NRS 193.165 in July of 2007. The facts in this case are entirely different. Here, the date of offense was January 31, 2010, which was nearly three (3) years after the current version of NRS 195.163 went into effect. As cited above, NRS 193.165 contains no language that "clearly expresses the legislative intent" to apply it retroactively. In fact, in Pullin, the Nevada Supreme Court specifically held that NRS 193.165 should not be applied retroactively:

> Further, we reject Pullin's contention that the retroactive application of the amendments to NRS 193.165 is appropriate here because NRS 193.165 is a procedural or remedial statute.

Id. at 1080.

Petitioner also argues that pursuant to Welch and Montgomery, which both create rules for retroactive application of some laws due to substantive constitutional changes, Pullin should be reversed. Again, Petitioner is incorrect. Pullin specifically addresses whether the changes made to NRS 193.165 were constitutional in nature:

> Here, the amendments made to NRS 193.165 were not of constitutional dimension. The amendments did not alter any of the constitutional aspects of NRS 193.165, such as the requirement that a jury must find, or a defendant must admit to the fact that a deadly weapon was used in the commission of a crime. Instead, the amendments merely give the district court more discretion in determining the sentence. Thus, we decline to apply these amendments retroactively.

Id. at 1084.

As such, Welch and Montgomery do not apply, and NRS 193.165 is not applied retroactively. The date of the instant offense was January 31, 2010. The applicable version of NRS 193.165 which went into effect on July 1, 2007 controlled the District Court's requirement to impose a consecutive sentence for deadly weapon enhancement within the statutory limits, which is exactly what the District Court did.

Thus, the District Court did not err in sentencing Petitioner to four (4) to twelve (12) years for the deadly weapon enhancement.

IV. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Petitioner argues that "counsel was ineffective in not effectively advocating for a fairer and more just sentence." APWHC 7, SAPWHC 9. Petitioner's claim is bare, naked, meritless, and fails.

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

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

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

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

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

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

challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

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

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

Additionally, Petitioner's claims are not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden

Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

A. Petitioner's claims are bare, naked, and unsupported by specific facts.

Petitioner argues, "defense counsel failed in providing effective assistance at sentencing. Defense counsel did not argue that the court exercise its discretion to sentence the Defendant concurrently. He did not apparently advise the defendant when AB 510 changed the law so that he could take steps to properly challenge his disproportionate sentence, see Mendoza-Lopez v. State, 125 Nev. 634, 218 P.3d 501 (2009). A defense counsel must be an aggressive, not a passive advocate at sentencing. He must argue all reasonable factual or legal arguments to minimize his client's sentence and to ensure a just sentence. In this case, pursuant to negotiation, defense counsel stipulated to a particular sentence of lengthy imprisonment." APWHC 8, SAPWHC 9. Petitioner's argument is bare and naked, meritless, and fails.

Not only are Petitioner's claims meritless, but they are also not sufficiently pled pursuant to Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984), and Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Indeed, a party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions.

Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits). Claims for relief devoid of specific factual allegations are "bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "[Petitioner] *must* allege specific facts supporting the claims in the petition[.]...Failure to allege specific facts rather than just conclusions may cause [the] petition to be dismissed." NRS 34.735(6) (emphasis added).

Here, Petitioner does not cite to a sentencing transcript or any other specific facts that provide any evidence whatsoever to support his assertions. Petitioner provides no evidence that counsel at sentencing failed to make arguments in favor of a lower sentence. Additionally, as explained above, the District Court was *required* to impose a consecutive sentence for the use of a deadly weapon. Therefore, an "aggressive" argument against a consecutive sentence would have been futile and belied by statute. Ennis. Counsel would have been entirely incorrect in advising his client that the change in NRS 193.165 that allowed Petitioner to challenge consecutive sentences.

Thus, Petitioner provides no specific facts that would warrant relief, and instead offers unsupported conclusory statements that even if true are belied by statute, and therefore his argument fails.

//

//

B. Petitioner's aggregate sentence is not excessive, cruel, or unusual, and it is therefore not a violation of the Eight Amendment of the Constitution.

Petitioner claims that counsel was ineffective at sentencing and therefore, "it should not be presumed that his aggregate sentence of thirty-seven (37) years was consistent with the Eighth Amendment. Even though this sentence was within statutory guidelines, Defendant respectfully submits that this sentence was unnecessarily long and unnecessarily harsh because it removed any meaningful possibility of rehabilitation." APWHC 8, SAPWHC 10. Petitioner's argument is meritless and fails.

The Eighth Amendment to the United States Constitution as well as Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. The Nevada Supreme Court has stated that "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, the Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

First, as discussed above, Petitioner misrepresents the sentence imposed by the Court by stating that he was sentenced to thirty-seven (37) years. Petitioner was sentenced to an

aggregate of fourteen (14) to thirty-seven (37) years for Second Degree Murder with Use of a Deadly Weapon and Attempt Murder with Use of a Deadly Weapon. Second, as Petitioner acknowledges multiple times in his Petition, the sentence imposed by the District Court was within the statutory limits, and therefore is not considered to be cruel and unusual. Allred. Finally, Petitioner argues that his sentence "shocks the conscience" and is not fair or reasonable. APWHC 9, SAPWHC 11. Petitioner is incorrect. An aggregate sentence within the statutory limits of fourteen (14) to thirty-seven (37) years does not shock the conscience for Petitioner's crime of shooting and killing a man after an argument while he was on federal parole.

As such, Petitioner has not been subjected to cruel and unusual punishment as a result of ineffective assistance of counsel, and therefore his claim fails.

V. PETITIONER IS NOT ENTITLED TO AN EVIDENTAIRY HEARING

Petitioner requests an evidentiary hearing "to establish Defendant's counsel was ineffective under Strickland in numerous ways. An evidentiary hearing will establish the Defendant filed his Pro Per Mandamus Petitioner for appointment of counsel as soon as he became aware of the Supreme Court's cases of Montgomery v. Louisiana, and Welch v. United States, which changed the law regarding the retroactivity of AB 510. An evidentiary hearing is necessary to show that counsel did not assist Defendant ever in challenging his wrongful sentence, despite the fundamental change in constitutional law which the Supreme Court enacted." APWHC 12, SAPWHC 14-15. Petitioner is not entitled to an evidentiary hearing. Petitioner's claims are bare, naked, meritless, and therefore fail.

Under NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. *See* Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); *See also* Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A petitioner is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled

by the record. *See* Marshall, 110 Nev. at 1331, 885 P.2d at 605; *See also* Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). It is improper to hold an evidentiary hearing simply to make a complete record. *See* State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. *See* Harrington v. Richter, 562, U.S. 86, 105, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to specific issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective State of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Petitioner's claims are suitable only for summary denial as Petitioner's claims are time-barred, barred as successive, barred by the law of the case and res judicata, and meritless. The record as it stands is more than sufficient to resolve the Petitioner's allegations on procedural grounds and on the merits. Additionally, Petitioner provides only conclusory statements unsupported by facts or the record and is not entitled to relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As such, Petitioner's request for an evidentiary hearing is denied.

VI. PETITIONER IS NOT ENTITLED TO A HEARING TO BE RE-SENTENCED

Petitioner argues that his "sentence and Judgment of Conviction should be reversed, and the case should be remanded to District Court for re-sentencing. The District Court should be ordered to re-sentence the Defendant and eliminate the consecutive enhancement given for

use of a deadly weapon, or alternatively remand the case to District Court for the District Court to state in writing the reasons why any consecutive sentence for the weapons enhancement." APWHC 13-14, SAPWHC 16. Petitioner is not entitled to be resentenced.

First, the case would not need to be "remanded" to District Court. This case is currently in District Court. Second, the District Court is not required to state their findings as to a deadly weapon enhancement in writing. NRS 193.165(1)(e) states:

> 1. In determining the length of the additional penalty imposed, the court shall consider the following information:
>
> (a) The facts and circumstances of the crime;
>
> (b) The criminal history of the person;
>
> (c) The impact of the crime on any victim;
>
> (d) Any mitigating factors presented by the person; and
>
> (e) Any other relevant information.
>
> The court shall state on the record that it has considered the information described in paragraphs (a) to (e), inclusive, in determining the length of the additional penalty imposed.

Petitioner provides no evidence in the form of transcripts or any other specific facts that show the District Court failed to adhere to the statute and state the reasons for the length of the sentence for the deadly weapon enhancement on the record or that counsel failed to argue any mitigating factors. Petitioner also does not provide specific facts as to what mitigating factors existed that should have been argued, or how those mitigating factors would have changed the outcome of the case in any way. Instead, Petitioner provides unsupported conclusory statements. Hargrove, 100 Nev. at 503, 686 P.2d at 225. As acknowledged by Petitioner, his sentence was within the statutory limits and the discretion of the Court, and therefore there is no cogent argument that would support a hearing to re-sentence Petitioner. As such, Petitioner is not entitled to a hearing to be resentenced.

//

//

//

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Amended and Second Amended Petition for Writ of Habeas Corpus (Post-Conviction) and Request for Evidentiary Hearing shall be, and are, hereby denied.

Dated this 17th day of June, 2022

47B 0E4 DA19 DCBB
Tierra Jones
District Court Judge

STEVEN WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734

CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that service of the above and foregoing was made this ____ day of _____, 2022, by electronic transmission to:

TERRANCE M. JACKSON
Terry.jackson.esq@gmail.com

BY */s/ E. Del Padre*
E. DEL PADRE
Secretary for the District Attorney's Office

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Cedric Jackson, Plaintiff(s)	CASE NO: A-22-849718-W
vs.	DEPT. NO. Department 10
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: 6/17/2022

Terrence Jackson	terry.jackson.esq@gmail.com
Dept 10 LC	dept10lc@clarkcountycourts.us

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	COURT MINUTES	May 04, 2022

A-22-849718-W Cedric Jackson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

May 04, 2022 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Jones, Tierra **COURTROOM:** RJC Courtroom 14B

COURT CLERK: Teri Berkshire

RECORDER: Victoria Boyd

REPORTER:

PARTIES PRESENT:

Jackson, Terrence Michael	Attorney
Thoman, Charles W.	Attorney

JOURNAL ENTRIES

- Mr. Jackson not present and in the Nevada Department of Corrections. Following arguments, COURT ORDERED, As to Second Amended Petition For Writ of Habeas Corpus, or alternatively, Motion to Modify Sentence Based Upon Changes in Supreme Court Law and Changes in Nevada Revised Statute 193.165, the Court will issue a Written Decision.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	COURT MINUTES	May 06, 2022

A-22-849718-W Cedric Jackson, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

May 06, 2022 **10:45 AM** **Minute Order**

HEARD BY: Jones, Tierra **COURTROOM:** Chambers

COURT CLERK: Teri Berkshire

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Following review of the papers and pleadings on file herein and hearing arguments of counsel, COURT ORDERS, Defendant s Second Amended Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing is DENIED. The COURT FINDS that the District Court did not err when it sentenced Petitioner to consecutive sentence of twelve (12) years for the deadly weapon enhancement. The COURT FURTHER FINDS that the application for amendments in NRS 193.165 is not retroactive. The COURT FURTHER FINDS that the aggregate sentence of thirty-seven (37) years was not excessive and cruel and unusual punishment and defense counsel was not ineffective in not effectively advocating for a fairer and more just sentence. The COURT FURTHER FINDS that Petitioner s Post-Conviction Petition for Writ of Habeas Corpus and Second Amended Petition for Writ of Habeas Corpus are procedurally barred as there has been no good cause shown to overcome the procedural bar. The COURT FURTHER FINDS that Petitioner is not entitled to an evidentiary hearing to show ineffective assistance of counsel and to prove that the petition is not procedurally barred. The COURT FURTHER FINDS that there is no need for the case to be remanded back to district court for re-sentencing. As such, the Defendant s Second Amended Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing is DENIED.

The COURT FURTHER FINDS that the State s Motion to Strike Procedurally barred Amended Petition for Writ of Habeas Corpus, Second Amended Petition for Writ of Habeas Corpus, and Request for Evidentiary hearing is DENIED.

The State is ordered to prepare a Findings of Fact, Conclusions of Law, and Order consistent with this Court s ruling and submit it to the Court for signature within 10 days of the filing of this Order.

Clerk's Note: This Minute Order was electronically served by Courtroom Clerk, Teri Berkshire, to all registered parties for Odyssey File & Serve. /tb

Certification of Copy and Transmittal of Record

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

Pursuant to the Supreme Court order dated June 23, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 187.

CEDRIC L. JACKSON,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-22-849718-W

Dept. No: X

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 30 day of June 2022.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk