

No. A-19-800950-W

Dept. No. 3

*Steven D. Grierson*

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF CLARK

Electronically Filed  
May 02 2022 08:51 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

CHRISTOPHER KELLER

Petitioner/Plaintiff,

v.

STATE OF NEVADA

Respondent/Defendant.

NOTICE OF APPEAL  
(BELATED)

Notice is hereby given that CHRISTOPHER KELLER, Petitioner/Defendant above named,  
hereby appeals to the Supreme Court of Nevada from the final judgment/order  
( AMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW & ORDER. HABEAS CORPUS )  
entered in this action on the 19<sup>th</sup> day of April, 20 22.

Dated this 19<sup>th</sup> day of April, 20 22.

*Chris Keller*

Christopher R. KELLER

Appellant

H.D.S.P. Ely State Prison  
P.O. Box 650 P.O. Box 1989  
INDIAN SPRINGS, NEVADA 89301-1989  
89070

RECEIVED  
APR 25 2022  
CLERK OF THE COURT

**AFFIRMATION PURSUANT TO NRS 239B.030**

I, Christopher R. Keller, NDOC# 81840,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE  
ATTACHED DOCUMENT ENTITLED NOTICE OF APPEAL &  
APPEAL STATEMENT

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY  
PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_\_\_\_.

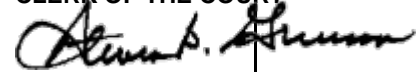
SIGNATURE: Chris Keller

INMATE PRINTED NAME: CHRISTOPHER R. KELLER

INMATE NDOC # 81840

INMATE ADDRESS: ~~ELY STATE PRISON~~ H.D.S.P.  
~~P.O. BOX 1989~~ P.O. BOX 650  
~~ELY, NV 89301~~ INDIAN SPRINGS, NV 89070





1 ASTA

2  
3  
4  
5  
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**  
7 **STATE OF NEVADA IN AND FOR**  
8 **THE COUNTY OF CLARK**  
9

10 CHRISTOPHER R. KELLER,

11 Plaintiff(s),

12 vs.

13 STATE OF NEVADA,

14 Defendant(s),  
15

Case No: A-19-800950-W

Dept No: III

16  
17 **CASE APPEAL STATEMENT**  
18

19 1. Appellant(s): Christopher R. Keller

20 2. Judge: Nancy Becker

21 3. Appellant(s): Christopher R. Keller

22 Counsel:

23 Christopher R. Keller #81840  
24 1200 Prison Rd.  
Lovelock, NV 89419

25 4. Respondent (s): State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney  
28 200 Lewis Ave.  
Las Vegas, NV 89155-2212

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

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

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

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

7 8. Appellant Granted Leave to Proceed in Forma Pauperis\*\*: Yes, December 7, 2020  
8 \*\*Expires 1 year from date filed (Expired)  
9 Appellant Filed Application to Proceed in Forma Pauperis: No  
Date Application(s) filed: N/A

10 9. Date Commenced in District Court: August 26, 2019

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

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

13 11. Previous Appeal: Yes

14 Supreme Court Docket Number(s): 73817, 73871, 81988

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 27 day of April 2022.

18 Steven D. Grierson, Clerk of the Court

19  
20  
21 /s/ Heather Ungermann

22 Heather Ungermann, Deputy Clerk  
23 200 Lewis Ave  
24 PO Box 551601  
Las Vegas, Nevada 89155-1601  
(702) 671-0512

25 cc: Christopher R. Keller  
26  
27  
28

*Steven D. Grierson*

No. A-19-800950-W

Dept. No. 3

IN THE 8<sup>th</sup> JUDICIAL DISTRICT COURT OF THE  
STATE OF NEVADA IN AND FOR  
THE COUNTY OF CLARK

Christopher Keller }  
 }  
Petitioner/Plaintiff, }  
 }  
v. }  
 }  
STATE OF NEVADA }  
 }

Respondent/Defendant.

CASE APPEAL STATEMENT

1. Name of Appellant filing this appeal statement: CHRISTOPHER KELLER.
2. Identify the judge issuing the decision, judgment, or order appealed from: HABEAS CORPUS & AMENDED FINDINGS OF FACTS, CONCLUSIONS OF LAW & ORDER
3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited): JUDGE MONICA TRUJILLO, JUDGE KEPHART ORIGINALLY.
4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited): KELLER, CHRISTOPHER.
5. Set forth the name, law firm, address, and telephone number of all counsel on appeal and identify the parties or party whom they represent:

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Attorney

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Address

\_\_\_\_\_  
Telephone Number

\_\_\_\_\_  
Telephone number

\_\_\_\_\_  
Telephone number

\_\_\_\_\_  
Represents

\_\_\_\_\_  
Represents

\_\_\_\_\_  
Represents

6. Indicate whether appellant was represented by appointed or retained counsel in the district

court: Appointed Counsel ✓ Retained Counsel \_\_\_\_\_ Pro Per ✓

7. Indicate whether appellant was represented by appointed or retained counsel on appeal:

Appointed Counsel \_\_\_\_\_ Retained Counsel \_\_\_\_\_ Pro Per ✓

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave: Yes ✓ No \_\_\_\_\_

Date: 12/07/2020

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed): Date: 11/19/21 <sup>complaint</sup> ~~1/28/16~~

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

CHRISTOPHER KELLER  
Appellant  
~~Ely State Prison~~ H.O.S.P.  
~~P.O. Box 1989~~ P.O. BOX 650  
~~Ely, Nevada 89301~~ INDIAN SPRINGS, NV  
89070

**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that a true and correct copy of the fore going Notice of Appeal (Belated), Case Appeal Statement, was mailed to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 200  .

# CASE SUMMARY

## CASE NO. A-19-800950-W

Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

§  
§  
§  
§  
§  
§

Location: **Department 3**  
Judicial Officer: **Trujillo, Monica**  
Filed on: **08/26/2019**  
Case Number History:  
Cross-Reference Case Number: **A800950**  
Supreme Court No.: **81988**

### CASE INFORMATION

**Related Cases**  
C-16-312717-1 (Writ Related Case)

Case Type: **Writ of Habeas Corpus**

**Statistical Closures**  
03/09/2021 Other Manner of Disposition

Case Status: **03/09/2021 Closed**

### DATE

### CASE ASSIGNMENT

#### Current Case Assignment

Case Number A-19-800950-W  
Court Department 3  
Date Assigned 01/04/2021  
Judicial Officer Trujillo, Monica

### PARTY INFORMATION

**Plaintiff** **Keller, Christopher R**

*Lead Attorneys*

**Pro Se**

**Defendant** **State of Nevada**

**Wolfson, Steven B**  
*Retained*  
702-671-2700(W)


### DATE

### EVENTS & ORDERS OF THE COURT


### INDEX

#### EVENTS


08/26/2019

 Inmate Filed - Petition for Writ of Habeas Corpus  
Party: Plaintiff Keller, Christopher R  
[1] Petition for Writ of Habeas Corpus (Post-Conviction Relief - NRS 34.735)


09/05/2019

 Order for Petition for Writ of Habeas Corpus  
[2]

01/17/2020

 Response  
[15] State's Response to Defendant's Pro Per Petition for Writ of Habeas Corpus (Post-Conviction)






01/21/2020

 Response  
Filed by: Defendant State of Nevada  
[3] State's Response to Defendant's Pro Per Petition for Writ of Habeas Corpus (Post-Conviction)
















02/12/2020

 Supplemental  
Filed by: Plaintiff Keller, Christopher R  
[4] Defendants Supplemental Response to State's Response to Defendants Pro Per Petition for Writ of Habeas Corpus.

**CASE SUMMARY**  
**CASE NO. A-19-800950-W**

03/20/2020	 Order for Production of Inmate <i>[5] Order for Production of Inmate Christopher Robert Keller, BAC #81840</i>
05/20/2020	 Audiovisual Transmission Equipment Appearance Request <i>[6] Audiovisual Transmission Equipment Appearance Request and Physical Presence be Waived</i>
09/16/2020	 Order for Production of Inmate <i>[7] Order for Production Via Video Conference of Inmate Christopher Robert Keller, BAC #81840</i>
09/16/2020	 Motion for Appointment of Attorney Filed By: Plaintiff Keller, Christopher R <i>[8] Motion to Appoint Counsel; Hearing Requested</i>
09/16/2020	 Notice of Motion Filed By: Plaintiff Keller, Christopher R <i>[9]</i>
09/16/2020	 Clerk's Notice of Hearing <i>[10] Notice of Hearing</i>
10/20/2020	 Notice of Appeal <i>[11]</i>
10/21/2020	 Case Appeal Statement Filed By: Plaintiff Keller, Christopher R <i>[12]</i>
11/02/2020	 Findings of Fact, Conclusions of Law and Order <i>[13] Findings of Fact, Conclusions of Law, and Order</i>
11/05/2020	 Notice of Entry of Findings of Fact, Conclusions of Law Filed By: Defendant State of Nevada <i>[14] Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
11/19/2020	 Application to Proceed in Forma Pauperis Filed By: Plaintiff Keller, Christopher R <i>[16] Application to Proceed in Forma Pauperis</i>
11/19/2020	 Motion Filed By: Plaintiff Keller, Christopher R <i>[17] Motion to Produce</i>
11/19/2020	 Clerk's Notice of Hearing <i>[18] Notice of Hearing</i>
12/07/2020	 Order to Proceed In Forma Pauperis <i>[19] Order to Proceed in Forma Pauperis</i>
01/04/2021	Case Reassigned to Department 1 <i>Judicial Reassignment to Judge Bita Yeager</i>

**CASE SUMMARY**  
**CASE NO. A-19-800950-W**

01/04/2021	Case Reassigned to Department 3 <i>Judicial Reassignment to Judge Monica Trujillo</i>
01/05/2021	 Notice of Change of Hearing <i>[20] Notice of Change of Hearing</i>
01/14/2021	 Notice of Rescheduling of Hearing <i>[21] Notice of Rescheduling of Hearing C800950 Keller</i>
01/15/2021	 Notice of Department Reassignment <i>[22] Notice of Department Reassignment</i>
03/09/2021	 Order Filed By: Defendant State of Nevada <i>[23] Order Denying Defendant's Motion to Produce</i>
08/27/2021	 Recorders Transcript of Hearing <i>[24] Recorders Transcript of Hearing Re: Evidentiary Hearing; Petition for Writ of Habeas Corpus; Plaintiff's Motion to Appoint Counsel 10.1.20</i>
10/28/2021	 NV Supreme Court Clerks Certificate/Judgment - Dismissed <i>[25] Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Dismissed</i>
11/19/2021	 Request Filed by: Plaintiff Keller, Christopher R <i>[26] Request for Submission of Motion (Motion to Amended "Findings of Facts, Conclusion of Law &amp; Order ")</i>
11/19/2021	 Clerk's Notice of Hearing <i>[27] Notice of Hearing</i>
12/23/2021	 Request Filed by: Plaintiff Keller, Christopher R <i>[28] Request for Submission of Motion</i>
03/30/2022	 Request Filed by: Plaintiff Keller, Christopher R <i>[29] Request for Submission of Motion</i>
04/11/2022	 Findings of Fact, Conclusions of Law and Order <i>[30] Finding of Fact, Conclusions of Law, and Order</i>
04/18/2022	 Notice of Entry of Findings of Fact, Conclusions of Law <i>[31] Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
04/26/2022	 Notice of Appeal <i>[32] Notice of Appeal</i>
04/26/2022	 Case Appeal Statement <i>[33] Case Appeal Statement</i>
04/27/2022	 Case Appeal Statement


**CASE SUMMARY**  
**CASE NO. A-19-800950-W**

*Case Appeal Statement*

**DISPOSITIONS**


10/28/2021 **Clerk's Certificate** (Judicial Officer: Trujillo, Monica)  
Debtors: Christopher R Keller (Plaintiff)  
Creditors: State of Nevada (Defendant)  
Judgment: 10/28/2021, Docketed: 10/28/2021  
Comment: Supreme Court No 81988 - "APPEAL DISMISSED"

**HEARINGS**

12/09/2019  **Petition for Writ of Habeas Corpus** (8:30 AM) (Judicial Officer: Kephart, William D.)  
**12/09/2019, 03/11/2020, 10/01/2020**  
Matter Continued;  
Matter Heard;  
  
Denied;  
Matter Continued;  
Matter Heard;  
  
Denied;  
Journal Entry Details:  
*Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court noted Defendant has made a number of claims and COURT ORDERED, as to claims 1 - 7 are substantive claims which should have been raised on direct appeal and have therefore been those claims have been waived. FURTHER ORDERED, matter SET for Evidentiary Hearing as to 3, 4, 5, 7 & 8 regarding ineffective of counsel as follows; 3 - counsel failing to use a different investigator based on his parents 4 - counsel failing to visit while preparing 5 - failure to subpoena and/or call certain witnesses regarding living arrangements he had 7 - failure to ask for testimony of canine handlers records 8 - failure to relay Defendant's mental health history and the fact Defendant was on and off medication. Court noted as to claims 1, 2 & 6 the Court will not need to hear any information regarding these claims. NDC 4/23/2020 8:30 AM EVIDENTIARY HEARING;*  
Matter Continued;  
Matter Heard;  
  
Denied;  
Journal Entry Details:  
*Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court stated a written opposition has not been filed. Mr. Zadrowski advised the State is requesting 45 days to file a written response. COURT ORDERED, State's Response shall be due on or before 1/22/2020; Defendant's Reply shall be due on or before 2/26/2020 and matter CONTINUED. NDC CONTINUED TO: 3/11/2020 8:30 AM CLERK'S NOTE: The above minute order has been distributed to: CHRISTOPHER KELLER # 81840 LOVELOCK CORRECTIONAL CENTER 1200 PRISON RD LOVELOCK, NV 89419;*

10/01/2020 **Evidentiary Hearing** (8:30 AM) (Judicial Officer: Kephart, William D.)  
Matter Heard;

10/01/2020 **Motion for Appointment of Attorney** (8:30 AM) (Judicial Officer: Kephart, William D.)  
*Plaintiff's Motion to Appoint Counsel*  
Denied;

10/01/2020  **All Pending Motions** (8:30 AM) (Judicial Officer: Kephart, William D.)  
Matter Heard;  
Journal Entry Details:  
*PLAINTIFF'S MOTION TO APPOINT COUNSEL: COURT ORDERED, Motion DENIED as Defendant is not entitled to counsel at this point. PETITION FOR WRIT OF HABEAS CORPUS ... EVIDENTIARY HEARING Court reviewed Defendant's claims for the record. Kenneth Frizzell sworn and testified. Court FINDS, Defendant's claims 1 - 7 were claims which could have been raised on direct appeal and therefore WAIVED; and Defendant has failed to establish how counsel's representations fell below a reasonable standard as well as but for counsel's errors how the outcome would have been different. COURT ORDERED, Petition DENIED. NDC;*

**CASE SUMMARY**  
**CASE NO. A-19-800950-W**

01/27/2021



**Motion** (8:30 AM) (Judicial Officer: Trujillo, Monica)

*Plaintiff's Motion to Produce*

Denied;

Journal Entry Details:

*Defendant not present, in custody of the Nevada Department of Corrections. COURT FINDS the minutes from the 10/1/2020 evidentiary hearing were sufficiently clear and ORDERED, Motion DENIED. State to prepare the order. NDC CLERK'S NOTE: The above minute order has been distributed to: Christopher Keller, #81840, HDSP, PO Box 650, Indian Springs, NV 89070. 2/3/21km;*

12/20/2021



**Motion** (8:30 AM) (Judicial Officer: Trujillo, Monica)

**12/20/2021, 12/29/2021**

*Plaintiffs Request for Submission of Motion*

**MINUTES**

Matter Continued;

Off Calendar;

Journal Entry Details:

*Court NOTED Mr. Keller filed a Pro Per Petition for Post-Conviction Relief that was handled by Judge Kephart. The findings of facts and conclusions of law was filed, however did not include all of the Deft's causes of action in the petition, as a result Deft. filed a Notice of Appeal, due to the denial of the petition, the Court of Appeals determined it was not a final order, they lacked jurisdiction, and referred the matter back to District Court to address those additional issues so there could be a final order to be appealed. Court ADVISED it would review the entire post-conviction record, evidentiary hearing conducted by Judge Kephart, and trial court proceedings, therefore, ORDERED, matter taken UNDER ADVISEMENT to determine (1) whether the appropriate findings could be made to address the entirety of the petition or (2) whether a new Evidentiary Hearing would need to be conducted. COURT FURTHER ORDERED, matter SET for status check on decision. NDC 1/19/22 8:30 AM - STATUS CHECK: DECISION;*

Matter Continued;

Off Calendar;

Journal Entry Details:

*Court NOTED this case was remanded by the Court of Appeals because the issue that was present in the post-conviction petition did not make it into the Order. Court ADVISED it would review the record and the petition to determine whether or not the absent findings could be made if not a Evidentiary Hearing would need to be set, therefore, ORDERED, matter CONTINUED. NDC 12/29/21 8:30 AM - PLAINTIFF'S REQUEST FOR SUBMISSION OF MOTION;*

**SCHEDULED HEARINGS**



**Status Check** (01/19/2022 at 8:30 AM) (Judicial Officer: Trujillo, Monica)

**01/19/2022, 02/02/2022, 02/09/2022, 02/16/2022, 02/28/2022, 03/07/2022, 03/16/2022, 03/30/2022, 04/13/2022**

*Status Check: Decision*

01/19/2022



**Status Check** (8:30 AM) (Judicial Officer: Trujillo, Monica)

**01/19/2022, 02/02/2022, 02/09/2022, 02/16/2022, 02/28/2022, 03/07/2022, 03/16/2022, 03/30/2022, 04/13/2022**

*Status Check: Decision*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*Court noted Judge Becker issued a decision on April 12, 2022; therefore, matter OFF*

**CASE SUMMARY**  
**CASE NO. A-19-800950-W**

CALENDAR.;

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*Def't. not present. COURT NOTED, Senior Judge Nancy Becker will be taking the case; she will issue her decision with the findings of fact and conclusions of law. COURT ORDERED, matter CONTINUED. CONTINUED TO: 04.13.22 8:30 A.M. CLERK'S NOTE: A copy of this minute order was mailed to Def't. (Christopher Keller, 81840, Lovelock Correctional Center, 1200 Prison Rd, Lovelock, NV 89419). / sb 04.02.22;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*The Court noted Judge Becker needed more time; ORDERED, matter CONTINUED. NDC CONTINUED TO 03.30.2022 8:30 AM CLERK'S NOTE: This Minute Order was prepared using JAVS.//rh03.25.22;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*COURT ORDERED, matter CONTINUED for Judge Becker's decision. NDC 3/7/22 8:30 AM - STATUS CHECK: DECISION;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*COURT ORDERED, matter CONTINUED for Judge Becker's decision. NDC 3/7/22 8:30 AM - STATUS CHECK: DECISION;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

**CASE SUMMARY**

**CASE NO. A-19-800950-W**

*COURT ORDERED, matter CONTINUED for Judge Becker's decision. NDC 2/23/22 8:30 AM - STATUS CHECK: DECISION;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*Court NOTED Senior Judge Becker is writing the decision on this matter. COURT ORDERED, Matter CONTINUED. CONTINUED TO: 2/16/22;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*Court NOTED Judge Becker was in the process of drafting an Order, therefore, ORDERED, matter CONTINUED. 2/9/22 8:30 AM - STATUS CHECK: DECISION;*

Matter Continued;

Matter Continued;

Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Matter Continued;

Off Calendar;

Journal Entry Details:

*COURT ORDERED, matter CONTINUED for Judge Becker's to review the matter. NDC 2/2/22 8:30 AM - STATUS CHECK: DECISION;*

## DISTRICT COURT CIVIL COVER SHEET

A-19-800950-W

County, Nevada

Dept. XIX

Case No. \_\_\_\_\_

(Assigned by Clerk's Office)

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

Plaintiff(s) (name/address/phone): Christopher Keller	Defendant(s) (name/address/phone): State of Nevada
Attorney (name/address/phone):	Attorney (name/address/phone):

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

<b>Real Property</b> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <b>Title to Property</b> <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property <b>Other Real Property</b> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<b>Negligence</b> <input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence <b>Malpractice</b> <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	<b>Torts</b> <b>Other Torts</b> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<b>Probate</b> <b>Probate</b> (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <b>Estate Value</b> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<b>Construction Defect &amp; Contract</b> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <b>Contract Case</b> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	<b>Judicial Review/Appeal</b> <b>Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <b>Nevada State Agency Appeal</b> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <b>Appeal Other</b> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<b>Civil Writ</b> <b>Civil Writ</b> <input checked="" type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ		<b>Other Civil Filing</b> <b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters

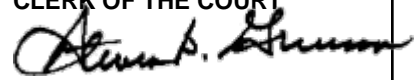
Business Court filings should be filed using the Business Court civil coversheet.

August 26, 2019

Date

Signature of initiating party or representative

See other side for family-related case filings.



FFCO  
NANCY A. BECKER  
Senior District Judge  
Sitting in Department 3

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

CHRISTOPHER ROBERT KELLER,  
#1804258

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. A-19-800950-W

DEPT NO. III

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

DATE OF HEARING: December 29, 2021

TIME OF HEARING: 8:30 a.m.

THIS CAUSE having come before the Honorable NANCY A. BECKER, Senior District Court Judge<sup>1</sup>, on the 29 day of December, 2021, Petitioner not present and not represented by counsel, Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, through NOREEN DEMONTE, Deputy District Attorney, and the Court having considered the matter, including the briefs, transcripts and documents on file

<sup>1</sup> The Honorable William D. Kephart was the district court judge for the pretrial, trial, and post-conviction proceedings. However, when the matter was remanded by the Court of Appeals for amended findings, Judge Kephart was no longer on the bench. While the matter was pending at the Court of Appeals, the case was administratively transferred to Department 3. Senior Judge Becker was assigned to Department 3 when the matter came on calendar. Whenever the term "the Court" is used in these findings, the reference is to Senior Judge Becker. Judge Kephart is named whenever he made the trial or post-conviction ruling.

1 herein and without oral argument<sup>2</sup>, the Court makes the following findings of fact and  
2 conclusions of law.

3  
4 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

5  
6 **STATEMENT OF THE CASE**

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8 After a Preliminary Hearing held on February 16, 2016, on February 17, 2016,  
9 Christopher Robert Keller (hereinafter (“Petitioner”) was charged by way of Information with  
10 Counts 1 and 2 - Trafficking In Controlled Substance (Category A Felony - NRS 453.3385.3  
11 - NOC 51160); Count 3 - Possession Of Controlled Substance, Marijuana (Category E Felony  
12 - NRS 453.336 - NOC 51127); Counts 4, 5, 6, and 7 - Possession Of Controlled Substance  
13 With Intent To Sell (Category D Felony – NRS 453.337 - NOC 51141); and Counts 8 and 9 -  
14 Ownership Or Possession Of Firearm By Prohibited Person (Category B Felony - NRS  
15 202.360 - NOC 51460). On February 18, 2016, Petitioner entered a plea of not guilty and  
16 invoked his constitutional right to a speedy trial.

17 On March 24, 2016, the State filed a Notice of Intent to Seek Punishment as a Habitual  
18 Criminal. At Calendar Call on April 13, 2016, counsel, Michael Sanft, Esq., announced he  
19 had a conflict for the trial date. Although Petitioner stated he wanted to go to trial on the  
20 original date, Judge Kephart ordered the trial date reset. On this date, the State also extended  
21 a plea offer to Petitioner for one count of Low-Level Trafficking in a Controlled Substance  
22 and one count of Possession of a Firearm by a Prohibited Person, with Petitioner stipulating  
23 to small habitual treatment and a stipulated maximum sentence of twelve and a half (12.5)  
24 years. The trial date was reset to May 2, 2016 (“First Continuance”).

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<sup>2</sup> Because the matter was taken under advisement, Senior Judge Becker heard no oral argument. The  
27 Court did review the arguments made by both sides at the Evidentiary Hearing conducted by Judge  
28 Kephart on October 1, 2020. However, the Court did not rely on any of the testimony and the findings  
are based entirely on the pleadings, pre-trial hearings and district court minutes, trial and sentencing  
transcripts.

1 At Calendar Call on April 20, 2016, Petitioner stated he wanted to go to trial and was  
2 willing to represent himself if need be. On April 29, 2016, the State filed an Amended  
3 Information, charging Petitioner with the same charges as the original Information. Also on  
4 that date, Mr. Sanft requested to withdraw due to a conflict of interest. Judge Kephart granted  
5 the request and appointed Kenneth Frizzell, Esq. to represent Petitioner. On May 4, 2016, Mr.  
6 Frizzell confirmed as counsel. Due to the change in counsel, the trial date was vacated and  
7 reset to June 27, 2016 (“Second Continuance”).

8 On June 10, 2016, Petitioner filed a Motion to Suppress. The State filed an Opposition  
9 on June 17, 2016. On June 20, 2016, Petitioner requested more time to file a Reply to the  
10 Opposition, and Judge Kephart vacated the trial date of June 27, 2016. The Court set a new  
11 Calendar Call for July 20, 2016, and a Jackson v. Denno hearing on the suppression motion  
12 for July 21, 2016. (“Third Continuance”).

13 On June 13, 2016, Petitioner filed a Pro Per Motion to Dismiss Counsel and Appoint  
14 Alternate Counsel. Judge Kephart denied the Motion on July 21, 2016, after hearing from  
15 Petitioner.

16 On July 18, 2016, the State filed a second Notice of Intent to Seek Habitual Treatment.  
17 On July 21, 2016, the State also informed Judge Kephart that it had extended a new plea offer  
18 for one count of Mid-Level Trafficking and one count of Possession of a Firearm by a  
19 Prohibited Person, with the State retaining the right to argue at sentencing but having no  
20 opposition to the counts running concurrently. Petitioner rejected the offer.

21 On July 21, 2016, after the Jackson v. Denno hearing, Judge Kephart denied Petitioner’s  
22 Motion to Suppress. Defense counsel then requested another continuance, stating that due to  
23 the Motion to Suppress, he had not been able to adequately prepare for trial. Judge Kephart  
24 granted the continuance and reset the trial date for September 19, 2016. (“Fourth  
25 Continuance”).

26 At Calendar Call on September 14, 2016, Petitioner waived his speedy trial and  
27 requested a continuance. Judge Kephart granted the continuance and reset the trial to March  
28 6, 2017. (“Fifth Continuance”).

The Order denying suppression motion and the motion to dismiss counsel was filed on

1 August 18, 2016.

2 At Calendar Call on February 22, 2017, both Petitioner and the State announced ready.  
3 However, on March 6, 2017, the day trial was due to begin, Amy Feliciano, Esq., appeared  
4 and attempted to substitute in as trial counsel. Ms. Feliciano informed Judge Kephart that she  
5 had been retained by Petitioner's mother sometime in early February, but had not moved to  
6 substitute in as counsel until March 6, 2017, due to multiple medical and personal problems.  
7 As Ms. Feliciano was unprepared for trial without a sixth continuance being granted, Judge  
8 Kephart denied her request for a continuance and ordered trial to proceed with Mr. Frizzell as  
9 trial counsel.

10 On March 6, 2017, the State filed a Second Amended Information as the State chose to  
11 bifurcate Counts 8 and 9 (gun charges involving ex-felon evidence) from the first seven (7)  
12 counts. The Second Amended Information was filed in open court on March 6, 2017, charging  
13 Petitioner with Counts 1 and 2 - Trafficking in Controlled Substance (Category A Felony -  
14 NRS 453.3385.3 - NOC 51160); Count 3 - Possession of Controlled Substance, Marijuana  
15 (Category E Felony - NRS 453.336 - NOC 51127); and Counts 4-7 - Possession Of Controlled  
16 Substance With Intent To Sell (Category D Felony - NRS 453.337 - NOC 51141).

17 The first part of the jury trial commenced on March 7, 2017, and concluded on March  
18 10, 2017, when the jury returned a verdict of guilty on all seven (7) counts. A Third Amended  
19 Information was subsequently filed in open court which added Counts 8 and 9 - Ownership or  
20 Possession of Firearm by Prohibited Person (Category B Felony - NRS 202.360 - NOC  
21 51460). Trial on those counts was had and the jury also returned verdicts of guilty on Counts  
22 8 and 9.

23 On April 29, 2017, Ms. Feliciano substituted as counsel of record to represent Petitioner  
24 at sentencing and post-trial proceedings. Mr. Frizzell withdrew from his representation. Ms.  
25 Feliciano requested that sentencing be continued three (3) times: May 8, 2017, June 5, 2017,  
26 and June 19, 2017.

27 On July 24, 2017, Ms. Feliciano requested a fourth sentencing continuance, and  
28 Petitioner requested that she be dismissed as counsel of record. Judge Kephart granted the  
request, and re-appointed Mr. Frizzell as counsel. On July 31, 2017, Judge Kephart granted

1 Mr. Frizzell a continuance to allow him to retrieve the file from Ms. Feliciano.

2 On August 7, 2017, Petitioner was sentenced as follows: as to Count 1 - LIFE in the  
3 Nevada Department of Corrections (NDC) with a minimum parole eligibility after ten (10)  
4 years in NDC; as to Count 2 - LIFE in the NDC with a minimum parole eligibility after ten  
5 (10) years in the NDC; Count 2 to run concurrent with Count 1; as to Count 3 - a minimum of  
6 twelve (12) months and a maximum of forty-eight (48) months in the NDC; Count 3 to run  
7 concurrent with Count 2; as to Count 4 - to a minimum of twelve (12) months and a maximum  
8 of forty-eight (48) months in the NDC; Count 4 to run concurrent with Count 3; as to Count 5  
9 – to a minimum of twelve (12) month and a maximum of forty-eight (48) months in the NDC;  
10 Count 5 to run concurrent with Count 4; as to Count 6 - to a minimum of twelve (12) months  
11 and a maximum of forty-eight (48) months in the NDC; Count 6 to run concurrent with Count  
12 5; as to Count 7 - to a minimum of twelve (12) months and a maximum of forty-eight (48)  
13 months in the NDC; Count 7 to run concurrent with Count 6; as to Count 8 - Petitioner  
14 sentenced under the large habitual criminal statute to LIFE in the Nevada Department of  
15 Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count  
16 8 to run CONSECUTIVE to Counts 1, 2, 3, 4, 5, 6, and 7; and as to Count 9, Defendant was  
17 sentenced under the large habitual criminal statute to LIFE in the Nevada Department of  
18 Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count  
19 9 to run concurrent with Count 8; for a total aggregate sentence of LIFE in the NDC with a  
20 minimum parole eligibility of TWENTY (20) years in the NDC, and five-hundred fifty-nine  
(559) days credit for time served.

21 The Judgment of Conviction was filed on August 10, 2017. On August 24, 2017,  
22 Petitioner filed a Notice of Appeal.

23 On November 14, 2017, while the appeal was pending, Petitioner filed a pro se Motion  
24 for Appointment of Counsel, Withdrawal of Attorney of Record and Request for an  
25 Evidentiary Hearing citing post-conviction petition statutes and case law. Also on that date,  
26 Petitioner moved to have Kenneth Frizzell, Esq. withdraw as his attorney of record and for a  
27 transfer of files to Petitioner. On December 6, 2017, Judge Kephart heard both motions. Judge  
28 Kephart required that Mr. Frizzell remain counsel through the filing of the opening brief on

1 appeal and thereafter would be withdrawn as counsel of record. Judge Kephart denied the  
2 request for appointment of new counsel, or for an evidentiary hearing since there was no  
3 pending post-conviction petition proceedings.<sup>3</sup>

4 An Amended Judgment of Conviction was filed on December 12, 2017, correcting the  
5 statute to NRS 435.337 for Possession of Controlled Substance with Intent to Sell on Counts  
6 4, 5, 6 and 7.

7 On March 22, 2018, again while his appeal was pending, Petitioner filed a second  
8 Motion for Appointment of Counsel and a Motion to Dismiss Attorney of Record citing to  
9 post-conviction petition law. On April 13, 2018, the State filed its Opposition to the second  
10 Motion to Appoint Counsel and Motion to Dismiss Attorney of Record. On April 16, 2018,  
11 Judge Kephart denied the motion noting that Petitioner had a pending Supreme Court appeal.  
12 The Order reflecting this decision was filed on May 10, 2018.

13 On October 15, 2018, the Nevada Supreme Court affirmed Petitioner's Judgment of  
14 Conviction. Remittitur was issued on November 9, 2018. The Supreme Court addressed four  
15 (4) issues in the affirmance order: 1) the denial of Petitioner's request for a continuance on the  
16 day of trial to allow for the substitution of private counsel (and related issues addressing  
17 whether a true conflict existed between Petitioner and appointed counsel Mr. Frizzell); 2) the  
18 denial of Petitioner's motion to suppress evidence seized from his condominium; 3) the denial  
19 of Petitioner's motion to exclude jail conversations as inadmissible hearsay and 4) cumulative  
20 error. The Supreme Court rejected each of these contentions.

21 On December 31, 2018, Petitioner filed his third Motion for Withdrawal of Counsel  
22 and transmittal of his files to him. The matter was heard on January 23, 2019. The Motion  
23 was granted, and an Order was entered on February 1, 2019.

24 On April 3, 2019, Petitioner filed a request for the District Court Clerk to send him  
25 copies of all court documents, including transcripts. On the same day, Petitioner filed a  
26 Motion to Compel seeking an order to require former counsel Kenneth Frizzell to transmit

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27 <sup>3</sup> The Order reflecting these decisions was not filed until April 18, 2018. In addition, it appears that  
28 the Nevada Supreme Court never permitted Mr. Frizzell to withdraw as appellate counsel.

1 evidence photos to Petitioner. The motions were heard on April 24, 2019. Mr. Frizzell was  
2 ordered to turn over his file to Petitioner but the motion to compel was denied as overly broad.  
3 Judge Kephart did not specifically address the request regarding court records, presumably  
4 because those would be included in Mr. Frizzell's files.<sup>4</sup>

5 On June 12, 2019, Petitioner filed a motion for production of transcripts at the State's  
6 expense. The matter was heard on July 8, 2019 and denied. The Order of Denial was filed on  
7 July 22, 2019.

8 On August 26, 2019, Petitioner filed the instant Pro Per Petition for Writ of Habeas  
9 Corpus. The State filed its Response on January 21, 2020. On February 12, 2020, Petitioner  
10 filed a supplement to his petition addressing the State's response. Thereafter, on September  
11 16, 2020, Petitioner filed a motion to appoint post-conviction counsel. At that time,  
12 Petitioner's evidentiary hearing on his post-conviction petition was set for October 1, 2020.

13 On October 1, 2020, Judge Kephart formally denied Petitioner's request for  
14 appointment of counsel. Judge Kephart determined that many of Petitioner's claims were  
15 either belied by the record, already raised on appeal and denied, could have been raised on  
16 appeal and were waived or vague/unsupported by specific facts. Judge Kephart denied the  
17 Motion for Appointment of Counsel and proceeded with the evidentiary hearing.<sup>5</sup> Judge  
18 Kephart found testimony was needed on four issues: 1) why Mr. Frizzell did not use a different  
19 investigator and how was the use of the investigator prejudicial; 2) the level of communication  
20 between Petitioner, Mr. Frizzell and the investigator; 3) why Mr. Frizzell did not call the K-9  
21 Officer; and, 4) whether Mr. Frizzell knew Petitioner was taking medications during the pre-

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22 <sup>4</sup> No formal order reflecting these rulings was filed.

23 <sup>5</sup> Judge Kephart's oral rulings found that the substance claims 1-7 in the Petition were waived. He  
24 indicated that Petitioner's claims regarding ineffective assistance or trial and appellate counsel on  
25 suppression issues were naked allegations. Judge Kephart indicated Petitioner failed to specify what  
26 suppression issues should have been raised and how Petitioner was prejudiced. Regarding claims  
27 involving uncalled witnesses, Judge Kephart found Petitioner failed to identify the witnesses in the  
28 Petition as well as noting trial counsel had discretion on what witnesses to call. He denied the IAC  
claims on this issue. Judge Kephart also denied claims regarding failure to call witnesses at sentencing  
finding no such right existed, therefore counsel did not err.

1 trial proceedings and any mental health issues.

2 The only witness to testify was Kenneth Frizzell. Petitioner did not call witnesses,  
3 indicating he did not understand he had the ability to do that. Although not sworn under oath,  
4 Judge Kephart did hear factual and legal arguments from Petitioner. Judge Kephart concluded  
5 Frizzell's decisions were reasonable and did not fall below the standard of care under  
6 Strickland. Judge Kephart also concluded that the outcome of the trial would not have changed  
7 had Frizzell called any of the witnesses or presented the testimony Petitioner generally referred  
8 to at the hearing.

9 A Findings of Fact, Conclusions of Law and Order reflecting the denial of the petition  
10 was filed on November 20, 2020. A premature Notice of Appeal was filed on October 20,  
11 2020, but the appeal proceeded once the formal order was entered.

12 On November 19, 2020, Petitioner filed a motion for production of the transcripts of  
13 the October 1 evidentiary hearing. No decision was made on this motion.<sup>6</sup>

14 On April 12, 2021, the Nevada Supreme Court transferred the post-conviction petition  
15 appeal to the Nevada Court of Appeals. On September 28, 2021, the Court of Appeals  
16 dismissed the appeal due to a jurisdictional defect. Remittitur issued on October 28, 2021.  
17 The Court of Appeals noted the November 20, 2020, findings did not dispose of every issue  
18 raised in the post-conviction petition. Specifically, the Court of Appeals indicated the  
19 following ineffective assistance of trial counsel claims were not addressed and resolved: 1)  
20 counsel should have objected to consecutive habitual-criminal sentences; 2) counsel should  
21 have objected to use of Keller's prior felonies; 3) counsel should have impeached Officer  
22 Lopez with prior inconsistent statements; 4) counsel should have filed a motion to dismiss the  
23 case and requested an evidentiary hearing; 5) counsel should have considered the importance

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24 <sup>6</sup>Judge Kephart left the bench in early 2021. The case was reassigned to Department 3, the Honorable  
25 Monica Trujillo. Although the District Court records reflect that the motion was heard on January 27,  
26 2021, the minutes reflect the motion on calendar that day had something to do with appointment of  
27 post-conviction counsel, not the motion for transcripts. The Order entered on March 9, 2021, simply  
28 reflects the motion that was heard on January 27, 2021, was denied. At any rate, the record reflects  
the Nevada Supreme Court and Nevada Court of Appeals had the transcript of the October 1, 2021,  
evidentiary hearing.

1 of "owe sheets" as evidence; and 6) counsel improperly advised Petitioner that he would lose  
2 his right to appeal if he plead guilty.

3 In addition, the Court of Appeals determined that the following claims of ineffective  
4 assistance of appellate counsel were not addressed: 1) alleged illegality of consecutive  
5 habitual-criminal sentences; 2) whether the search of Petitioner's vehicle violated the 4<sup>th</sup>  
6 Amendment; 3) whether the three hour delay between the time of the initial stop and the  
7 obtaining of a warrant to search Petitioner's vehicle rendered the vehicle stop invalid; 4)  
8 whether the case was subject to dismissal for failure of the police to preserve body camera  
9 footage; 5) whether the district court erred by not excluding all or a part of Officer Lopez'  
10 testimony; and 6) whether the district court erred by denying a continuance to allow Petitioner  
11 to retain new counsel.

12 The matter was remanded for the district court to address these issues. On remand,  
13 Petitioner filed two motions to have the matter calendared so the district court could decide  
14 the remaining issues. The matter first appeared on calendar on December 20, 2021. Upon  
15 review of the file, Senior Judge Becker concluded that as Judge Kephart was no longer  
16 available to make additional findings, the successor judge was required to review the entire  
17 record to address the unresolved issues. Given the extensive nature of the record, Senior Judge  
18 Becker took the matter under advisement on December 29, 2021. Having completed the  
19 review of the record, these Amended Findings are issued.<sup>7</sup>  
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21  
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23  
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25 <sup>7</sup> As it is impossible to consider the issues specified by the Court of Appeals and simply incorporate  
26 Judge Kephart's prior findings, to avoid confusion, Senior Judge Becker reviewed all of Petitioner's  
27 claims and made an independent determination on each issue. Where both Judge Becker and Judge  
28 Kephart addressed an issue, this is reflected by footnote in these findings.

## **STATEMENT OF FACTS<sup>8</sup>**

On January 28, 2016, at approximately 2:25 a.m., Officer D. Lopez P#9806 of the Las Vegas Metropolitan Police Department (hereinafter “LVMPD”) was approaching the intersection of Sunrise and Lamb. There is a stop sign at the intersection for traffic on Sunrise. He observed a 2002 silver Dodge Stratus make a left turn from Sunrise onto Lamb at a speed greater than that one would normally expect if a person obeyed the stop sign, but as he did not have a clear view, he could not determine whether the vehicle stopped.<sup>9</sup>

The vehicle did not turn into a travel lane. Instead, it immediately entered the double-yellow center lane reserved for vehicles making turns off Lamb into driveways or other streets. The vehicle was now traveling towards Officer Lopez’ marked police vehicle. Officer Lopez estimated the vehicle traveled over 300 feet in the double-yellow left-hand turn lane. As the vehicle approached, it made a U-turn and appeared to speed up. Officer Lopez noticed the vehicle had a broken taillight. As Officer Lopez was running a records check on the vehicle, it made an abrupt right turn into the Crossroad III residential complex. Officer Lopez believed the vehicle was trying to put distance between it and the patrol car.

The Dodge Stratus drove through the parking lot, hitting some speed bumps and parked in a space outside a building. At some point, as the vehicle approached or was in the parking space, Officer Lopez activated his lights.<sup>10</sup> The Petitioner jumped out of the driver’s seat, leaving the driver’s door open and moved back towards the trunk of the vehicle. At this point, Officer Lopez’ vehicle was behind the Dodge. Officer Lopez ordered Petitioner to walk to the

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<sup>8</sup> The Statement of Facts is taken from the preliminary hearing transcripts as well as the trial testimony. Where testimony of a witness between the two hearings might arguably be inconsistent, this has been identified since it relates to Petitioner’s claims regarding failure to properly impeach an officer with alleged prior inconsistent statements. The record does not contain a suppression hearing transcript – apparently it was never transcribed.

<sup>9</sup> The information concerning the vehicle speed vis-a-vis the stop sign was not stated at the preliminary hearing but was made at trial.

<sup>10</sup> Officer Lopez’ testimony was not consistent about whether he activated only his lights or his lights and siren. The testimony regarding the speed bumps was not presented at the preliminary hearing.

1 front of the patrol car and the Petitioner complied.

2 At this point, Officer Lopez testified he smelled a cannabis/marijuana odor coming  
3 from Petitioner's person as well as from the inside of the Dodge vehicle. Officer Lopez notified  
4 dispatch that he had initiated a traffic stop and asked for backup.

5 Based upon Petitioner's demeanor, driving, abrupt exit from the vehicle and loose-  
6 fitting clothes, Officer Lopez handcuffed Petitioner. Officer Lopez indicated this was partially  
7 for officer safety and partially to prevent Petitioner from fleeing. Officer Lopez then  
8 performed a *Terry* weapons pat down. Officer Lopez asked for identification and Petitioner  
9 indicated it was in his wallet. Officer Lopez felt a wallet-sized object during the pat down and  
10 Petitioner indicated his wallet with his ID was in a pants pocket. Officer Lopez requested  
11 permission to remove the wallet and Petitioner consented.<sup>11</sup> Officer Lopez removed  
12 Petitioner's wallet from his pocket to retrieve Petitioner's identification. As Officer Lopez  
13 removed the wallet, a wad of cash next to the wallet also came out. The cash was right outside  
14 of Petitioner's wallet and consisted of multiple denominations.

15 There were sixty-eight (68) \$20 bills separated in groups of five (5) bills (\$100) and  
16 folded in alternating directions. The remaining bills were \$5 and \$10 bills. The cash total  
17 amount equaled \$2,187.00. Based upon his training and experience regarding narcotic sales,  
18 given the denominations of the cash, the way the cash was specifically folded, the fact that  
19 \$20 bills were folded in increments of \$100, the direction the bills were facing, and amount of  
20 money, Officer Lopez concluded the cash wad was consistent with the sale of narcotics.

21 At about the same time the pat down and wallet retrieval occurred, Officer Henry  
22 arrived on the scene. As Officer Henry approached, approximately five (5) shots were fired  
23 within the apartment complex. Officer Lopez placed the handcuffed Petitioner into a patrol  
24 vehicle. This was done for Petitioner's safety, to prevent Petitioner from leaving in the  
25 confusion, and to allow Officers Lopez and Henry to address issues stemming from the shots  
26 fired.

27 While Officer Henry moved around the building to the location where it appeared the  
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<sup>11</sup> In post-conviction proceedings, Petitioner now asserts he did not give consent.

1 shots were fired, Officer Lopez took a position by Petitioner's driver's door. He reported the  
2 shots and requested additional backup. Other patrol cars arrived as well as a police helicopter.  
3 Officer Lopez was directing some of the search efforts via radio. At this point, Officer Lopez  
4 indicated he was positioned such that he had the driver's side floorboard in plain view. He  
5 noticed green leafy particles on the floorboard.

6 Once the shooting investigation was under control, Officer Lopez determined he had  
7 probable cause to search the Dodge for narcotics. Officer Lopez based this upon the odor of  
8 marijuana emanating from Petitioner and the vehicle, the green leafy residue in plain view,  
9 Petitioner's abrupt exit from the vehicle and the cash wad.

10 Officer Henry and Officer Lopez conducted the probable cause search. During the  
11 probable cause search, the officers located a clear sealable plastic bag containing multiple  
12 smaller clear plastic bags underneath the driver's seat as well as a large plastic bag between  
13 the driver's seat and the center console. At that point, based on the size of the bags found in  
14 Petitioner car, as well as the amount of cash found on Petitioner and the other factors, Officer  
15 Lopez requested the assistance of a K-9 narcotics dog.

16 When the K-9 narcotics dog arrived, it alerted to the glove box. Officer Henry, who  
17 had returned from looking for the shooter, opened the glove box. A side panel was loose and  
18 when he touched it, he discovered it was a false cover. A hole was revealed.<sup>12</sup> Officer Lopez  
19 put his hand inside the hole and could feel a bag with something solid inside. He believed the  
20 object was a gun.

21 Officer Lopez then stopped his probable cause search and obtained a telephonic search  
22 warrant. Pursuant to the search warrant, Officer Lopez located several additional items of  
23 evidence.

24 Officer Lopez, Officer Henry, and Crime Scene Analyst Stephanie Thi searched the  
25 remainder of the vehicle. In the secret compartment, they found a black mesh bag, within  
26 which they found two gold colored plastic bags. One of the gold bags contained a nylon

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27 <sup>12</sup> Officer Lopez' testimony differed from Officer Henry's in that Officer Lopez indicated he opened  
28 the glove box, and the hole was immediately noticeable.

1 drawstring bag which contained a loaded Beretta model 950, .22 caliber handgun. Moreover,  
2 Officer Lopez also found several packages of a white crystal substance, plastic wrappers with  
3 a brown substance, and a plastic bag with an off-white powdery substance. Officer Lopez  
4 believed these substances, based on his training and experience, to be various controlled  
5 substances. ODV tests were done and tested positive for cocaine, heroin, and  
6 methamphetamine.

7 Forensic Scientist Jason Althnether tested the substances and determined that the white  
8 crystal substance was methamphetamine with a net weight of 344.29 grams, that the brown  
9 substance was indeed heroin with a net weight of 33.92 grams, and that the white powdery  
10 substance was indeed cocaine with a weight of 0.537 grams. Officer Lopez testified he also  
11 found a blue powdery substance in the secret compartment. Mr. Althnether tested the  
12 substance and determined it was a combination of methamphetamine, amphetamine, and  
13 cocaine with a weight of 0.795 grams.

14 During the car search, an unknown woman approached Officer Henry and indicated  
15 she left her purse in the car and asked if she could retrieve it. She was asked to describe the  
16 purse, including color. She gave a vague response. She was told she could not look in the car,  
17 but Officer Henry searched for a purse in the car and did not locate one.<sup>13</sup>

18 Information was obtained from the Nevada Department of Motor Vehicles  
19 ("NDMOV") that the Dodge was registered to the Petitioner at 265 North Lamb, Unit F and  
20 this was the address on his driver's license.<sup>14</sup> The stop occurred outside Unit F.<sup>15</sup>

21 Based on what was discovered in the car and the information obtained from NDMV,  
22 Officer Lopez obtained a search warrant for Petitioner's house located at 265 North Lamb,

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23 <sup>13</sup> Several times in the Petition, Petitioner asserts the drugs found in the car were all in a purse and  
24 suggests it was the woman's purse. This is belied by the record. There was no purse in the car and the  
25 testimony established the drugs were found in mesh and colored bags, not a purse.

26 <sup>14</sup> Evidence was presented that NDMV also had the car registered at a different address.

27 <sup>15</sup> Testimony indicated the building nearest to the parking space where the Dodge stopped was Unit F  
28 although it was mismarked with the wrong letter.

1 Unit F. Officer Lopez, Officer Steven Hough, Detective Chad Embry, and Detective Michael  
2 Belmont searched Petitioner's residence, a one-bedroom condominium.

3 While searching the bedroom, Officer Lopez found used smoking pipes, four (4) scales,  
4 a box of 9mm ammunition, and two (2) bags containing a white crystalline substance. This  
5 substance was later tested by Mr. Althnether, who determined the substance was  
6 methamphetamine. The first bag weighed 3.818 grams and the second bag weighed 2.357  
7 grams. Officer Lopez also found in the bedroom a brown substance he believed was heroin.  
8 Upon testing, Mr. Althnether confirmed the substance was heroin, weighing .895 grams. In  
9 the storage closet, Detective Embry found a .22 short ammunition. Also in the bedroom, police  
10 discovered a Ruger 9mm handgun and a pay stub with Petitioner's name on it.<sup>16</sup>

11 Upon searching the kitchen, Detective Belmont found a glass jar containing a green  
12 leafy substance believed to be marijuana, which was confirmed as such by Mr. Althnether,  
13 finding the marijuana to weigh 175 grams. Officers also found balloons, clean pipes, syringes,  
14 and elastic bands in Petitioner's residence.

15 In the bathroom officers discovered a hole cut through the wall that would allow a  
16 person to exit Petitioner's residence and enter the vacate condo that adjoined Petitioner's  
17 condo.

18 During trial, the State introduced a jail call wherein Petitioner told a woman to move  
19 into his house and make it her home.

20 After Petitioner was placed under arrest and brought to Northeast Area Command,  
21 Officer Quintero, who was watching Petitioner in an interview room on a monitor, observed  
22 Petitioner pull a small baggie from inside his pants. She notified Officer Hough. By the time  
23 he and another officer arrived in the room, Petitioner had a white powdery substance on his

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24 <sup>16</sup>Petitioner's counsel, through cross-examination and photographs of various areas in the residence  
25 established that there were male and female clothing and/or personal items in the residence. Officers'  
26 testimony differed. Some indicated there was no female items, others said they didn't pay attention  
27 to clothes or that there may have been some female clothing. Pictures established there were female  
28 items. Part of the defense involved arguing that Petitioner was not the only person who occupied the  
residence and therefore the State did not establish he had actual or constructive notice and possession  
of the drugs or firearms.

1 nose and mouth. Upon searching Petitioner, Officer Hough found another small bag of white  
2 powder attached to the left side of Petitioner's scrotum.

3 Petitioner called one witness, Officer Henry. Petitioner did not testify.<sup>17</sup>

### 4 ANALYSIS

5  
6 The law on post-conviction relief is governed by statute and case law in Nevada.  
7 Pursuant to NRS 34.810:

8 1. The court shall dismiss a petition if the court determines that:

9 ...

10 (b) The petitioner's conviction was the result of a trial and the grounds for the  
petition could have been:

11 (1) Presented to the trial court;

12 (2) Raised in a direct appeal or a prior petition for a writ of habeas  
corpus or postconviction relief; or

13 (3) Raised in any other proceeding that the petitioner has taken to  
secure relief from the petitioner's conviction and sentence, unless the court finds  
14 both good cause for the failure to present the grounds and actual prejudice to the  
15 petitioner.

16 ...

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and  
proving specific facts that demonstrate:

17 (a) Good cause for the petitioner's failure to present the claim or for  
18 presenting the claim again; and

19 (b) Actual prejudice to the petitioner.

20 The Nevada Supreme Court has held that that claims that are appropriate for a direct  
21 appeal must be pursued on direct appeal or they will be considered waived in subsequent  
22 proceedings. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (disapproved  
23 on other grounds by Thomas v. State, 115 Nev. 148, 115 Nev. 148, 979 P.2d 222 (1999)). "A

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24  
25 <sup>17</sup> Because Petitioner believed his family were hiring private counsel to represent him, he chose not to  
26 reveal witness information to Mr. Frizzell until his motion to continue was denied on the first day of  
27 trial. Judge Kephart, over the State's objection, indicated the unnoticed witnesses would be allowed  
28 to testify and gave some additional time during trial to try to get witnesses to the courthouse. However,  
either witnesses did not appear, or after interviewing them, they were not called because their  
testimony would not have helped the defense.

1 court must dismiss a habeas petition if it presents claims that either were or could have been  
2 presented in an earlier proceeding, unless the court finds both cause for failing to present the  
3 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,  
4 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a defendant does not show good cause  
5 for failure to raise claims of error upon direct appeal, the district court is not obliged to consider  
6 them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

7 “To establish good cause, [a petitioner] must show that an impediment external to the  
8 defense prevented their compliance with the applicable procedural rule. A qualifying  
9 impediment might be shown where the factual or legal basis for a claim was not reasonably  
10 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).  
11 Examples of good cause also include interference by State officials and the previous  
12 unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 275 P.3d 91  
13 (2012). Ineffective assistance of trial or appellate counsel may also constitute good cause.

14 In order to establish prejudice, the defendant must show “not merely that the errors of  
15 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
16 substantial disadvantage, in affecting the state proceedings with error of constitutional  
17 dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting  
18 United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause  
19 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119  
20 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d  
21 1229, 1230 (1989)).

22 In addition, a proper petition for post-conviction relief must set forth specific factual  
23 allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part,  
24 that a defendant must allege specific facts supporting the claims in a petition seeking relief  
25 from any conviction or sentence. Failure to raise specific facts and reliance on vague  
26 allegations or generalized statements may cause a petition to be dismissed. “Bare” and  
27 “naked” allegations are not sufficient to warrant post-conviction relief, nor are those belied  
28 and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).  
“A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at

the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

**I. PETITIONER WAIVED HIS SUBSTANTIVE GROUNDS ONE (1) THROUGH SEVEN (7) AND THEIR SUBPARTS BY FAILING TO RAISE THEM ON DIRECT APPEAL**

Petitioner raises several substantive challenges to his convictions and sentences in Grounds 1-7.<sup>18</sup> However, several of the grounds allege distinct sub issues. Specifically, Petitioner asserts: 1) it was illegal to run his habitual criminal sentence on Court 8 consecutive with his drug trafficking sentence on Count 9; 2) he was entitled to a jury trial on the fact of his habitual criminal status; 3) at least two of his prior convictions arose out of the same factual incident and, therefore, should only count as one conviction for purposes of the habitual statute; 4) the State failed to file an Amended Information charging him with being an habitual criminal; 5) the trial court erred in failing to exclude Officer Lopez’ testimony regarding the reliability of the K-9 dog and denying him the opportunity to cross-examine the K-9 officer directly; 6) the car search did not meet the grounds for an exigency and items as well as testimony about recovered items should have been suppressed; 7) the trial court erred in not suppressing the car search evidence for violations of NRS 173.123(4) and NRS 171.1771; 8) the trial court should have suppressed the car search evidence because it did not derive from a search incident to arrest; 9) the officer lacked probable cause for the traffic stop; 10) the officer lacked probable cause to continue the stop and call in a K-9 unit; 11) the officer’s reasons for the traffic stop were pretextual; 12) the car search went beyond even a permissible search incident to an arrest because Petitioner had no access to his car once he was handcuffed; 13) the trial court erred in failing to suppress the evidence seized in the search of the house for

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<sup>18</sup> Petitioner did not testify at the suppression hearing, the trial or at the post-conviction hearing. He includes in his petition several factual statements disputing what happened or making factual assumptions not supported by the record. Nevertheless, Judge Kephart, based upon his rulings, listened to the written and oral assertions during the post-conviction proceedings and rejected them as grounds for relief. Senior Judge Becker considered Petitioner’s testimonial statements only in the context that even if he had testified in the suppression or trial, there is no reasonable probability of a different result. Petitioner would have been subject to impeachment with his multiple felony convictions and his credibility severely questioned had he testified at any proceeding.

1 lack of probable cause in the warrant; 14) the officer could not have smelled a marijuana order  
2 because there was no evidence in the car that marijuana had been smoked and another officer  
3 didn't smell anything, therefore, the car search was based on false information; 15) Petitioner  
4 did not give the officer permission to retrieve his wallet to look at his ID; 16) there was no  
5 basis for a pat down and without the pat down, the officer had no basis for removing  
6 Petitioner's wallet from his pants thus revealing the cash wad; 17) Petitioner requested a  
7 lawyer moments into the encounter and all further activity after that was illegal; 18) the State  
8 never prosecuted the alleged underlying vehicle traffic offense so anything observed or found  
9 was seized illegally; 19) Petitioner was denied due process because the State lost or destroyed  
10 evidence, i.e. body camera footage which would have supported his suppression motion; 20)  
11 Officer Lopez' testimony was false as demonstrated by changes in testimony from reports to  
12 the suppression hearing to the trial and the State knew this; 21) the trial court erred in  
13 permitting inconclusive DNA to be admitted; and 21) the State improperly argued that as the  
14 DNA analyzed from the firearms was from a male individual, it showed Petitioner was that of  
a man.<sup>19</sup>

15 As to issues 1-4, 8, 12, 18, 20-22, these arguments were not raised at trial or appeal and  
16 are barred by NRS 34.810(1)(b)(1) and (2). Issue number 13 was raised on direct appeal and  
17 rejected by the Nevada Supreme Court. It too is barred. Issues 15 and 17 are not supported  
18 by evidence in the record – they were therefore not raised at trial or direct appeal. Issues 5-7,  
19 10, 11, 14, 16, and 19 were raised at some point before the trial court but not raised on appeal.

20 Petitioner does not argue good cause or prejudice to overcome these procedural bars.  
21 Indeed, this Court finds that Petitioner could not successfully do so, as all the facts and  
22 information needed to raise these issues were available at the time Petitioner filed his direct  
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24 <sup>19</sup> At various points in the Petition, it is asserted that the parking space where the vehicle was parked  
25 constituted curtilage, therefore a search warrant was necessary and exigent vehicle stop law does not  
26 apply. As the space was not attached to the building and is, at most, simply an assigned space in a  
27 common parking lot, it is not curtilage. As a substantive claim it is barred. To the extent it was  
28 intended to be a claim of ineffective assistance of trial or appellate counsel, it is denied. Counsel is  
not ineffective for failing to make futile arguments.

1 appeal, and Petitioner does not allege that there was any external impediment to his raising of  
2 these issues at that time.

3 The Court addresses the issues as well in its analysis of ineffective assistance of trial  
4 and appellate counsel below. Because the Court finds no ineffective assistance of trial or  
5 appellate counsel, there is no good cause for failure to raise the substantive claims at an earlier  
6 proceeding and they are waived and barred.<sup>20</sup>

## 7 **II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS**

8 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
9 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of  
10 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063 64. See also Love, 109 Nev. at 1138, 865  
11 P.2d at 323. Under the Strickland standard, a defendant must show representation fell below  
12 an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable  
13 probability that the result of the proceedings would have been different. 466 U.S. at 687 88,  
14 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683  
15 P.2d 504, 505 (1984) (adopting the Strickland two-part test). A court is not required to address  
16 both prongs once it determines that petitioner failed to satisfy one of the two components.  
17 Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

18 A court begins with the presumption of effectiveness and then must determine whether  
19 the defendant has demonstrated by a preponderance of the evidence that counsel was  
20 ineffective. Means v. State, 537 P.2d 473, 474 (1975). “Effective counsel does not mean  
21 errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of competence  
22 demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d  
23 473, 474 (1975).

24 Counsel is not ineffective for failing to make futile objections or arguments. See Ennis

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25 <sup>20</sup> Judge Kephart reached the same conclusion on the seven main issues: 1) illegal sentence; 2) failure  
26 to present K-9 Officer testimony; 3) the exigent circumstances doctrine did not apply to the vehicle  
27 search; 4) the police lacked probable cause to search the vehicle; 5) the stop violated NRS 171.123;  
28 6) lost body camera footage; 7) Officer Lopez presented false testimony. However, Judge Kephart’s  
ruling did not analyze most of the sub-issues.

1 v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the “immediate  
2 and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call,  
3 and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
4 (2002).

5 Based on the above law, the role of a court in considering allegations of ineffective  
6 assistance of counsel “is not to pass upon the merits of the action not taken but to determine  
7 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
8 reasonably effect assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
9 (1978). This means that the post-conviction court should not second guess reasoned choices  
10 between trial tactics. Nor should defense counsel, to protect himself against allegations of  
11 inadequacy, be required to make every conceivable motion no matter how remote the  
12 possibility of success. Id. To be effective, the Constitution “does not require that counsel do  
13 what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot  
14 create one and may disserve the interests of his client by attempting a useless charade.” United  
15 States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

16 “There are countless ways to provide effective assistance in any given case. Even the  
17 best criminal defense attorneys would not defend a particular client in the same way.”  
18 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
19 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
20 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
21 P.2d 951, 953 (1989). In essence, the reviewing court must look at the challenged conduct on  
22 the facts at the time counsel made decisions. Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

23 The decision not to call witnesses is within the discretion of trial counsel and will not  
24 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,  
25 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland  
26 does not enact Newton's third law for the presentation of evidence, requiring every prosecution  
27 expert an equal and opposite expert from the defense. In many instances cross-examination  
28 will be sufficient to expose defects in an expert's presentation. When defense counsel does not  
have a solid case, the best strategy can be to say that there is too much doubt about the State’s

theory for a jury to convict. Harrington v. Richter, 131 S. Ct. 770, 791, 578 F.3d. 944 (2011).

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. McNelson 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 also requires a petition to prove 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).

Petitioner claims that trial counsel was ineffective for failing to: 1) make all of the suppression arguments listed in Items 6-9, 11-18 above under barred claims; 2) get a new investigator when Petitioner alleged the investigator was biased against him based on alleged negative comments made about Petitioner's parents;<sup>21</sup> 3) visit him at the jail or communicate with him about his case; 4) subpoena or return calls of unspecified or unnamed witness; 4) subpoena, call or require the state to call the K-9 officer in charge of the drug detecting dog or requesting the K-9 certification records; 5) present evidence of Petitioner's mental health history or medications he was using during the pre-trial process; 6) call witnesses to testify on his behalf at his penalty hearing; 7) make arguments regarding the validity of his prior felony convictions or challenging his habitual criminal sentences as listed in Items 1-4 above under

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<sup>21</sup> The investigator was a retired police officer. Petitioner's mother and stepfather worked for the police department at the same time the investigator was an active police officer, and the investigator knew Petitioner's parents.

1 barred claims; 8) impeach Officer Lopez with prior inconsistent statements; 9) file a motion  
2 to dismiss the case and request an evidentiary hearing presumably based on the lost or  
3 destroyed body camera footage; 10) investigate the "owe sheets" as potential exculpatory  
4 evidence; 11) properly advise Petitioner regarding his right to testify at the suppression  
5 hearing; and 12) properly advise Petitioner regarding the consequences of pleading guilty  
6 (wherein counsel allegedly told Petitioner if he entered a guilty plea he would lose his right to  
7 appeal trial court decisions).

8 The Court finds that these claims fail to establish ineffective assistance of trial counsel  
9 because they are either belied by the record, "bare" or "naked" allegations, or, even if true,  
10 would not create a reasonable probability of a different result.<sup>22</sup>

#### 11 A. Suppression Issues

12 Trial counsel moved to suppress all the evidence recovered from Petitioner's vehicle.  
13 Counsel also argued that without the vehicle evidence, the warrant issued for searching  
14 Petitioner's residence fails and that evidence should be suppressed. Finally, if the arrest was  
15 illegal, then the drugs found on Petitioner's person should be suppressed. Either in writing  
16 through a motion to suppress or during the suppression hearing, trial counsel raised the  
17 following issues: 1) the officer turned an alleged traffic stop into a custodial arrest without  
18 probable cause and in violation of the 4<sup>th</sup> Amendment and NRS 484A.730; 2) the officer placed  
19 Petitioner under arrest at the time he handcuffed him and no probable cause existed to justify  
20 an arrest at that time, and the arrest violated of NRS 171.1771; 3) even if there were grounds  
21 for a traffic stop, Petitioner was detained beyond sixty (60) minutes in violation of NRS

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22 <sup>22</sup> The Court independently reviewed the district court and appellate records. After reviewing the  
23 Petition, the Supplement and the State's Opposition, the pre-trial and trial transcripts, and all the pre-  
24 trial and post-trial motions, but not considering the transcript of the post-conviction evidentiary  
25 hearing testimony, the Court concludes the Petition should be denied without an evidentiary hearing.  
26 An appellant is entitled to an evidentiary hearing if he raises claims supported by factual assertions  
27 that, if true, would entitle him to relief, and those claims are not belied by the record on appeal.  
28 Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984). Here, Petitioner's assertions  
are either belied by the record or, if true, would not entitle him to relief. Where a footnote indicates  
Judge Kephart ruled on an issue, he considered both the record plus the testimony at the evidentiary  
hearing.

1 171.123 without probable cause to arrest; 4) once the vehicle was stopped and Petitioner could  
2 not have driven it away, a search warrant was necessary; and 5) the initial search of the vehicle,  
3 the summoning of a K-9 Unit, and subsequent search during the three (3) hour period were not  
4 justified by exigent circumstances. Trial counsel also pointed out the circumstances of the  
5 traffic stop and pat down were questionable, and there was no prosecution on the alleged traffic  
6 offenses.

7 Trial Counsel did raise Item 6 (exigency), Item 7 (NRS 173.123), Item 9 (validity of  
8 traffic stop), Item 13 (items seized from house based on invalid car search), Item 14 (marijuana  
9 odor and probable cause), Item 16 (*Terry* pat down) and Item 18 (traffic offenses not  
10 prosecuted) in suppression arguments, therefore these ineffective assistance of counsel claims  
11 are belied by the record.

12 Counsel did not argue that the searches were improper because they exceeded a search  
13 incident to arrest (Item 8). However, the State never claimed any of the recovered evidence  
14 was the result of a search incident to arrest. Therefore, counsel is not ineffective for failing to  
15 raise a futile argument and there is no reasonable probability if the argument was raised it  
16 would have made a difference on the suppression issues.

17 Additionally, Counsel did not specifically argue this was a pretextual traffic stop (Item  
18 11). The record clearly supports that the stop was not pretextual. Whether or not the vehicle  
19 actually traveled 300' in the turn lane or the taillight was broken or only appeared to be broken  
20 do not negate the totality of Officer Lopez' observations. He may have been mistaken, but  
21 that is not grounds for arguing the stop was pretextual. Taken as a whole, his observations  
22 were sufficient that there is no reasonable probability such an argument would have resulted  
23 in the suppression of the evidence.

24 The allegations that Petitioner asked for a lawyer immediately and did not give Officer  
25 Lopez permission to get his wallet from his pocket are bare allegations not supported by the  
26 record. However, even if Petitioner had testified at the suppression hearing and asserted these  
27 allegations, there is no reasonable probability of a different result. A request for a lawyer only  
28 suppresses statements resulting from an interrogation. Asking for identification after a traffic  
stop is not an interrogation. Moreover, the trial court is unlikely to have found Petitioner's

1 testimony regarding the wallet credible considering his prior felony convictions.

2 Thus, Petitioner's ineffective assistance of counsel claims relating to suppression of  
3 evidence fail.<sup>23</sup>

4 **B. Investigator, Jail Visits and Motions Requesting New Counsel**

5 Petitioner filed multiple motions requesting trial counsel be replaced. The Judge  
6 Kephart granted the first motion and replaced appointed attorney Michael Sanft, Esq. with  
7 appointed attorney Kenneth Frizzell, Esq. Mr. Sanft, in pleadings, indicated he had a conflict  
8 of interest, so the Judge Kephart granted the withdrawal request. The subsequent motions  
9 involved Mr. Frizzell.

10 Counsel is expected to conduct legal and factual investigations when developing a  
11 defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at  
12 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d  
13 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make  
14 a reasonable decision that makes particular investigations unnecessary.'" State v. Love, 109  
15 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at  
16 2066). A defendant who contends his attorney was ineffective because he did not adequately  
17 investigate must show how a better investigation would have rendered a more favorable  
18 outcome. Molina, 120 Nev. at 192, 87 P.3d at 538.

19 Petitioner's primary arguments during the trial proceedings was that Mr. Frizzell hired  
20 the same investigator that Mr. Sanft was using, and that Mr. Frizzell did not file every motion  
21 or raise every issue Petitioner wanted done.

22 As to the investigator issue, Petitioner claimed the investigator made derogatory  
23 remarks to Petitioner about Petitioner's mother. Mr. Frizzell, at a hearing during the trial stage  
24 proceedings, represented that the investigator denied making such remarks and that the

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26 <sup>23</sup> Judge Kephart did not specifically address any of the issues. He found trial counsel filed a  
27 suppression motion and raised many of the issues, so those claims were belied by the record. As to  
28 any issue not raised in the suppression motion and evidentiary hearing, Judge Kephart concluded  
Petitioner failed to show how the result would differ in the omitted issues had been raised.

1 investigator, while employed by LVMPD, worked with Petitioner's mother and stepfather and  
2 respected both. Mr. Frizzell also indicated that he did not frequently converse with Petitioner  
3 because every time he or the investigator tried to visit or talk to Petitioner, Petitioner refused  
4 to cooperate with them. Petitioner simply kept stating that his family was going to retain  
5 private counsel and he would talk to that counsel. Petitioner confirmed this in numerous  
6 statements made during the trial state proceedings. Indeed, it was not until the trial began that  
7 Petitioner gave witness information to trial counsel.<sup>24</sup>

8 During the various trial stage proceedings when this issue was raised, Mr. Frizzell  
9 indicated the investigator was a former police officer, had been used by defense counsel that  
10 Mr. Frizzell knew and respected. He did not believe the investigator was biased against  
11 Petitioner and this was simply one of many areas where Petitioner refused to cooperate with  
12 counsel unless counsel did exactly as Petitioner asked.

13 The trial record reflects when Petitioner finally provided information on potential  
14 witnesses, Mr. Frizzell and the investigator tried to locate them. They successfully located  
15 some and could not locate others because Petitioner provided insufficient information.

16 Finally, the Nevada Supreme Court discussed the relationship between Petitioner and  
17 Mr. Frizzell in its Order of Affirmance. The Supreme Court concluded that the District Court  
18 properly handled the Motions to Dismiss counsel and did not err in finding a lack of actual  
19 conflict or denying Petitioner's requests for new counsel.

20 The Court finds these claims fail to demonstrate ineffective assistance of trial counsel.  
21 First, these claims are belied by the record. Second, Petitioner does not indicate names,  
22 specific information of witnesses that should have been called, the nature of their testimony  
23 or what else the investigator should have done. Petitioner simply asserts that there was some  
24 witness who could have testified someone besides Petitioner was living at the residence at the  
25 time of the search. Third, Petitioner failed to demonstrate how trial counsel fell below a

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26 <sup>24</sup> Petitioner was also dissatisfied with his counsel for not making every motion and every argument,  
27 especially as to suppression of evidence, that Petitioner wanted raised. These arguments are included  
28 in other aspects of his post-conviction petition and are not addressed again in this section.

1 reasonable standard for not using another investigator simply because Petitioner did not like  
2 this investigator. A defendant is not entitled to a particular “relationship” with an attorney. By  
3 extension, that also applies to the investigator. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct.  
4 1610, 1617 (1983). Therefore, this Court concludes that the choice of investigator was a  
5 reasonable decision to make and does not amount to deficient representation under Strickland.  
6 Further, this Court finds that Petitioner fails to demonstrate how the employment of a different  
7 investigator would have resulted in a different outcome.

8 Fourth, there is no requirement for any specific amount of communication if counsel is  
9 reasonably effective in his representation. See id. Further, this Court finds that Petitioner fails  
10 to demonstrate how more jail visits would have changed the outcome at trial.

11 Therefore, this claim is denied.<sup>25</sup>

### 12 C. Failure to Call Witnesses

13 Petitioner asserts that trial counsel was ineffective for failing to call witnesses. Counsel  
14 is not ineffective for deciding not to call a witness because, after interviewing them, it was  
15 determined their testimony would not aid in the defense or for other strategic reasons. See  
16 Love, 109 Nev. at 1145, 865 P.2d at 328.

17 The Petition fails to state what witness and the nature of the testimony that witness  
18 would have provided. In general, Petitioner claims that trial counsel was ineffective for failing  
19 to subpoena or return calls of unnamed witnesses to testify that a female resided in the  
20 townhouse he owned and switched vehicles with him. Therefore, a strong probability exists  
21 that the drugs in the house or car belonged to someone else.

22 The record reflects that Petitioner waited until the trial date to supply witness  
23 information to trial counsel. For at least one witness, Petitioner’s information was insufficient  
24 to locate that person.<sup>26</sup> Another witness and Petitioner’s mother were interviewed, but neither

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25 <sup>25</sup> Judge Kephart came to the same conclusion, but also relied on evidence at the evidentiary hearing  
26 to reach that conclusion.

27 <sup>26</sup> Petitioner had the name of a woman who was arrested after Petitioner was arrested and who would  
28 allegedly testify that she stayed at Petitioner’s house and used his car.

1 could testify of personal knowledge that someone else was living with Petitioner as the time  
2 he was arrested. A third witness who would have corroborated that the searched residence  
3 contained women's clothing and other items likely to belong to a woman was scheduled to  
4 testify. However, she did not appear at the time she indicated she would be present. Trial  
5 Counsel also convinced Judge Kephart to allow Petitioner to call Officer Henry to testify in  
6 the defense case-in-chief – something Petitioner desired to show the differences between  
7 Officer Henry's memory of events and Officer Lopez'.

8 The trial record also reflects Petitioner wanted to call witnesses to testify about  
9 Petitioner's character. Mr. Frizzell indicated he would not recommend that as it would allow  
10 the State to use Petitioner's prior felony convictions during cross-examination of those  
11 witnesses. The character witnesses were not called for strategic reasons.

12 Trial counsel talked with located witnesses and had one witness ready to testify. As  
13 noted above, other witnesses had no personal knowledge about who was in the townhouse or  
14 used Petitioner's vehicle. So, they were not called. Moreover, trial counsel, over the State's  
15 objection, convinced Judge Kephart to allow Petitioner to call witnesses who had not been  
16 properly noticed.

17 THE COURT: Okay. Notwithstanding the fact that the State was not put on notice of  
18 these witnesses, I'm going to allow you to call her if you choose to. But you need to  
19 make her available to the State to give them an opportunity to question her to see what,  
20 if anything, she's going to be offering.

21 MR. FRIZZELL: And that is fine, Your Honor. I actually just learned of her potential  
22 as a witness yesterday evening from an e-mail, which I received.

23 THE COURT: Okay. So –

24 MR. FRIZZELL: And --

25 THE COURT: -- she wasn't even somebody that defendant was telling you previously  
26 that we discussed before we started the trial?

27 MR. FRIZZELL: No, Your Honor.

28 A review of the record demonstrates that trial counsel had one witness waiting to testify.  
This witness, a woman named Mary Silva, cleaned Petitioner's residence a few times,  
allegedly before the house search occurred. She would have testified that when she cleaned,

1 she saw female items in the condo and that a female hired her.

2 From the trial record, Ms. Silva apparently got tired of waiting and left. This discussion  
3 appears in the record of the fourth day of the trial:

4 MR. FRIZZELL: -- what happened here. While you were probably walking down the  
5 hallway to come in, I was on the phone with the witness that you said you would allow  
6 to testify, Mary Silva, who was on the road ostensibly heading home, she told me. I  
7 asked her -- I said, we're ready and it's now time and the judge isn't going to wait. How  
8 long was it going to take you to get back? And she said she could be back here by 3:00  
o'clock, when I told her it was 1:55.

9 The record then reflects that, although Judge Kephart delayed the proceedings for her to return,  
10 Ms. Silva never appeared.

11 Finally, even if some unknown and unnamed woman had been located and came  
12 forward to testify that she lived at the condo and used Petitioner's car, there is no reasonable  
13 probability of a different result at trial. The residence and car were owned by Petitioner. The  
14 location of the drugs in the car, behind concealed panels, belie they were put there by an  
15 occasional user of the car. The location and amount of the drugs and the gun in the residence,  
16 together with Petitioner's paystub found in the home, were sufficient for a jury to conclude,  
17 beyond a reasonable doubt, that the items were Petitioner's or that he knew they were there  
18 and had access to them. There was more male clothing in the residence than female. At most,  
19 the testimony would most likely lead to the conclusion Petitioner had a partner in crime, not  
20 reasonable doubt on his innocence.

21 Thus, this claim is partially belied by the record, it is a bare and vague allegation and,  
22 even had such a witness testified, there is no reasonable probability of a different result at trial.  
23 Therefore, this claim is denied.<sup>27</sup>

24  
25  
26  
27 <sup>27</sup> Judge Kephart found reached the same result, but based part of his ruling on the evidentiary hearing  
28 testimony, rather than just the trial record.

1                   **D.       K-9 Evidence Issues**

2           Petitioner alleges that trial counsel was ineffective for failing to establish through cross-  
3 examination that the front passenger door was closed when officers first encountered him, and  
4 they opened the door to allow the K-9 dog access to the interior of the vehicle. In addition,  
5 Petitioner asserts trial counsel should have subpoenaed the dog's certification records and  
6 called the K-9 officer in charge of the dog to testify about its qualifications.

7           Trial counsel did object to other officers' asserting the K-9 dog was certified to detect  
8 drugs. However, the objection was overruled.

9           Petitioner failed to present any evidence on how these actions would have changed the  
10 outcome of the case. There is no evidence the dog was not qualified. Petitioner merely asserts  
11 that because direct evidence of the dog's qualifications was not presented, it was error to use  
12 the dog's reactions to be the basis for additional searches. Moreover, Officer Lopez' testimony  
13 regarding his belief as to the dog's reliability would still have been admissible on the issues  
14 of his probable cause determination and good faith reliance on the two formal warrants. There  
15 is no reasonable probability that such evidence would alter the outcome of the trial. Therefore,  
16 this claim is denied.<sup>28</sup>

17                   **E.       Mental Health Allegations**

18           Petitioner alleges he was taking medications during the pre-trial phase of the  
19 proceedings. Petitioner supported this claim with vague statements he was on medication, but  
20 does not give specifics about what medication, at what time, what effect such medication  
21 would have on his mental state or other information on how the result of the proceeding would  
22 change if that information was presented. Nothing in the record suggests Petitioner was  
23 unable, as opposed to unwilling, to assist counsel. In fact, the record belies this claim as  
24 Petitioner wrote numerous requests and filed many pro per documents suggesting he was well  
25 aware of the proceedings. This is a bare and naked allegation.

26           Therefore, this claim is denied.<sup>29</sup>

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27 <sup>28</sup> Judge Kephart did not address this claim.

28 <sup>29</sup> Judge Kephart agreed that Petitioner failed to indicate, either in the Petition or the evidentiary

1                                   **F.      Call Witnesses at Penalty Hearing**

2           Petitioner claims trial counsel should have presented live witness testimony at his  
3 sentencing. Petitioner fails to state specifics on names of witnesses and the nature of their  
4 testimony. The record reflects that several letters from community members and family were  
5 submitted to the Judge prior to sentencing.

6           First, Petitioner did not have a penalty hearing as that term is normally understood.  
7 Defendants have no right to call witnesses during sentencing hearings unless they are  
8 convicted of First-Degree Murder. NRS 176.015; NRS 175.552. This was a normal judicial  
9 sentencing proceeding, not a murder case.

10          Second, while a judge can permit live testimony, a judge is not required to, and such  
11 requests are not normally granted. There is no reasonable probability that Judge Kephart  
12 would grant such a request. Moreover, as Judge Kephart already had a number of written  
13 statements requesting leniency, there is no reasonable probability that live testimony would have  
14 produced a different sentencing result, especially considering Petitioner's prior criminal  
15 record and the amount of narcotics involved.

16          Therefore, this Court finds that counsel cannot be deemed ineffective for failing to call  
17 family and witnesses to speak on his behalf at his sentencing. This claim is denied.<sup>30</sup>

18                                   **G.      Habitual Criminal Sentence Challenges**

19          Petitioner alleges trial counsel should have: 1) contested the underlying felonies  
20 supporting the habitual offender finding; 2) that the habitual criminal finding was required to  
21 be made by the jury; 3) that two of the felonies arose out of the same factual background; 4)  
22 that the State failed to amend the information to add habitual criminal charges; and 5) that his

23 \_\_\_\_\_  
24 hearing, the nature of his mental illness, provide any support for his statements other than identifying  
25 he was taking certain medications or state he was confused during the pre-trial process. Judge Kephart  
26 concluded these were naked allegations. Judge Kephart also concluded, based on the record of pre-  
27 trial and trial proceedings that nothing indicated Petitioner was incompetent. Judge Kephart also relied  
28 on Mr. Frizzell's testimony. Judge Kephart denied this claim for those reasons and that Petitioner did  
not demonstrate how this information would change the outcome.

<sup>30</sup> Judge Kephart addressed and denied this claim for the same reasons.

1 habitual criminal sentence could not be run consecutively.

2 Other than asserting that two of the felony convictions arise from the same fact pattern,  
3 Petitioner fails to state how any of the felony convictions are constitutionally infirm. The  
4 sentencing record reflects counsel examined the documents supporting the convictions and he  
5 had no basis for contesting them. Petitioner fails to present any evidence of infirmity, so this  
6 is a bare and naked allegation, and is denied.

7 In Nevada, only findings relating to certain murder convictions and sentencing require  
8 findings by a jury. The habitual criminal sentencing statutes are penalty enhancements, not  
9 separate offenses. They are not elements of criminal offenses. While the prior convictions  
10 must be established by the State, a properly authenticated copy of a conviction establishes this  
11 fact. The underlying facts of the criminal offense evidenced by the conviction are not retried,  
12 rather the defense may contest the convictions on legal grounds – a matter for the judge not  
13 the jury. The caselaw cited by Petitioner is distinguishable and does not support his assertions.  
14 Counsel cannot be ineffective for failing to make futile motions or objections. Therefore, this  
claim is denied.

15 Petitioner asserts that the State failed to give proper notice of its intent to seek habitual  
16 criminal enhancement at sentencing. Petitioner bases this claim on the fact that the State did  
17 not amend the charging document to include “habitual criminal charges.” The State is not  
18 required to include notice that it is seeking habitual criminal treatment in the charging  
19 document, though it may do so. It simply must provide adequate notice before sentencing of  
20 this intent. NRS 207.010(2). The State did this in March and July of 2016. Therefore, this  
21 claim is belied by the record and denied.

22 Multiple convictions can arise out of the same factual scenario so long as one crime is  
23 not a lesser included of another offense. Thus, one can be convicted of kidnapping and robbery  
24 arising out of the same convenience store incident. Again, the cases cited do not stand for the  
25 proposition Petitioner asserts. Of course, a defendant can always argue that a judge use  
26 discretion and discount a prior felony arising from the same factual transaction. To the extent  
27 no argument was made in this case, the Court finds there is no reasonable probability if an  
28 argument was made it would have changed Judge Kephart’s mind, given the totality of

1 Petitioner's criminal history and the amount of narcotics involved in this case. Judge Kephart  
2 considered all the sentencing evidence and determined to run most of the sentences together  
3 concurrently, but clearly believed Petitioner needed to spend considerable time in custody  
4 before parole eligibility.

5 Finally, while case law indicates a defendant cannot receive the normal sentence on the  
6 underlying criminal offense and be additionally sentenced as an habitual criminal, nothing  
7 prevents a judge from imposing habitual criminal sentences on separate crimes or from  
8 running a habitual criminal sentence consecutive to other distinct convictions. That is what  
9 happened in this instance. The record belies Petitioner's assertion that his habitual criminal  
10 sentences were to run consecutively.

11 Because Petitioner cites to inapplicable law and the record belies his claims, any  
12 argument counsel could make regarding the habitual criminal sentencing is not supported by  
13 the law and would be futile. Therefore, counsel was not ineffective, and the claim is denied.<sup>31</sup>

#### 14 **H. Failure to Cross-Examine Lopez with Prior Inconsistent Statements**

15 Trial counsel did point out and cross-examine Officer Lopez on differences between  
16 the arrest declaration and his testimony at various pre-trial proceedings. Counsel pointed out  
17 that aspects of the traffic stop, *Terry* frisk, three-hour delay between the stop and vehicle  
18 search warrant and other matters got more detailed from the earlier statements until the trial  
19 testimony. Counsel also noted where testimony from Officer Henry differed from Officer  
20 Lopez. The Petition asserts certain inconsistency and argues this is evidence that Officer  
21 Lopez gave false testimony, and the State encouraged such testimony.

22 This claim is belied by the record and there is no reasonable probability of a different  
23 result if trial counsel more aggressively cross-examined Officer Lopez or argued his testimony  
24 on the traffic stop and probable cause search was fabricated. It is true that additional detail is  
25 added between the declaration and the preliminary hearing and between those events and trial.

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26  
27 <sup>31</sup> Judge Kephart only addressed these issues as substantive claims, not as ineffective assistance of  
28 trial counsel.

1 However, the consistent statements provide more than enough grounds for a traffic stop,  
2 probable cause for the initial vehicle search and the decision to request a K-9 dog. In addition,  
3 the consistent statements also support probable cause for the vehicle warrant and the results  
4 of the vehicle warrant provided the grounds for the house search. Finally, trial counsel did  
5 point out issues of inconsistency between the photographs of the searches, Officer Henry's  
6 testimony and Officer Lopez' testimony. For example, counsel argued that such differences  
7 created reasonable doubt concerning ownership or knowledge of the narcotics and guns.  
8 Moreover, even if Petitioner testified in opposition to Officer Lopez' version of the events,  
9 Petitioner's own credibility would be severely damaged by his felony convictions.

10 For these reasons, the claim is denied.<sup>32</sup>

### 11 I. Body Camera Footage

12 Petitioner claims trial counsel was ineffective for failing to take more action with  
13 respect to the lost or destroyed footage from Officer's Henry's body camera. Officer Henry  
14 was wearing a camera on his glasses. The camera recorded whatever Officer Henry saw when  
15 he looked in a certain direction. Arguably, it recorded the state of the glove box when it was  
16 opened, what happened when the unknown woman approached the car inquiring about a purse  
17 and other matters. Officer Henry testified that it was a new device. At the end of his shift, he  
18 placed the camera into a recharging/upload station. The video from the camera should then  
19 have uploaded into a central database. It would remain in the base for 45 days and then would  
20 be automatically deleted.<sup>33</sup> If an officer wanted to preserve the recording, he or she needed to  
21 tag the file, so it would not be automatically erased. Officer Henry indicated he thought he  
22 tagged the file, but he assumed he was mistaken because it was not in the system when Defense

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23 <sup>32</sup> Judge Kephart did not rule on this claim.

24  
25 <sup>33</sup> Petitioner asserts he made a request for the body camera footage within 45 days of his arrest at one  
26 of his initial Justice Court appearances. The record reflects that defense counsel did make a request  
27 for the footage at some point because the lack of video footage was discussed at the February 22,  
28 2017, Calendar Call. The State continually represented in hearings that no video footage existed, and  
they did not know what happened to it. For purposes of these Findings, the Court assumes defense  
counsel made a request for the footage within the 45-day period.

1 made a request for a copy of the footage. He also indicated he didn't know if the video  
2 uploaded properly. No evidence demonstrates the database was tampered with or the footage  
3 deliberately destroyed.

4 Many of the issues Petitioner alleges would be shown on the tape were, in fact, testified  
5 to by Officer Henry or other officers. Officer Henry indicated the concealed compartment in  
6 the glove box was not noticeable immediately upon opening the box. Rather, a false side wall  
7 fell when one of the officers reached into the glove box. At that point the concealed hole was  
8 revealed. The same is true of the woman asking about a purse, as Officer Henry testified to  
9 that event.

10 Although not specifically argued by Petitioner, it appears he asserts that trial counsel  
11 should have moved to dismiss the charges, suppress the evidence, or ask for other relief based  
12 on lost or destroyed evidence. While case law does permit these remedies, the standard for  
13 imposing them depends upon how the evidence was lost. Evidence lost because of routine  
14 records destruction may warrant some type of jury instruction but will not warrant dismissal  
15 of a case or suppression of evidence. If the evidence was deliberately destroyed, dismissal or  
16 suppression is more likely to be granted.

17 Here, even if trial counsel made such requests, there is no reasonable probability the  
18 case would be dismissed, or the evidence suppressed. At most, trial counsel may have received  
19 a jury instruction that the jury could infer the tape would show what Officer Henry saw. If  
20 Officer Henry looked in an area, but could not remember what he saw, the jury might be able  
21 to infer the area contained no incriminating evidence. However, Officer Henry did not search  
22 the entire vehicle, nor was he always present or looking at the same sections as Officer Lopez.  
23 Moreover, Officer Henry testified to most of the points Petitioner wanted to make and, at  
24 times, differently from Officer Lopez. All of this was pointed out to the jury.

25 Therefore, this claim is denied.<sup>34</sup>

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26  
27 <sup>34</sup> Judge Kephart did not rule on this claim, although it was discussed at the evidentiary hearing.  
28

1                                   **J.       Owe Sheets**

2           Petitioner claims in his Reply to the State’s Opposition to his Petition that trial counsel  
3 should have admitted the “owe sheets” recovered in the residence search.<sup>35</sup> Petitioner alleges  
4 the documents are clearly in a woman’s handwriting and not the Petitioner’s, although  
5 Petitioner presents no specific facts to support this assertion. Nonetheless, assuming this is  
6 true, there is no reasonable possibility of a different result if the evidence were admitted.  
7 Petitioner also claims this unnamed woman was arrested for separate narcotic charges while  
8 he was in custody. First, by admitting the documents in Petitioner’s case, Petitioner would be  
9 effectively admitting narcotics were being sold from his residence. The same would be true  
10 of an arrest of this woman, if admissible. Given where narcotics were found in Petitioner’s  
11 car and residence, there is no reasonable probability that a jury would believe Petitioner knew  
12 nothing about the narcotics and was simply a dupe of this unknown woman.<sup>36</sup> The greater  
13 probability is that the jury would conclude Petitioner had a female partner in crime. Therefore,  
14 this claim is denied.<sup>37</sup>

15                                   **K.       Improper Advice Regarding Effect of Guilty Plea and Hearing**  
16                                   **Testimony**

17           In his Petition and Reply, Petitioner claims that trial counsel was ineffective when he:  
18 1) advised Petitioner that if he accepted a plea offer, he would waive his right to appeal the  
19 suppression issues; 2) advised Petitioner that if he testified at the suppression hearing his  
20 felony convictions could be admitted at trial. Assuming these assertions are true, they do not  
21 warrant relief.

22           First, trial counsel correctly advised Petitioner that a guilty plea would be a waiver of  
23

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24 <sup>35</sup> “Owe sheets” are documents which officers’ identify as evidence of narcotic sale transactions (as  
25 opposed to personal use). Officers will testify that, based upon their training and experience, a  
26 document or documents are “owe sheets”.

27 <sup>36</sup> Petitioner has never identified the name of the woman who allegedly lived with him.

28 <sup>37</sup> Judge Kephart did not address this claim.

1 direct appeal and he could not challenge the suppression rulings on appeal. Petitioner  
2 complains because he rejected the State's offers so he could raise the suppression issues and  
3 then appellate counsel failed to raise them. However, this failure amounts to an allegation of  
4 ineffective assistance of appellate counsel. Trial Counsel cannot be ineffective for correctly  
5 advising Petitioner on the law.

6 Second, if Petitioner testified at the suppression hearing his felonies convictions could  
7 be used to impeach and there is no reasonable probability of a different result on the  
8 suppression motion. While Petitioner's testimony would not necessarily be admitted at trial,  
9 there are circumstances where it might be admissible together with the felony impeachment  
10 evidence. This is especially true if Petitioner testified at trial or attempted to use the  
11 suppression hearing testimony to support his defense at trial. Counsel is not ineffective  
12 because the attorney correctly advises a defendant of the pros and cons of specific decisions.  
Therefore, this claim is denied.<sup>38</sup>

### 13 **Conclusion**

14 For all the reasons set forth above, Petitioner's claims of ineffective assistance of trial  
15 counsel are denied.

### 16 **III. Ineffective Assistance of Appellate Counsel Claims**

17 To succeed on an ineffective assistance of appellate counsel claim, a petitioner must  
18 satisfy the two- prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923  
19 P.2d 1102, 1114 (1996). To satisfy Strickland, the defendant must show that the omitted issue  
20 would have had a reasonable probability of success on appeal. Id. There is a strong  
21 presumption that appellate counsel's performance was reasonable and fell within the "wide  
22 range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560  
23 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065).

24 The professional diligence and competence required on appeal involves "winnowing  
25 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a  
26

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27 <sup>38</sup> Judge Kephart did not address these issues.  
28

1 few key issues.” Jones v. Barnes, 463 U.S. 745, 751-752, 103 S. Ct. 3308, 3313 (1983). In  
2 particular, a “brief that raises every colorable issue runs the risk of burying good arguments. .  
3 .in a verbal mound made of strong and weak contentions.” Id. at 753, 103 S.Ct. at 3313. “For  
4 judges to second-guess reasonable professional judgments and impose on appointed counsel a  
5 duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of  
6 vigorous and effective advocacy.” Id. at 754, 103 S.Ct. at 3314.

7 Petitioner asserts appellate counsel should have raised the following issues on appeal:  
8 a) alleged illegality of habitual-criminal sentences (Items 1-4 under waived claims); b)  
9 whether the search of Petitioner’s vehicle violated the 4<sup>th</sup> Amendment (Items 6, 8-12, 14-18);  
10 c) whether the three hour delay between the time of the initial stop and the obtaining of a  
11 warrant to search Petitioner’s vehicle rendered the vehicle stop invalid (Item 7); d) whether  
12 the case was subject to dismissal for failure of the police to preserve body camera footage  
13 (Item 19); e) whether the district court erred by not excluding all or a part of Officer Lopez’  
14 testimony (Items 10 and 20); 6) the district court should have excluded the male DNA on a  
15 gun and arguments based on the same (Items 21 and 22) and 7) whether the district court erred  
16 by denying a continuance to allow Petitioner to retain new counsel.<sup>39</sup>

#### 17 **A. Issues Not Preserved for Appeal**

18 Issues not raised in the trial court cannot be assert on direct appeal Peke Res.,Inc. v.  
19 Fifth Jud. Dist. Ct., 113 Nev. 1062, 1068 n.5, (1997), Hooper v. State, 95 Nev. 924, 926 (1979).  
20 Items 1-4, 8, 15, 17, 18, 20, 21 and 22 were not raised at the trial level. Therefore, they could  
21 not be raised on appeal and appellate counsel was not ineffective. However, even if raised,  
22 there is no reasonable probability of a different result on appeal.

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23 <sup>39</sup> Petitioner also asserts that he did not accept the negotiations offered by the State because he wanted  
24 to raise every issue of suppression on appeal. When appellate counsel refused to raise every issue, he  
25 was stuck because his Motions to Dismiss Counsel and represent himself on appeal were denied. The  
26 record reflects Judge Kephart granted the pro se representation request, but limited it to after opening  
27 briefs were filed. Regardless, the Nevada Supreme Court did not let Petitioner represent himself.  
28 Appellate Counsel is under no obligation to simply do whatever the client wants or raise every issue.  
However, even if such issues were raised, as discussed in the main body of this Order, there is no  
reasonable probability of a different result on appeal.

1 As noted above under ineffective assistance of trial counsel, Petitioner was properly  
2 sentenced under the habitual criminal statutes. On the Fourth Amendment search issues, also  
3 discussed above, this was not a search incident to arrest and failure to prosecute the traffic  
4 offenses does not invalidate the searches, so these issues would not constitute grounds for  
5 invalidating the vehicle and residences searches on appeal. Also, as noted above, even if  
6 Petitioner presented evidence below that he requested a lawyer immediately when *Mirandized*,  
7 such a request would not affect search and seizure issues not based on interrogation. Such a  
8 claim had no reasonable probability of success on appeal. The same is true of the permission  
9 to remove the wallet issue – even if preserved, it would not be an abuse of discretion for the  
10 trial judge to believe officer testimony vis-à-vis Petitioner’s testimony on consent. Thus, this  
11 issue would not reasonably lead to a different result on appeal.

12 Based upon the trial and hearing records, differences in Officer Lopez’s trial or  
13 evidentiary hearing testimony from his statements in arrest reports or declarations, prior  
14 testimony, crime scene photographs or testimony from other officers, do not demonstrate  
15 Officer Lopez was giving false testimony. In some instances, the information was not  
16 necessary to the purpose of the document (probable cause for arrest), hearing (scintilla of  
17 evidence for preliminary hearing); therefore, not every fact relating to the searches may have  
18 been presented. In addition, the majority of Officer Lopez’ testimony was supported by the  
19 physical evidence and Officer Henry’s testimony.

20 Petitioner argues that Officer Lopez was testifying falsely when he said he smelled a  
21 marijuana odor coming from the car and Petitioner’s person. Petitioner correctly indicates no  
22 marijuana was found in the car or on his person; the car did not contain lighters, matches,  
23 rolling papers, pipes, or other smoking apparatus; no marijuana residue (ashes, butts, etc.) was  
24 inside the vehicle. Petitioner asserts absent all of this; Officer Lopez must have been lying.  
25 Trial counsel pointed out this discrepancy through cross-examination and in the suppression  
26 motion. Nonetheless, lying is not the only explanation.

27 Assuming marijuana odor can only be produced from recent smoking activity, Officer  
28 Lopez may have been mistaken. However, the issue is not whether the odor actually existed,  
but whether Officer Lopez believed he smelled an odor. This is a question of credibility. Such

1 questions are left to the trier of fact. Given Officer Henry's corroboration of most of Officer  
2 Lopez' testimony, the large amount of marijuana found in Petitioner's residence (178 grams)  
3 and all the other evidence, the judge (at the suppression hearing) and the jury (at trial) could  
4 find Officer Lopez' was mistaken about the odor but was still being truthful about what he  
5 thought he smelled.

6 Finally, there is no evidence that the State had any reason to believe Officer Lopez was  
7 lying and not just mistaken. Other than the "bare" allegation that Lopez' was lying, based  
8 almost entirely on Petitioner's assertion that he did not consent to have his wallet removed and  
9 there could be no marijuana odor because there was no evidence anything was smoked, there  
10 is no reasonable probability that the Nevada Supreme Court would reach a different result if a  
11 claim of prosecutorial misconduct were raised.

12 The final two items involve DNA testing done on the guns seized from the car and the  
13 residence. The results were inconclusive. They showed a mixture of partial DNA reflecting  
14 more than one person handled the items and, on one gun, that one of the persons was male.  
15 The major defense strategy involved stressing evidence that another person, a woman, was  
16 connected to the car and the residence. Therefore, defense counsel argued, reasonable doubt  
17 existed regarding whether Petitioner had actual or constructive possession of the controlled  
18 substances or guns. The fact that the weapons demonstrated a mixture of DNA profiles  
19 supported this defense. Although the State, at one point, indicated male DNA on both  
20 weapons, the Prosecutor amended this statement to reflect only one gun. Finally, Defense  
21 counsel did object to the DNA evidence, but the objection was overruled. Defense counsel  
22 also argued the lack of conclusive DNA evidence and the failure of the police to take DNA  
23 from anything else as grounds for reasonable doubt.

24 On appeal, the district court's decision to admit the evidence would be reviewed under  
25 an abuse of discretion standard. Harkins v. State, 122 Nev. 974, 980, 143 P.3d. 706, 709  
26 (2006). The issue was relevancy. In pre-trial hearings, it was evident the defense would  
27 involve assertions that the drugs and guns belonged to some unknown woman. The evidence  
28 was relevant to demonstrate that at least one weapon had male DNA and that the State was not  
denying someone else could equally be in actual or constructive possession of the drugs and

1 guns. Rather, the State was demonstrating the unlikelihood that Petitioner was ignorant of  
2 their existence and was the dupe of this unknown woman. There is no reasonable probability  
3 that the Nevada Supreme Court would find an abuse of discretion in permitting the DNA  
4 evidence. Moreover, even if the Supreme Court did find an abuse, the admission of the  
5 evidence would be harmless error given the remainder of the evidence.

6 For the reasons state above, these ineffective assistance of appellate counsel claims are  
7 denied.<sup>40</sup>

### 8 **B. Preserved Suppression Issues – Not Raised on Appeal**

9 The following vehicle and residence search issues were raised at trial, but not on appeal:  
10 Item 6 – lack of exigency; Item 9 – lack of probable cause for the traffic stop; Item 10 – lack  
11 of probable cause to search with K-9 unit; Item 11 – the traffic stop was pretextual; Item 12 –  
12 even if the initial look in the car and pat down were proper as a search incident to an arrest,  
13 any further searches exceeded the scope of that search once Petition was handcuffed and  
14 secured in the police vehicle; Item 14 – no smoking apparatus or residue in car negates odor  
15 of marijuana, so there was a lack of probable cause for the initial car search; and, Item 16 – no  
16 basis for *Terry* pat down.

17 As noted in the Supreme Court direct appeal decision, denials of motions to suppress  
18 are reviewed for an abuse of discretion on factual findings and de novo on legal conclusions.  
19 The facts demonstrate the trial court did not abuse its discretion in denying the Motion to  
20 Suppress the results of the vehicle search. And, as there was probable cause for the initial  
21 vehicle and K-9 searches, there is no reasonable probability the Nevada Supreme Court would  
22 reach a different conclusion on appeal if the issues were raised.

23 As discussed under the ineffective assistance of trial counsel claims, Officer Lopez  
24 observed several traffic violations that justified a vehicle stop. So long as the officer  
25 reasonably believed the vehicle traveled 300' in a turn lane and the rear light was broken, the  
26 fact that he may have been mistaken does not negate grounds for a stop nor does it support

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27 <sup>40</sup> Judge Kephart did not address these issues.  
28

1 pretextual stop arguments.

2 Petitioner relies on obsolete case law on vehicular searches in Nevada. As pointed out  
3 in the State's Opposition to the motion to suppress, a warrant is not required to search a stopped  
4 vehicle so long as the vehicle was moving at the time of the stop. See State v. Lloyd, 312 P.3d  
5 467 (Nev. 2013). So long as an officer has probable cause to believe the vehicle may contain  
6 evidence of crimes beyond the minor vehicle violations, exigent circumstances exist to search  
7 the vehicle. Of course, once a person is under arrest, express or implied, a warrant should be  
8 obtained for continued evidentiary searches.

9 Here, the following evidence constitutes probable cause for the initial vehicle search -  
10 the odor of marijuana, cash amounts and folding, Petitioner's hasty exit from the vehicle and  
11 the bits of green leafy substance in plain view on the floor of the driver's seat. The lack of  
12 smoking apparatus or residue after the vehicle was searched is irrelevant to this inquiry. While  
13 Officer Henry did not notice the odor and Officer Lopez could have been mistaken, the cash,  
14 exit, and leafy substance alone would lead a reasonable person to suspect Petitioner was  
15 dealing in controlled substances and that the vehicle contained contraband. Indeed, the  
16 Nevada Supreme Court pointed this out in the Order of Affirmance when it considered the  
17 suppression argument raised on appeal.

18 Once a quick search was made of the interior, additional items connected with narcotic  
19 sales were located. This justified bringing in the K-9 unit. When the K-9 dog focused on the  
20 glove compartment and it was opened, the secret panel was dislodged. When items in the  
21 secret compartment could not be easily seen or retrieved, the probable cause search ended. It  
22 is clear at this point; Petitioner's was being detained on drug charges, under de facto arrest and  
23 a search warrant was requested and obtained.

24 Finally, with respect to the *Terry* frisk, Officer Lopez initiated the pat down based on  
25 Petitioner's demeanor, quick exit from the vehicle and Petitioner's clothes. Officer Lopez  
26 says the clothes were loose enough it would be hard to detect a gun visually – Petitioner asserts  
27 his clothes were not “baggy” as evidenced by his booking photo. Under *Terry*, an officer  
28 needs only minimal facts to conduct a weapons pat down. The trial judge concluded from  
the evidence that the pat down was permissible. Nothing in the booking photo negates Officer

1 Lopez' impression. Moreover, Officer Lopez did not grab the cash while retrieving what he  
2 thought might be a weapon, instead he was reaching for Petitioner's wallet and the cash came  
3 out while he was removing the wallet. There is no reasonable probability the Nevada Supreme  
4 Court would conclude the frisk was improper and suppress the cash that came out with  
5 Petitioner's wallet or that the Court would reverse the trial verdict based on this claim.

6 In conclusion, there is no reasonable probability these issues, if raised on appeal, would  
7 have led to a different result and the ineffective assistance of appellate counsel claims based  
8 on these assertions are denied.<sup>41</sup>

9 **C. Three Hour Delay Issues – NRS 171.123 and NRS 171.1771**

10 Petitioner asserts the evidence seized from the vehicle should have been suppressed for  
11 violations of NRS 171.123 and NRS 171.1771. (Item 7 under issues waived). Trial counsel  
12 asserted this argument in the motion to suppress below. NRS 171.123 specifies that an officer  
13 may detain an individual for no more than 60 minutes based upon reasonable suspicion that  
14 the person has, is or is about to commit a crime. The stop allows the officer to identify the  
15 individual and conduct a preliminary investigation into the crime(s). Detention beyond 60  
16 minutes is not permissible unless there is probable cause for an arrest. However, if probable  
17 cause for arrest exists, the statute no longer applies. NRS 171.1231. State v. Beckman, 305  
18 P.3d. 912, 915 (Nev. 2013).

19 NRS 171.1771 relates to the preference for the issuance of a citation in lieu of arrest  
20 for misdemeanor crimes.

21 The record reflects that approximately three hours passed from the initial traffic stop  
22 until the application for a search warrant on the vehicle. However, the record is also clear that  
23 Petitioner was not detained on reasonable suspicion grounds for the whole of that time.  
24 Petitioner was initially placed into handcuffs almost immediately after he jumped out of the  
25 vehicle. Officer Lopez did this to prevent Petitioner from leaving the scene and for officer

---

26 <sup>41</sup> Judge Kephart, based on the record below and the evidentiary hearing, concluded appellate counsel  
27 made a strategic choice on which suppression issues to appeal and that Petitioner also failed to show  
28 prejudice.

1 safety while the *Terry* pat down was completed. Petitioner was clearly detained, but not under  
2 arrest at this point.

3 Shortly after the pat down, as Officer Henry arrived at the scene, five shots were fired  
4 in the complex. This caused considerable delay in processing the traffic stop as well as the  
5 probable cause search of the vehicle. At this point, Petitioner was placed in a patrol vehicle,  
6 still handcuffed, for his safety and to prevent him fleeing during the confusion. The officers  
7 had no idea whether the shots were connected to Petitioner or completely unrelated.<sup>42</sup> It took  
8 some time to investigate the shots and clear the scene as multiple patrol cars and a police  
9 helicopter conducted a search for the shooter.

10 Once the shooting investigation ended, Officer Lopez and Officer Henry conducted a  
11 probable cause search of the vehicle. Based on the items found, the K-9 unit was called, and  
12 a sniff search was done, and the glove box opened. By this time, the detention exceeded the  
13 60-minute time frame for the initial stop.

14 When the shots started, under NRS 171.123, the officers had reasonable suspicion that  
15 Petitioner may have been involved given the location and timing vis-à-vis the traffic stop. This  
16 extends the detention deadline beyond the interrupted initial traffic and reasonable suspicion  
17 period of the initial stop as a new crime was being investigated. Once the shot investigation  
18 ceased, the narcotic investigation continued. Baggies consistent with narcotics sales were  
19 found in the vehicle. Then, the K-9 unit arrived, and the false wall of the glove box was  
20 discovered. At this point, the record supports an inference that the initial investigation before  
21 the shooting and the remaining investigation after the shooting did not exceed the 60-minute  
22 period.<sup>43</sup> When the 60-minutes was exceeded, the officers had reasonable grounds to arrest

---

23 <sup>42</sup> In fact, intercepted jail calls between Petitioner and a woman indicated the woman saw the stop and  
24 fired the shots to create confusion in the hopes Petitioner would get away. However, there is no  
evidence that Petitioner was aware of, or instigated, her actions.

25 <sup>43</sup> Electronic records from the police department were part of the record, but they only note times for  
26 certain events. The precise time between the initial stop and the shots, the shots and the initial probable  
27 cause search, the initial probable cause search and the K-9 search and the K-9 search to the warrant  
28 are not clear.

1 Petitioner.

2 When the glove compartment false wall was discovered, the officers had probable cause  
3 for a search warrant and grounds to continue the detention.

4 As for NRS 171.1771, it only applies to misdemeanor offenses. Here, Petitioner was  
5 never arrested for the traffic offenses, so the citation statute is inapplicable.

6 There is no reasonable probability, based on the totality of the circumstances, that the  
7 Nevada Supreme Court would find the trial court erred in not suppressing evidence seized  
8 after the shooting. Therefore, appellate counsel was not ineffective for failing to raise this  
9 argument.<sup>44</sup>

#### 10 **D. Body Camera Issues**

11 Trail counsel did not move to dismiss the charges based on the failure of the State to  
12 preserve the video taken by Officer Henry's body camera. (Item 19 under waived issues).  
13 Counsel only raised this issue in regarding to credibility determinations at the suppression  
14 hearing. Thus, this issue was not preserved for appeal and appellate counsel was not  
15 ineffective.

16 This claim is discussed under the ineffective assistance of trial counsel section above.  
17 Even if trial counsel preserved the issue, for the reasons cited in that section, there is no  
18 reasonable probability that the Nevada Supreme Court would find the failure to upload or tag  
19 the video warranted dismissal of the charges. At most, it might have found a jury instruction  
20 was warranted, but any error was harmless beyond a reasonable doubt given the totality of the  
21 evidence and Officer Henry's testimony.

22 Therefore, this claim is denied.<sup>45</sup>

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25 <sup>44</sup> Judge Kephart did not rule on this issue specifically. It was included in his general ruling that  
26 Petitioner failed to show prejudice and Counsel made strategic decisions on what to raise in the appeal.

27 <sup>45</sup> Judge Kephart did not rule on this issue save for his general ruling discussed in fn. 41.

1                                   **E.      Failure to Exclude K-9 Qualification Testimony**

2           Petitioner asserts appellate counsel should have challenged the admission of the K-9  
3 dog's qualifications and results of the K-9 inspection on appeal. Some of the testimony was  
4 objected to and the issue preserved for appeal. Other parts of the testimony were not preserved  
5 by objection. Essentially, Petitioner alleges the trial court erred in admitting the K-9 testimony  
6 because the State failed to call the K-9 Officer and the remaining testimony was inadmissible  
7 hearsay. And, without the K-9 testimony, the evidence seized pursuant to the vehicle search  
8 warrant would have been suppressed.

9           Even assuming all these arguments were preserved for appeal, there is no reasonable  
10 probability of a different result if appellate counsel raised them. First, Officer Lopez and  
11 Officer Henry witnessed what the dog did. So, their testimony was not hearsay. Officer  
12 Lopez' testimony about his belief that the dog was properly certified was admissible to show  
13 probable cause for the vehicle warrant. Perhaps an objection would gain a limiting jury  
14 instruction, but not the suppression of the evidence located pursuant to the warrant. Second,  
15 assuming the K-9 Officer directly testified, there is no reason to believe the dog was not  
16 certified and Petitioner presents no evidence to the contrary. Third, even if the dog were not  
17 certified, the warrant was obtained in good faith and the evidence would still not be  
18 suppressed. United States v. Leon, 468 U.S. 897 (1984); State v. Allen, 119 Nev. 166 (2003).

19           Appellate counsel was not ineffective, and the claim is denied.<sup>46</sup>

20                                   **F.      Gun DNA Testimony**

21           This issue was discussed under the non-preserved issues above. Essentially, Petitioner  
22 asserts appellate counsel failed argue on appeal that the district court erred in admitting the  
23 DNA results from the guns found in the vehicle and the residence. Even if preserved, this  
24 issue would not succeed on appeal. Decisions on the admission of evidence are subject to an  
25 abuse of discretion standard on appeal. Harkins, Id. The evidence was relevant and the

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26           <sup>46</sup> Judge Kephart addressed the K-9 issues in his ineffective assistance of trial counsel analysis. He  
27 did not rule on it in the appellate context save for his general ruling discussed in fn. 41.  
28

1 probative value was not outweighed by the prejudicial value. Given the defense that a woman  
2 owned and controlled the guns, the presence of mixed DNA on one gun and male DNA on  
3 another gun was relevant together with the placement of the guns in the vehicle and the  
4 residence owned by Petitioner to demonstrate Petitioner had knowledge and control of the  
5 weapons.

6 As there is no reasonable probability of a different result on appeal, the failure to raise  
7 this issue is not ineffective assistance of counsel, and the claim is denied.<sup>47</sup>

#### 8 **G. Trial Court Erred in Denying Continuances for New Counsel**

9 This issue was raised by appellate counsel and denied in the Order of Affirmance.  
10 Moreover, the Order of Affirmance also addressed that the trial court did not err in finding no  
11 actual conflict existed between Petitioner and Mr. Frizzell. Therefore, the trial court did not  
12 err in refusing to dismiss Mr. Frizzell. Therefore, this claim is denied.<sup>48</sup>

#### 13 **Conclusion**

14 For the reasons cited above, Petitioner's claims of ineffective assistance of appellate  
15 counsel are denied.

#### 16 **IV. Cumulative Error Is Not A Cognizable Claim for Habeas Relief**

17 The Nevada Supreme Court has never held that instances of ineffective assistance of  
18 counsel can be cumulated. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009).  
19 Further, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim  
20 of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of  
21 the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d  
22 845, 855 (2000).

23 As the Nevada Supreme Court found in affirming Petitioner's convictions:

24 The totality of the circumstances supports finding probable cause to search Keller's  
25

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26 <sup>47</sup> Judge Kephart did not rule on this issue.

27 <sup>48</sup> Judge Kephart did not address this issue.  
28

1 home. Inside Keller's car, officers found 344.29 grams of methamphetamine, 33.92  
2 grams of heroin, .537 grams of cocaine, a mixture of the three controlled substances,  
3 and a gun. The quantity of methamphetamine and heroin exceed personal use levels,  
4 and the discovery of 1-inch by 1-inch baggies, a large amount of cash, as well as a gun,  
5 fairly indicated to the officers that Keller was trafficking in drugs. Further, when  
6 Officer Lopez initiated the traffic stop, Keller tried to exit the car parked in front of his  
7 condo, which in conjunction with Keller's evasive driving, Officer Lopez took as an  
8 attempt to escape. Taken as a whole, these circumstances supported a finding of  
9 probable cause that Keller was a drug dealer and that more drugs and guns would be  
10 found inside his condo.

11  
12 Order of Affirmance at page 5.

13 The Nevada Supreme Court also determined that the issue of guilt was not close in this  
14 case. In addressing Petitioner's claim of cumulative error on appeal, the Nevada Supreme  
15 Court further found overwhelming evidence of guilt:

16 Keller summarily argues that cumulative error requires reversal. But, Keller fails to  
17 establish any error on appeal, and the evidence presented at trial against him was  
18 overwhelming. See *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)

19  
20 Order of Affirmance at pages 8-9.

21 Finally, even if any of Petitioner's ineffective assistance of counsel allegations had  
22 merit, this Court finds that Petitioner has failed to establish a reasonable likelihood that, when  
23 aggregated, those errors deprived him of a better outcome at trial or on appeal. Since the issue  
24 of guilt was not close, and because Petitioner failed to sufficiently undermine confidence in  
25 the outcome of his case, this Court concludes the Petitioner's claim of cumulative error is  
26 without merit.<sup>49</sup>

27  
28 

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<sup>49</sup> Judge Kephart made the same ruling.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED, Petitioner Christopher Keller's Petition for Post-Conviction for Writ of Habeas Corpus shall be, and is, DENIED.

DATED this 8 day of April, 2022.

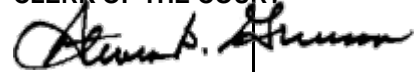
Day & Becker

**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing was made this \_\_\_\_\_ day of \_\_\_\_\_, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. KELLER, BAC #81840  
LOVELOCK CORRECTIONAL CENTER  
1200 PRISON ROAD  
LOVELOCK, NV, 89419

BY \_\_\_\_\_



1 NEFF

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

4  
5 CHRISTOPHER KELLER,

6 Petitioner,

7 vs.

8 STATE OF NEVADA,

9 Respondent,

Case No: A-19-800950-W

Dept No: III

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

11 PLEASE TAKE NOTICE that on April 11, 2022, the court entered a decision or order in this matter, a  
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you  
14 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 April 18, 2022.

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

17 Amanda Hampton, Deputy Clerk

18  
19 CERTIFICATE OF E-SERVICE / MAILING

20 I hereby certify that on this 18 day of April 2022, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

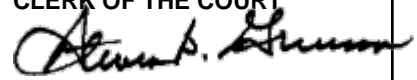
22 Clark County District Attorney's Office  
Attorney General's Office – Appellate Division-

23  
24 ☒ The United States mail addressed as follows:

25 Christopher Keller # 81840  
1200 Prison Rd.  
26 Lovelock, NV 89419

27 /s/ Amanda Hampton

28 Amanda Hampton, Deputy Clerk



FFCO  
NANCY A. BECKER  
Senior District Judge  
Sitting in Department 3

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

CHRISTOPHER ROBERT KELLER,  
#1804258

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

CASE NO. A-19-800950-W

DEPT NO. III

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

DATE OF HEARING: December 29, 2021

TIME OF HEARING: 8:30 a.m.

THIS CAUSE having come before the Honorable NANCY A. BECKER, Senior District Court Judge<sup>1</sup>, on the 29 day of December, 2021, Petitioner not present and not represented by counsel, Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, through NOREEN DEMONTE, Deputy District Attorney, and the Court having considered the matter, including the briefs, transcripts and documents on file

<sup>1</sup> The Honorable William D. Kephart was the district court judge for the pretrial, trial, and post-conviction proceedings. However, when the matter was remanded by the Court of Appeals for amended findings, Judge Kephart was no longer on the bench. While the matter was pending at the Court of Appeals, the case was administratively transferred to Department 3. Senior Judge Becker was assigned to Department 3 when the matter came on calendar. Whenever the term "the Court" is used in these findings, the reference is to Senior Judge Becker. Judge Kephart is named whenever he made the trial or post-conviction ruling.

1 herein and without oral argument<sup>2</sup>, the Court makes the following findings of fact and  
2 conclusions of law.

3  
4 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

5  
6 **STATEMENT OF THE CASE**

7  
8 After a Preliminary Hearing held on February 16, 2016, on February 17, 2016,  
9 Christopher Robert Keller (hereinafter (“Petitioner”) was charged by way of Information with  
10 Counts 1 and 2 - Trafficking In Controlled Substance (Category A Felony - NRS 453.3385.3  
11 - NOC 51160); Count 3 - Possession Of Controlled Substance, Marijuana (Category E Felony  
12 - NRS 453.336 - NOC 51127); Counts 4, 5, 6, and 7 - Possession Of Controlled Substance  
13 With Intent To Sell (Category D Felony – NRS 453.337 - NOC 51141); and Counts 8 and 9 -  
14 Ownership Or Possession Of Firearm By Prohibited Person (Category B Felony - NRS  
15 202.360 - NOC 51460). On February 18, 2016, Petitioner entered a plea of not guilty and  
16 invoked his constitutional right to a speedy trial.

17 On March 24, 2016, the State filed a Notice of Intent to Seek Punishment as a Habitual  
18 Criminal. At Calendar Call on April 13, 2016, counsel, Michael Sanft, Esq., announced he  
19 had a conflict for the trial date. Although Petitioner stated he wanted to go to trial on the  
20 original date, Judge Kephart ordered the trial date reset. On this date, the State also extended  
21 a plea offer to Petitioner for one count of Low-Level Trafficking in a Controlled Substance  
22 and one count of Possession of a Firearm by a Prohibited Person, with Petitioner stipulating  
23 to small habitual treatment and a stipulated maximum sentence of twelve and a half (12.5)  
24 years. The trial date was reset to May 2, 2016 (“First Continuance”).

25  
26 <sup>2</sup> Because the matter was taken under advisement, Senior Judge Becker heard no oral argument. The  
27 Court did review the arguments made by both sides at the Evidentiary Hearing conducted by Judge  
28 Kephart on October 1, 2020. However, the Court did not rely on any of the testimony and the findings  
are based entirely on the pleadings, pre-trial hearings and district court minutes, trial and sentencing  
transcripts.

1 At Calendar Call on April 20, 2016, Petitioner stated he wanted to go to trial and was  
2 willing to represent himself if need be. On April 29, 2016, the State filed an Amended  
3 Information, charging Petitioner with the same charges as the original Information. Also on  
4 that date, Mr. Sanft requested to withdraw due to a conflict of interest. Judge Kephart granted  
5 the request and appointed Kenneth Frizzell, Esq. to represent Petitioner. On May 4, 2016, Mr.  
6 Frizzell confirmed as counsel. Due to the change in counsel, the trial date was vacated and  
7 reset to June 27, 2016 (“Second Continuance”).

8 On June 10, 2016, Petitioner filed a Motion to Suppress. The State filed an Opposition  
9 on June 17, 2016. On June 20, 2016, Petitioner requested more time to file a Reply to the  
10 Opposition, and Judge Kephart vacated the trial date of June 27, 2016. The Court set a new  
11 Calendar Call for July 20, 2016, and a Jackson v. Denno hearing on the suppression motion  
12 for July 21, 2016. (“Third Continuance”).

13 On June 13, 2016, Petitioner filed a Pro Per Motion to Dismiss Counsel and Appoint  
14 Alternate Counsel. Judge Kephart denied the Motion on July 21, 2016, after hearing from  
15 Petitioner.

16 On July 18, 2016, the State filed a second Notice of Intent to Seek Habitual Treatment.  
17 On July 21, 2016, the State also informed Judge Kephart that it had extended a new plea offer  
18 for one count of Mid-Level Trafficking and one count of Possession of a Firearm by a  
19 Prohibited Person, with the State retaining the right to argue at sentencing but having no  
20 opposition to the counts running concurrently. Petitioner rejected the offer.

21 On July 21, 2016, after the Jackson v. Denno hearing, Judge Kephart denied Petitioner’s  
22 Motion to Suppress. Defense counsel then requested another continuance, stating that due to  
23 the Motion to Suppress, he had not been able to adequately prepare for trial. Judge Kephart  
24 granted the continuance and reset the trial date for September 19, 2016. (“Fourth  
25 Continuance”).

26 At Calendar Call on September 14, 2016, Petitioner waived his speedy trial and  
27 requested a continuance. Judge Kephart granted the continuance and reset the trial to March  
28 6, 2017. (“Fifth Continuance”).

The Order denying suppression motion and the motion to dismiss counsel was filed on

1 August 18, 2016.

2 At Calendar Call on February 22, 2017, both Petitioner and the State announced ready.  
3 However, on March 6, 2017, the day trial was due to begin, Amy Feliciano, Esq., appeared  
4 and attempted to substitute in as trial counsel. Ms. Feliciano informed Judge Kephart that she  
5 had been retained by Petitioner's mother sometime in early February, but had not moved to  
6 substitute in as counsel until March 6, 2017, due to multiple medical and personal problems.  
7 As Ms. Feliciano was unprepared for trial without a sixth continuance being granted, Judge  
8 Kephart denied her request for a continuance and ordered trial to proceed with Mr. Frizzell as  
9 trial counsel.

10 On March 6, 2017, the State filed a Second Amended Information as the State chose to  
11 bifurcate Counts 8 and 9 (gun charges involving ex-felon evidence) from the first seven (7)  
12 counts. The Second Amended Information was filed in open court on March 6, 2017, charging  
13 Petitioner with Counts 1 and 2 - Trafficking in Controlled Substance (Category A Felony -  
14 NRS 453.3385.3 - NOC 51160); Count 3 - Possession of Controlled Substance, Marijuana  
15 (Category E Felony - NRS 453.336 - NOC 51127); and Counts 4-7 - Possession Of Controlled  
16 Substance With Intent To Sell (Category D Felony - NRS 453.337 - NOC 51141).

17 The first part of the jury trial commenced on March 7, 2017, and concluded on March  
18 10, 2017, when the jury returned a verdict of guilty on all seven (7) counts. A Third Amended  
19 Information was subsequently filed in open court which added Counts 8 and 9 - Ownership or  
20 Possession of Firearm by Prohibited Person (Category B Felony - NRS 202.360 - NOC  
21 51460). Trial on those counts was had and the jury also returned verdicts of guilty on Counts  
22 8 and 9.

23 On April 29, 2017, Ms. Feliciano substituted as counsel of record to represent Petitioner  
24 at sentencing and post-trial proceedings. Mr. Frizzell withdrew from his representation. Ms.  
25 Feliciano requested that sentencing be continued three (3) times: May 8, 2017, June 5, 2017,  
26 and June 19, 2017.

27 On July 24, 2017, Ms. Feliciano requested a fourth sentencing continuance, and  
28 Petitioner requested that she be dismissed as counsel of record. Judge Kephart granted the  
request, and re-appointed Mr. Frizzell as counsel. On July 31, 2017, Judge Kephart granted

1 Mr. Frizzell a continuance to allow him to retrieve the file from Ms. Feliciano.

2 On August 7, 2017, Petitioner was sentenced as follows: as to Count 1 - LIFE in the  
3 Nevada Department of Corrections (NDC) with a minimum parole eligibility after ten (10)  
4 years in NDC; as to Count 2 - LIFE in the NDC with a minimum parole eligibility after ten  
5 (10) years in the NDC; Count 2 to run concurrent with Count 1; as to Count 3 - a minimum of  
6 twelve (12) months and a maximum of forty-eight (48) months in the NDC; Count 3 to run  
7 concurrent with Count 2; as to Count 4 - to a minimum of twelve (12) months and a maximum  
8 of forty-eight (48) months in the NDC; Count 4 to run concurrent with Count 3; as to Count 5  
9 – to a minimum of twelve (12) month and a maximum of forty-eight (48) months in the NDC;  
10 Count 5 to run concurrent with Count 4; as to Count 6 - to a minimum of twelve (12) months  
11 and a maximum of forty-eight (48) months in the NDC; Count 6 to run concurrent with Count  
12 5; as to Count 7 - to a minimum of twelve (12) months and a maximum of forty-eight (48)  
13 months in the NDC; Count 7 to run concurrent with Count 6; as to Count 8 - Petitioner  
14 sentenced under the large habitual criminal statute to LIFE in the Nevada Department of  
15 Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count  
16 8 to run CONSECUTIVE to Counts 1, 2, 3, 4, 5, 6, and 7; and as to Count 9, Defendant was  
17 sentenced under the large habitual criminal statute to LIFE in the Nevada Department of  
18 Corrections (NDC) with a minimum parole eligibility after ten (10) years in the NDC; Count  
19 9 to run concurrent with Count 8; for a total aggregate sentence of LIFE in the NDC with a  
20 minimum parole eligibility of TWENTY (20) years in the NDC, and five-hundred fifty-nine  
(559) days credit for time served.

21 The Judgment of Conviction was filed on August 10, 2017. On August 24, 2017,  
22 Petitioner filed a Notice of Appeal.

23 On November 14, 2017, while the appeal was pending, Petitioner filed a pro se Motion  
24 for Appointment of Counsel, Withdrawal of Attorney of Record and Request for an  
25 Evidentiary Hearing citing post-conviction petition statutes and case law. Also on that date,  
26 Petitioner moved to have Kenneth Frizzell, Esq. withdraw as his attorney of record and for a  
27 transfer of files to Petitioner. On December 6, 2017, Judge Kephart heard both motions. Judge  
28 Kephart required that Mr. Frizzell remain counsel through the filing of the opening brief on

1 appeal and thereafter would be withdrawn as counsel of record. Judge Kephart denied the  
2 request for appointment of new counsel, or for an evidentiary hearing since there was no  
3 pending post-conviction petition proceedings.<sup>3</sup>

4 An Amended Judgment of Conviction was filed on December 12, 2017, correcting the  
5 statute to NRS 435.337 for Possession of Controlled Substance with Intent to Sell on Counts  
6 4, 5, 6 and 7.

7 On March 22, 2018, again while his appeal was pending, Petitioner filed a second  
8 Motion for Appointment of Counsel and a Motion to Dismiss Attorney of Record citing to  
9 post-conviction petition law. On April 13, 2018, the State filed its Opposition to the second  
10 Motion to Appoint Counsel and Motion to Dismiss Attorney of Record. On April 16, 2018,  
11 Judge Kephart denied the motion noting that Petitioner had a pending Supreme Court appeal.  
12 The Order reflecting this decision was filed on May 10, 2018.

13 On October 15, 2018, the Nevada Supreme Court affirmed Petitioner's Judgment of  
14 Conviction. Remittitur was issued on November 9, 2018. The Supreme Court addressed four  
15 (4) issues in the affirmance order: 1) the denial of Petitioner's request for a continuance on the  
16 day of trial to allow for the substitution of private counsel (and related issues addressing  
17 whether a true conflict existed between Petitioner and appointed counsel Mr. Frizzell); 2) the  
18 denial of Petitioner's motion to suppress evidence seized from his condominium; 3) the denial  
19 of Petitioner's motion to exclude jail conversations as inadmissible hearsay and 4) cumulative  
20 error. The Supreme Court rejected each of these contentions.

21 On December 31, 2018, Petitioner filed his third Motion for Withdrawal of Counsel  
22 and transmittal of his files to him. The matter was heard on January 23, 2019. The Motion  
23 was granted, and an Order was entered on February 1, 2019.

24 On April 3, 2019, Petitioner filed a request for the District Court Clerk to send him  
25 copies of all court documents, including transcripts. On the same day, Petitioner filed a  
26 Motion to Compel seeking an order to require former counsel Kenneth Frizzell to transmit

---

27 <sup>3</sup> The Order reflecting these decisions was not filed until April 18, 2018. In addition, it appears that  
28 the Nevada Supreme Court never permitted Mr. Frizzell to withdraw as appellate counsel.

1 evidence photos to Petitioner. The motions were heard on April 24, 2019. Mr. Frizzell was  
2 ordered to turn over his file to Petitioner but the motion to compel was denied as overly broad.  
3 Judge Kephart did not specifically address the request regarding court records, presumably  
4 because those would be included in Mr. Frizzell's files.<sup>4</sup>

5 On June 12, 2019, Petitioner filed a motion for production of transcripts at the State's  
6 expense. The matter was heard on July 8, 2019 and denied. The Order of Denial was filed on  
7 July 22, 2019.

8 On August 26, 2019, Petitioner filed the instant Pro Per Petition for Writ of Habeas  
9 Corpus. The State filed its Response on January 21, 2020. On February 12, 2020, Petitioner  
10 filed a supplement to his petition addressing the State's response. Thereafter, on September  
11 16, 2020, Petitioner filed a motion to appoint post-conviction counsel. At that time,  
12 Petitioner's evidentiary hearing on his post-conviction petition was set for October 1, 2020.

13 On October 1, 2020, Judge Kephart formally denied Petitioner's request for  
14 appointment of counsel. Judge Kephart determined that many of Petitioner's claims were  
15 either belied by the record, already raised on appeal and denied, could have been raised on  
16 appeal and were waived or vague/unsupported by specific facts. Judge Kephart denied the  
17 Motion for Appointment of Counsel and proceeded with the evidentiary hearing.<sup>5</sup> Judge  
18 Kephart found testimony was needed on four issues: 1) why Mr. Frizzell did not use a different  
19 investigator and how was the use of the investigator prejudicial; 2) the level of communication  
20 between Petitioner, Mr. Frizzell and the investigator; 3) why Mr. Frizzell did not call the K-9  
21 Officer; and, 4) whether Mr. Frizzell knew Petitioner was taking medications during the pre-

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22 <sup>4</sup> No formal order reflecting these rulings was filed.

23 <sup>5</sup> Judge Kephart's oral rulings found that the substance claims 1-7 in the Petition were waived. He  
24 indicated that Petitioner's claims regarding ineffective assistance or trial and appellate counsel on  
25 suppression issues were naked allegations. Judge Kephart indicated Petitioner failed to specify what  
26 suppression issues should have been raised and how Petitioner was prejudiced. Regarding claims  
27 involving uncalled witnesses, Judge Kephart found Petitioner failed to identify the witnesses in the  
28 Petition as well as noting trial counsel had discretion on what witnesses to call. He denied the IAC  
claims on this issue. Judge Kephart also denied claims regarding failure to call witnesses at sentencing  
finding no such right existed, therefore counsel did not err.

1 trial proceedings and any mental health issues.

2 The only witness to testify was Kenneth Frizzell. Petitioner did not call witnesses,  
3 indicating he did not understand he had the ability to do that. Although not sworn under oath,  
4 Judge Kephart did hear factual and legal arguments from Petitioner. Judge Kephart concluded  
5 Frizzell's decisions were reasonable and did not fall below the standard of care under  
6 Strickland. Judge Kephart also concluded that the outcome of the trial would not have changed  
7 had Frizzell called any of the witnesses or presented the testimony Petitioner generally referred  
8 to at the hearing.

9 A Findings of Fact, Conclusions of Law and Order reflecting the denial of the petition  
10 was filed on November 20, 2020. A premature Notice of Appeal was filed on October 20,  
11 2020, but the appeal proceeded once the formal order was entered.

12 On November 19, 2020, Petitioner filed a motion for production of the transcripts of  
13 the October 1 evidentiary hearing. No decision was made on this motion.<sup>6</sup>

14 On April 12, 2021, the Nevada Supreme Court transferred the post-conviction petition  
15 appeal to the Nevada Court of Appeals. On September 28, 2021, the Court of Appeals  
16 dismissed the appeal due to a jurisdictional defect. Remittitur issued on October 28, 2021.  
17 The Court of Appeals noted the November 20, 2020, findings did not dispose of every issue  
18 raised in the post-conviction petition. Specifically, the Court of Appeals indicated the  
19 following ineffective assistance of trial counsel claims were not addressed and resolved: 1)  
20 counsel should have objected to consecutive habitual-criminal sentences; 2) counsel should  
21 have objected to use of Keller's prior felonies; 3) counsel should have impeached Officer  
22 Lopez with prior inconsistent statements; 4) counsel should have filed a motion to dismiss the  
23 case and requested an evidentiary hearing; 5) counsel should have considered the importance

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24 <sup>6</sup>Judge Kephart left the bench in early 2021. The case was reassigned to Department 3, the Honorable  
25 Monica Trujillo. Although the District Court records reflect that the motion was heard on January 27,  
26 2021, the minutes reflect the motion on calendar that day had something to do with appointment of  
27 post-conviction counsel, not the motion for transcripts. The Order entered on March 9, 2021, simply  
28 reflects the motion that was heard on January 27, 2021, was denied. At any rate, the record reflects  
the Nevada Supreme Court and Nevada Court of Appeals had the transcript of the October 1, 2021,  
evidentiary hearing.

1 of "owe sheets" as evidence; and 6) counsel improperly advised Petitioner that he would lose  
2 his right to appeal if he plead guilty.

3 In addition, the Court of Appeals determined that the following claims of ineffective  
4 assistance of appellate counsel were not addressed: 1) alleged illegality of consecutive  
5 habitual-criminal sentences; 2) whether the search of Petitioner's vehicle violated the 4<sup>th</sup>  
6 Amendment; 3) whether the three hour delay between the time of the initial stop and the  
7 obtaining of a warrant to search Petitioner's vehicle rendered the vehicle stop invalid; 4)  
8 whether the case was subject to dismissal for failure of the police to preserve body camera  
9 footage; 5) whether the district court erred by not excluding all or a part of Officer Lopez'  
10 testimony; and 6) whether the district court erred by denying a continuance to allow Petitioner  
11 to retain new counsel.

12 The matter was remanded for the district court to address these issues. On remand,  
13 Petitioner filed two motions to have the matter calendared so the district court could decide  
14 the remaining issues. The matter first appeared on calendar on December 20, 2021. Upon  
15 review of the file, Senior Judge Becker concluded that as Judge Kephart was no longer  
16 available to make additional findings, the successor judge was required to review the entire  
17 record to address the unresolved issues. Given the extensive nature of the record, Senior Judge  
18 Becker took the matter under advisement on December 29, 2021. Having completed the  
19 review of the record, these Amended Findings are issued.<sup>7</sup>  
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21  
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25 <sup>7</sup> As it is impossible to consider the issues specified by the Court of Appeals and simply incorporate  
26 Judge Kephart's prior findings, to avoid confusion, Senior Judge Becker reviewed all of Petitioner's  
27 claims and made an independent determination on each issue. Where both Judge Becker and Judge  
28 Kephart addressed an issue, this is reflected by footnote in these findings.

## **STATEMENT OF FACTS<sup>8</sup>**

On January 28, 2016, at approximately 2:25 a.m., Officer D. Lopez P#9806 of the Las Vegas Metropolitan Police Department (hereinafter “LVMPD”) was approaching the intersection of Sunrise and Lamb. There is a stop sign at the intersection for traffic on Sunrise. He observed a 2002 silver Dodge Stratus make a left turn from Sunrise onto Lamb at a speed greater than that one would normally expect if a person obeyed the stop sign, but as he did not have a clear view, he could not determine whether the vehicle stopped.<sup>9</sup>

The vehicle did not turn into a travel lane. Instead, it immediately entered the double-yellow center lane reserved for vehicles making turns off Lamb into driveways or other streets. The vehicle was now traveling towards Officer Lopez’ marked police vehicle. Officer Lopez estimated the vehicle traveled over 300 feet in the double-yellow left-hand turn lane. As the vehicle approached, it made a U-turn and appeared to speed up. Officer Lopez noticed the vehicle had a broken taillight. As Officer Lopez was running a records check on the vehicle, it made an abrupt right turn into the Crossroad III residential complex. Officer Lopez believed the vehicle was trying to put distance between it and the patrol car.

The Dodge Stratus drove through the parking lot, hitting some speed bumps and parked in a space outside a building. At some point, as the vehicle approached or was in the parking space, Officer Lopez activated his lights.<sup>10</sup> The Petitioner jumped out of the driver’s seat, leaving the driver’s door open and moved back towards the trunk of the vehicle. At this point, Officer Lopez’ vehicle was behind the Dodge. Officer Lopez ordered Petitioner to walk to the

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<sup>8</sup> The Statement of Facts is taken from the preliminary hearing transcripts as well as the trial testimony. Where testimony of a witness between the two hearings might arguably be inconsistent, this has been identified since it relates to Petitioner’s claims regarding failure to properly impeach an officer with alleged prior inconsistent statements. The record does not contain a suppression hearing transcript – apparently it was never transcribed.

<sup>9</sup> The information concerning the vehicle speed vis-a-vis the stop sign was not stated at the preliminary hearing but was made at trial.

<sup>10</sup> Officer Lopez’ testimony was not consistent about whether he activated only his lights or his lights and siren. The testimony regarding the speed bumps was not presented at the preliminary hearing.

1 front of the patrol car and the Petitioner complied.

2 At this point, Officer Lopez testified he smelled a cannabis/marijuana odor coming  
3 from Petitioner's person as well as from the inside of the Dodge vehicle. Officer Lopez notified  
4 dispatch that he had initiated a traffic stop and asked for backup.

5 Based upon Petitioner's demeanor, driving, abrupt exit from the vehicle and loose-  
6 fitting clothes, Officer Lopez handcuffed Petitioner. Officer Lopez indicated this was partially  
7 for officer safety and partially to prevent Petitioner from fleeing. Officer Lopez then  
8 performed a *Terry* weapons pat down. Officer Lopez asked for identification and Petitioner  
9 indicated it was in his wallet. Officer Lopez felt a wallet-sized object during the pat down and  
10 Petitioner indicated his wallet with his ID was in a pants pocket. Officer Lopez requested  
11 permission to remove the wallet and Petitioner consented.<sup>11</sup> Officer Lopez removed  
12 Petitioner's wallet from his pocket to retrieve Petitioner's identification. As Officer Lopez  
13 removed the wallet, a wad of cash next to the wallet also came out. The cash was right outside  
14 of Petitioner's wallet and consisted of multiple denominations.

15 There were sixty-eight (68) \$20 bills separated in groups of five (5) bills (\$100) and  
16 folded in alternating directions. The remaining bills were \$5 and \$10 bills. The cash total  
17 amount equaled \$2,187.00. Based upon his training and experience regarding narcotic sales,  
18 given the denominations of the cash, the way the cash was specifically folded, the fact that  
19 \$20 bills were folded in increments of \$100, the direction the bills were facing, and amount of  
20 money, Officer Lopez concluded the cash wad was consistent with the sale of narcotics.

21 At about the same time the pat down and wallet retrieval occurred, Officer Henry  
22 arrived on the scene. As Officer Henry approached, approximately five (5) shots were fired  
23 within the apartment complex. Officer Lopez placed the handcuffed Petitioner into a patrol  
24 vehicle. This was done for Petitioner's safety, to prevent Petitioner from leaving in the  
25 confusion, and to allow Officers Lopez and Henry to address issues stemming from the shots  
26 fired.

27 While Officer Henry moved around the building to the location where it appeared the  
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<sup>11</sup> In post-conviction proceedings, Petitioner now asserts he did not give consent.

1 shots were fired, Officer Lopez took a position by Petitioner's driver's door. He reported the  
2 shots and requested additional backup. Other patrol cars arrived as well as a police helicopter.  
3 Officer Lopez was directing some of the search efforts via radio. At this point, Officer Lopez  
4 indicated he was positioned such that he had the driver's side floorboard in plain view. He  
5 noticed green leafy particles on the floorboard.

6 Once the shooting investigation was under control, Officer Lopez determined he had  
7 probable cause to search the Dodge for narcotics. Officer Lopez based this upon the odor of  
8 marijuana emanating from Petitioner and the vehicle, the green leafy residue in plain view,  
9 Petitioner's abrupt exit from the vehicle and the cash wad.

10 Officer Henry and Officer Lopez conducted the probable cause search. During the  
11 probable cause search, the officers located a clear sealable plastic bag containing multiple  
12 smaller clear plastic bags underneath the driver's seat as well as a large plastic bag between  
13 the driver's seat and the center console. At that point, based on the size of the bags found in  
14 Petitioner car, as well as the amount of cash found on Petitioner and the other factors, Officer  
15 Lopez requested the assistance of a K-9 narcotics dog.

16 When the K-9 narcotics dog arrived, it alerted to the glove box. Officer Henry, who  
17 had returned from looking for the shooter, opened the glove box. A side panel was loose and  
18 when he touched it, he discovered it was a false cover. A hole was revealed.<sup>12</sup> Officer Lopez  
19 put his hand inside the hole and could feel a bag with something solid inside. He believed the  
20 object was a gun.

21 Officer Lopez then stopped his probable cause search and obtained a telephonic search  
22 warrant. Pursuant to the search warrant, Officer Lopez located several additional items of  
23 evidence.

24 Officer Lopez, Officer Henry, and Crime Scene Analyst Stephanie Thi searched the  
25 remainder of the vehicle. In the secret compartment, they found a black mesh bag, within  
26 which they found two gold colored plastic bags. One of the gold bags contained a nylon

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27 <sup>12</sup> Officer Lopez' testimony differed from Officer Henry's in that Officer Lopez indicated he opened  
28 the glove box, and the hole was immediately noticeable.

1 drawstring bag which contained a loaded Beretta model 950, .22 caliber handgun. Moreover,  
2 Officer Lopez also found several packages of a white crystal substance, plastic wrappers with  
3 a brown substance, and a plastic bag with an off-white powdery substance. Officer Lopez  
4 believed these substances, based on his training and experience, to be various controlled  
5 substances. ODV tests were done and tested positive for cocaine, heroin, and  
6 methamphetamine.

7 Forensic Scientist Jason Althnether tested the substances and determined that the white  
8 crystal substance was methamphetamine with a net weight of 344.29 grams, that the brown  
9 substance was indeed heroin with a net weight of 33.92 grams, and that the white powdery  
10 substance was indeed cocaine with a weight of 0.537 grams. Officer Lopez testified he also  
11 found a blue powdery substance in the secret compartment. Mr. Althnether tested the  
12 substance and determined it was a combination of methamphetamine, amphetamine, and  
13 cocaine with a weight of 0.795 grams.

14 During the car search, an unknown woman approached Officer Henry and indicated  
15 she left her purse in the car and asked if she could retrieve it. She was asked to describe the  
16 purse, including color. She gave a vague response. She was told she could not look in the car,  
17 but Officer Henry searched for a purse in the car and did not locate one.<sup>13</sup>

18 Information was obtained from the Nevada Department of Motor Vehicles  
19 ("NDMOV") that the Dodge was registered to the Petitioner at 265 North Lamb, Unit F and  
20 this was the address on his driver's license.<sup>14</sup> The stop occurred outside Unit F.<sup>15</sup>

21 Based on what was discovered in the car and the information obtained from NDMV,  
22 Officer Lopez obtained a search warrant for Petitioner's house located at 265 North Lamb,

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23 <sup>13</sup> Several times in the Petition, Petitioner asserts the drugs found in the car were all in a purse and  
24 suggests it was the woman's purse. This is belied by the record. There was no purse in the car and the  
25 testimony established the drugs were found in mesh and colored bags, not a purse.

26 <sup>14</sup> Evidence was presented that NDMV also had the car registered at a different address.

27 <sup>15</sup> Testimony indicated the building nearest to the parking space where the Dodge stopped was Unit F  
28 although it was mismarked with the wrong letter.

1 Unit F. Officer Lopez, Officer Steven Hough, Detective Chad Embry, and Detective Michael  
2 Belmont searched Petitioner's residence, a one-bedroom condominium.

3 While searching the bedroom, Officer Lopez found used smoking pipes, four (4) scales,  
4 a box of 9mm ammunition, and two (2) bags containing a white crystalline substance. This  
5 substance was later tested by Mr. Althnether, who determined the substance was  
6 methamphetamine. The first bag weighed 3.818 grams and the second bag weighed 2.357  
7 grams. Officer Lopez also found in the bedroom a brown substance he believed was heroin.  
8 Upon testing, Mr. Althnether confirmed the substance was heroin, weighing .895 grams. In  
9 the storage closet, Detective Embry found a .22 short ammunition. Also in the bedroom, police  
10 discovered a Ruger 9mm handgun and a pay stub with Petitioner's name on it.<sup>16</sup>

11 Upon searching the kitchen, Detective Belmont found a glass jar containing a green  
12 leafy substance believed to be marijuana, which was confirmed as such by Mr. Althnether,  
13 finding the marijuana to weigh 175 grams. Officers also found balloons, clean pipes, syringes,  
14 and elastic bands in Petitioner's residence.

15 In the bathroom officers discovered a hole cut through the wall that would allow a  
16 person to exit Petitioner's residence and enter the vacate condo that adjoined Petitioner's  
17 condo.

18 During trial, the State introduced a jail call wherein Petitioner told a woman to move  
19 into his house and make it her home.

20 After Petitioner was placed under arrest and brought to Northeast Area Command,  
21 Officer Quintero, who was watching Petitioner in an interview room on a monitor, observed  
22 Petitioner pull a small baggie from inside his pants. She notified Officer Hough. By the time  
23 he and another officer arrived in the room, Petitioner had a white powdery substance on his

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24 <sup>16</sup>Petitioner's counsel, through cross-examination and photographs of various areas in the residence  
25 established that there were male and female clothing and/or personal items in the residence. Officers'  
26 testimony differed. Some indicated there was no female items, others said they didn't pay attention  
27 to clothes or that there may have been some female clothing. Pictures established there were female  
28 items. Part of the defense involved arguing that Petitioner was not the only person who occupied the  
residence and therefore the State did not establish he had actual or constructive notice and possession  
of the drugs or firearms.

1 nose and mouth. Upon searching Petitioner, Officer Hough found another small bag of white  
2 powder attached to the left side of Petitioner's scrotum.

3 Petitioner called one witness, Officer Henry. Petitioner did not testify.<sup>17</sup>

### 4 ANALYSIS

5  
6 The law on post-conviction relief is governed by statute and case law in Nevada.  
7 Pursuant to NRS 34.810:

8 1. The court shall dismiss a petition if the court determines that:

9 ...

10 (b) The petitioner's conviction was the result of a trial and the grounds for the  
petition could have been:

11 (1) Presented to the trial court;

12 (2) Raised in a direct appeal or a prior petition for a writ of habeas  
corpus or postconviction relief; or

13 (3) Raised in any other proceeding that the petitioner has taken to  
secure relief from the petitioner's conviction and sentence, unless the court finds  
14 both good cause for the failure to present the grounds and actual prejudice to the  
15 petitioner.

16 ...

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and  
proving specific facts that demonstrate:

17 (a) Good cause for the petitioner's failure to present the claim or for  
18 presenting the claim again; and

19 (b) Actual prejudice to the petitioner.

20 The Nevada Supreme Court has held that that claims that are appropriate for a direct  
21 appeal must be pursued on direct appeal or they will be considered waived in subsequent  
22 proceedings. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (disapproved  
23 on other grounds by Thomas v. State, 115 Nev. 148, 115 Nev. 148, 979 P.2d 222 (1999)). "A

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24  
25 <sup>17</sup> Because Petitioner believed his family were hiring private counsel to represent him, he chose not to  
26 reveal witness information to Mr. Frizzell until his motion to continue was denied on the first day of  
27 trial. Judge Kephart, over the State's objection, indicated the unnoticed witnesses would be allowed  
28 to testify and gave some additional time during trial to try to get witnesses to the courthouse. However,  
either witnesses did not appear, or after interviewing them, they were not called because their  
testimony would not have helped the defense.

1 court must dismiss a habeas petition if it presents claims that either were or could have been  
2 presented in an earlier proceeding, unless the court finds both cause for failing to present the  
3 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,  
4 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001). Where a defendant does not show good cause  
5 for failure to raise claims of error upon direct appeal, the district court is not obliged to consider  
6 them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

7 “To establish good cause, [a petitioner] must show that an impediment external to the  
8 defense prevented their compliance with the applicable procedural rule. A qualifying  
9 impediment might be shown where the factual or legal basis for a claim was not reasonably  
10 available at the time of default.” Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).  
11 Examples of good cause also include interference by State officials and the previous  
12 unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 275 P.3d 91  
13 (2012). Ineffective assistance of trial or appellate counsel may also constitute good cause.

14 In order to establish prejudice, the defendant must show “not merely that the errors of  
15 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
16 substantial disadvantage, in affecting the state proceedings with error of constitutional  
17 dimensions.” Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting  
18 United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause  
19 there must be a “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119  
20 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d  
21 1229, 1230 (1989)).

22 In addition, a proper petition for post-conviction relief must set forth specific factual  
23 allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part,  
24 that a defendant must allege specific facts supporting the claims in a petition seeking relief  
25 from any conviction or sentence. Failure to raise specific facts and reliance on vague  
26 allegations or generalized statements may cause a petition to be dismissed. “Bare” and  
27 “naked” allegations are not sufficient to warrant post-conviction relief, nor are those belied  
28 and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).  
“A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at

the time the claim was made.” Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

**I. PETITIONER WAIVED HIS SUBSTANTIVE GROUNDS ONE (1) THROUGH SEVEN (7) AND THEIR SUBPARTS BY FAILING TO RAISE THEM ON DIRECT APPEAL**

Petitioner raises several substantive challenges to his convictions and sentences in Grounds 1-7.<sup>18</sup> However, several of the grounds allege distinct sub issues. Specifically, Petitioner asserts: 1) it was illegal to run his habitual criminal sentence on Court 8 consecutive with his drug trafficking sentence on Count 9; 2) he was entitled to a jury trial on the fact of his habitual criminal status; 3) at least two of his prior convictions arose out of the same factual incident and, therefore, should only count as one conviction for purposes of the habitual statute; 4) the State failed to file an Amended Information charging him with being an habitual criminal; 5) the trial court erred in failing to exclude Officer Lopez’ testimony regarding the reliability of the K-9 dog and denying him the opportunity to cross-examine the K-9 officer directly; 6) the car search did not meet the grounds for an exigency and items as well as testimony about recovered items should have been suppressed; 7) the trial court erred in not suppressing the car search evidence for violations of NRS 173.123(4) and NRS 171.1771; 8) the trial court should have suppressed the car search evidence because it did not derive from a search incident to arrest; 9) the officer lacked probable cause for the traffic stop; 10) the officer lacked probable cause to continue the stop and call in a K-9 unit; 11) the officer’s reasons for the traffic stop were pretextual; 12) the car search went beyond even a permissible search incident to an arrest because Petitioner had no access to his car once he was handcuffed; 13) the trial court erred in failing to suppress the evidence seized in the search of the house for

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<sup>18</sup> Petitioner did not testify at the suppression hearing, the trial or at the post-conviction hearing. He includes in his petition several factual statements disputing what happened or making factual assumptions not supported by the record. Nevertheless, Judge Kephart, based upon his rulings, listened to the written and oral assertions during the post-conviction proceedings and rejected them as grounds for relief. Senior Judge Becker considered Petitioner’s testimonial statements only in the context that even if he had testified in the suppression or trial, there is no reasonable probability of a different result. Petitioner would have been subject to impeachment with his multiple felony convictions and his credibility severely questioned had he testified at any proceeding.

1 lack of probable cause in the warrant; 14) the officer could not have smelled a marijuana order  
2 because there was no evidence in the car that marijuana had been smoked and another officer  
3 didn't smell anything, therefore, the car search was based on false information; 15) Petitioner  
4 did not give the officer permission to retrieve his wallet to look at his ID; 16) there was no  
5 basis for a pat down and without the pat down, the officer had no basis for removing  
6 Petitioner's wallet from his pants thus revealing the cash wad; 17) Petitioner requested a  
7 lawyer moments into the encounter and all further activity after that was illegal; 18) the State  
8 never prosecuted the alleged underlying vehicle traffic offense so anything observed or found  
9 was seized illegally; 19) Petitioner was denied due process because the State lost or destroyed  
10 evidence, i.e. body camera footage which would have supported his suppression motion; 20)  
11 Officer Lopez' testimony was false as demonstrated by changes in testimony from reports to  
12 the suppression hearing to the trial and the State knew this; 21) the trial court erred in  
13 permitting inconclusive DNA to be admitted; and 21) the State improperly argued that as the  
14 DNA analyzed from the firearms was from a male individual, it showed Petitioner was that of  
a man.<sup>19</sup>

15 As to issues 1-4, 8, 12, 18, 20-22, these arguments were not raised at trial or appeal and  
16 are barred by NRS 34.810(1)(b)(1) and (2). Issue number 13 was raised on direct appeal and  
17 rejected by the Nevada Supreme Court. It too is barred. Issues 15 and 17 are not supported  
18 by evidence in the record – they were therefore not raised at trial or direct appeal. Issues 5-7,  
19 10, 11, 14, 16, and 19 were raised at some point before the trial court but not raised on appeal.

20 Petitioner does not argue good cause or prejudice to overcome these procedural bars.  
21 Indeed, this Court finds that Petitioner could not successfully do so, as all the facts and  
22 information needed to raise these issues were available at the time Petitioner filed his direct  
23

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24 <sup>19</sup> At various points in the Petition, it is asserted that the parking space where the vehicle was parked  
25 constituted curtilage, therefore a search warrant was necessary and exigent vehicle stop law does not  
26 apply. As the space was not attached to the building and is, at most, simply an assigned space in a  
27 common parking lot, it is not curtilage. As a substantive claim it is barred. To the extent it was  
28 intended to be a claim of ineffective assistance of trial or appellate counsel, it is denied. Counsel is  
not ineffective for failing to make futile arguments.

1 appeal, and Petitioner does not allege that there was any external impediment to his raising of  
2 these issues at that time.

3 The Court addresses the issues as well in its analysis of ineffective assistance of trial  
4 and appellate counsel below. Because the Court finds no ineffective assistance of trial or  
5 appellate counsel, there is no good cause for failure to raise the substantive claims at an earlier  
6 proceeding and they are waived and barred.<sup>20</sup>

## 7 **II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS**

8 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
9 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of  
10 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063 64. See also Love, 109 Nev. at 1138, 865  
11 P.2d at 323. Under the Strickland standard, a defendant must show representation fell below  
12 an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable  
13 probability that the result of the proceedings would have been different. 466 U.S. at 687 88,  
14 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683  
15 P.2d 504, 505 (1984) (adopting the Strickland two-part test). A court is not required to address  
16 both prongs once it determines that petitioner failed to satisfy one of the two components.  
17 Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

18 A court begins with the presumption of effectiveness and then must determine whether  
19 the defendant has demonstrated by a preponderance of the evidence that counsel was  
20 ineffective. Means v. State, 537 P.2d 473, 474 (1975). “Effective counsel does not mean  
21 errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of competence  
22 demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d  
23 473, 474 (1975).

24 Counsel is not ineffective for failing to make futile objections or arguments. See Ennis

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25 <sup>20</sup> Judge Kephart reached the same conclusion on the seven main issues: 1) illegal sentence; 2) failure  
26 to present K-9 Officer testimony; 3) the exigent circumstances doctrine did not apply to the vehicle  
27 search; 4) the police lacked probable cause to search the vehicle; 5) the stop violated NRS 171.123;  
28 6) lost body camera footage; 7) Officer Lopez presented false testimony. However, Judge Kephart’s  
ruling did not analyze most of the sub-issues.

1 v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the “immediate  
2 and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call,  
3 and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
4 (2002).

5 Based on the above law, the role of a court in considering allegations of ineffective  
6 assistance of counsel “is not to pass upon the merits of the action not taken but to determine  
7 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
8 reasonably effect assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
9 (1978). This means that the post-conviction court should not second guess reasoned choices  
10 between trial tactics. Nor should defense counsel, to protect himself against allegations of  
11 inadequacy, be required to make every conceivable motion no matter how remote the  
12 possibility of success. Id. To be effective, the Constitution “does not require that counsel do  
13 what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot  
14 create one and may disserve the interests of his client by attempting a useless charade.” United  
15 States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

16 “There are countless ways to provide effective assistance in any given case. Even the  
17 best criminal defense attorneys would not defend a particular client in the same way.”  
18 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
19 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
20 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
21 P.2d 951, 953 (1989). In essence, the reviewing court must look at the challenged conduct on  
22 the facts at the time counsel made decisions. Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

23 The decision not to call witnesses is within the discretion of trial counsel and will not  
24 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,  
25 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland  
26 does not enact Newton's third law for the presentation of evidence, requiring every prosecution  
27 expert an equal and opposite expert from the defense. In many instances cross-examination  
28 will be sufficient to expose defects in an expert's presentation. When defense counsel does not  
have a solid case, the best strategy can be to say that there is too much doubt about the State’s

theory for a jury to convict. Harrington v. Richter, 131 S. Ct. 770, 791, 578 F.3d. 944 (2011).

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. McNelson 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 also requires a petition to prove 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).

Petitioner claims that trial counsel was ineffective for failing to: 1) make all of the suppression arguments listed in Items 6-9, 11-18 above under barred claims; 2) get a new investigator when Petitioner alleged the investigator was biased against him based on alleged negative comments made about Petitioner's parents;<sup>21</sup> 3) visit him at the jail or communicate with him about his case; 4) subpoena or return calls of unspecified or unnamed witness; 4) subpoena, call or require the state to call the K-9 officer in charge of the drug detecting dog or requesting the K-9 certification records; 5) present evidence of Petitioner's mental health history or medications he was using during the pre-trial process; 6) call witnesses to testify on his behalf at his penalty hearing; 7) make arguments regarding the validity of his prior felony convictions or challenging his habitual criminal sentences as listed in Items 1-4 above under

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<sup>21</sup> The investigator was a retired police officer. Petitioner's mother and stepfather worked for the police department at the same time the investigator was an active police officer, and the investigator knew Petitioner's parents.

1 barred claims; 8) impeach Officer Lopez with prior inconsistent statements; 9) file a motion  
2 to dismiss the case and request an evidentiary hearing presumably based on the lost or  
3 destroyed body camera footage; 10) investigate the "owe sheets" as potential exculpatory  
4 evidence; 11) properly advise Petitioner regarding his right to testify at the suppression  
5 hearing; and 12) properly advise Petitioner regarding the consequences of pleading guilty  
6 (wherein counsel allegedly told Petitioner if he entered a guilty plea he would lose his right to  
7 appeal trial court decisions).

8 The Court finds that these claims fail to establish ineffective assistance of trial counsel  
9 because they are either belied by the record, "bare" or "naked" allegations, or, even if true,  
10 would not create a reasonable probability of a different result.<sup>22</sup>

#### 11 A. Suppression Issues

12 Trial counsel moved to suppress all the evidence recovered from Petitioner's vehicle.  
13 Counsel also argued that without the vehicle evidence, the warrant issued for searching  
14 Petitioner's residence fails and that evidence should be suppressed. Finally, if the arrest was  
15 illegal, then the drugs found on Petitioner's person should be suppressed. Either in writing  
16 through a motion to suppress or during the suppression hearing, trial counsel raised the  
17 following issues: 1) the officer turned an alleged traffic stop into a custodial arrest without  
18 probable cause and in violation of the 4<sup>th</sup> Amendment and NRS 484A.730; 2) the officer placed  
19 Petitioner under arrest at the time he handcuffed him and no probable cause existed to justify  
20 an arrest at that time, and the arrest violated of NRS 171.1771; 3) even if there were grounds  
21 for a traffic stop, Petitioner was detained beyond sixty (60) minutes in violation of NRS

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22 <sup>22</sup> The Court independently reviewed the district court and appellate records. After reviewing the  
23 Petition, the Supplement and the State's Opposition, the pre-trial and trial transcripts, and all the pre-  
24 trial and post-trial motions, but not considering the transcript of the post-conviction evidentiary  
25 hearing testimony, the Court concludes the Petition should be denied without an evidentiary hearing.  
26 An appellant is entitled to an evidentiary hearing if he raises claims supported by factual assertions  
27 that, if true, would entitle him to relief, and those claims are not belied by the record on appeal.  
28 Hargrove v. State, 100 Nev. 498, 502-503, 686 P.2d 222, 225 (1984). Here, Petitioner's assertions  
are either belied by the record or, if true, would not entitle him to relief. Where a footnote indicates  
Judge Kephart ruled on an issue, he considered both the record plus the testimony at the evidentiary  
hearing.

1 171.123 without probable cause to arrest; 4) once the vehicle was stopped and Petitioner could  
2 not have driven it away, a search warrant was necessary; and 5) the initial search of the vehicle,  
3 the summoning of a K-9 Unit, and subsequent search during the three (3) hour period were not  
4 justified by exigent circumstances. Trial counsel also pointed out the circumstances of the  
5 traffic stop and pat down were questionable, and there was no prosecution on the alleged traffic  
6 offenses.

7 Trial Counsel did raise Item 6 (exigency), Item 7 (NRS 173.123), Item 9 (validity of  
8 traffic stop), Item 13 (items seized from house based on invalid car search), Item 14 (marijuana  
9 odor and probable cause), Item 16 (*Terry* pat down) and Item 18 (traffic offenses not  
10 prosecuted) in suppression arguments, therefore these ineffective assistance of counsel claims  
11 are belied by the record.

12 Counsel did not argue that the searches were improper because they exceeded a search  
13 incident to arrest (Item 8). However, the State never claimed any of the recovered evidence  
14 was the result of a search incident to arrest. Therefore, counsel is not ineffective for failing to  
15 raise a futile argument and there is no reasonable probability if the argument was raised it  
16 would have made a difference on the suppression issues.

17 Additionally, Counsel did not specifically argue this was a pretextual traffic stop (Item  
18 11). The record clearly supports that the stop was not pretextual. Whether or not the vehicle  
19 actually traveled 300' in the turn lane or the taillight was broken or only appeared to be broken  
20 do not negate the totality of Officer Lopez' observations. He may have been mistaken, but  
21 that is not grounds for arguing the stop was pretextual. Taken as a whole, his observations  
22 were sufficient that there is no reasonable probability such an argument would have resulted  
23 in the suppression of the evidence.

24 The allegations that Petitioner asked for a lawyer immediately and did not give Officer  
25 Lopez permission to get his wallet from his pocket are bare allegations not supported by the  
26 record. However, even if Petitioner had testified at the suppression hearing and asserted these  
27 allegations, there is no reasonable probability of a different result. A request for a lawyer only  
28 suppresses statements resulting from an interrogation. Asking for identification after a traffic  
stop is not an interrogation. Moreover, the trial court is unlikely to have found Petitioner's

1 testimony regarding the wallet credible considering his prior felony convictions.

2 Thus, Petitioner's ineffective assistance of counsel claims relating to suppression of  
3 evidence fail.<sup>23</sup>

4 **B. Investigator, Jail Visits and Motions Requesting New Counsel**

5 Petitioner filed multiple motions requesting trial counsel be replaced. The Judge  
6 Kephart granted the first motion and replaced appointed attorney Michael Sanft, Esq. with  
7 appointed attorney Kenneth Frizzell, Esq. Mr. Sanft, in pleadings, indicated he had a conflict  
8 of interest, so the Judge Kephart granted the withdrawal request. The subsequent motions  
9 involved Mr. Frizzell.

10 Counsel is expected to conduct legal and factual investigations when developing a  
11 defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at  
12 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d  
13 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make  
14 a reasonable decision that makes particular investigations unnecessary.'" State v. Love, 109  
15 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at  
16 2066). A defendant who contends his attorney was ineffective because he did not adequately  
17 investigate must show how a better investigation would have rendered a more favorable  
18 outcome. Molina, 120 Nev. at 192, 87 P.3d at 538.

19 Petitioner's primary arguments during the trial proceedings was that Mr. Frizzell hired  
20 the same investigator that Mr. Sanft was using, and that Mr. Frizzell did not file every motion  
21 or raise every issue Petitioner wanted done.

22 As to the investigator issue, Petitioner claimed the investigator made derogatory  
23 remarks to Petitioner about Petitioner's mother. Mr. Frizzell, at a hearing during the trial stage  
24 proceedings, represented that the investigator denied making such remarks and that the

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25  
26 <sup>23</sup> Judge Kephart did not specifically address any of the issues. He found trial counsel filed a  
27 suppression motion and raised many of the issues, so those claims were belied by the record. As to  
28 any issue not raised in the suppression motion and evidentiary hearing, Judge Kephart concluded  
Petitioner failed to show how the result would differ in the omitted issues had been raised.

1 investigator, while employed by LVMPD, worked with Petitioner's mother and stepfather and  
2 respected both. Mr. Frizzell also indicated that he did not frequently converse with Petitioner  
3 because every time he or the investigator tried to visit or talk to Petitioner, Petitioner refused  
4 to cooperate with them. Petitioner simply kept stating that his family was going to retain  
5 private counsel and he would talk to that counsel. Petitioner confirmed this in numerous  
6 statements made during the trial state proceedings. Indeed, it was not until the trial began that  
7 Petitioner gave witness information to trial counsel.<sup>24</sup>

8 During the various trial stage proceedings when this issue was raised, Mr. Frizzell  
9 indicated the investigator was a former police officer, had been used by defense counsel that  
10 Mr. Frizzell knew and respected. He did not believe the investigator was biased against  
11 Petitioner and this was simply one of many areas where Petitioner refused to cooperate with  
12 counsel unless counsel did exactly as Petitioner asked.

13 The trial record reflects when Petitioner finally provided information on potential  
14 witnesses, Mr. Frizzell and the investigator tried to locate them. They successfully located  
15 some and could not locate others because Petitioner provided insufficient information.

16 Finally, the Nevada Supreme Court discussed the relationship between Petitioner and  
17 Mr. Frizzell in its Order of Affirmance. The Supreme Court concluded that the District Court  
18 properly handled the Motions to Dismiss counsel and did not err in finding a lack of actual  
19 conflict or denying Petitioner's requests for new counsel.

20 The Court finds these claims fail to demonstrate ineffective assistance of trial counsel.  
21 First, these claims are belied by the record. Second, Petitioner does not indicate names,  
22 specific information of witnesses that should have been called, the nature of their testimony  
23 or what else the investigator should have done. Petitioner simply asserts that there was some  
24 witness who could have testified someone besides Petitioner was living at the residence at the  
25 time of the search. Third, Petitioner failed to demonstrate how trial counsel fell below a

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26 <sup>24</sup> Petitioner was also dissatisfied with his counsel for not making every motion and every argument,  
27 especially as to suppression of evidence, that Petitioner wanted raised. These arguments are included  
28 in other aspects of his post-conviction petition and are not addressed again in this section.

1 reasonable standard for not using another investigator simply because Petitioner did not like  
2 this investigator. A defendant is not entitled to a particular “relationship” with an attorney. By  
3 extension, that also applies to the investigator. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct.  
4 1610, 1617 (1983). Therefore, this Court concludes that the choice of investigator was a  
5 reasonable decision to make and does not amount to deficient representation under Strickland.  
6 Further, this Court finds that Petitioner fails to demonstrate how the employment of a different  
7 investigator would have resulted in a different outcome.

8 Fourth, there is no requirement for any specific amount of communication if counsel is  
9 reasonably effective in his representation. See id. Further, this Court finds that Petitioner fails  
10 to demonstrate how more jail visits would have changed the outcome at trial.

11 Therefore, this claim is denied.<sup>25</sup>

### 12 **C. Failure to Call Witnesses**

13 Petitioner asserts that trial counsel was ineffective for failing to call witnesses. Counsel  
14 is not ineffective for deciding not to call a witness because, after interviewing them, it was  
15 determined their testimony would not aid in the defense or for other strategic reasons. See  
16 Love, 109 Nev. at 1145, 865 P.2d at 328.

17 The Petition fails to state what witness and the nature of the testimony that witness  
18 would have provided. In general, Petitioner claims that trial counsel was ineffective for failing  
19 to subpoena or return calls of unnamed witnesses to testify that a female resided in the  
20 townhouse he owned and switched vehicles with him. Therefore, a strong probability exists  
21 that the drugs in the house or car belonged to someone else.

22 The record reflects that Petitioner waited until the trial date to supply witness  
23 information to trial counsel. For at least one witness, Petitioner’s information was insufficient  
24 to locate that person.<sup>26</sup> Another witness and Petitioner’s mother were interviewed, but neither

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25 <sup>25</sup> Judge Kephart came to the same conclusion, but also relied on evidence at the evidentiary hearing  
26 to reach that conclusion.

27 <sup>26</sup> Petitioner had the name of a woman who was arrested after Petitioner was arrested and who would  
28 allegedly testify that she stayed at Petitioner’s house and used his car.

1 could testify of personal knowledge that someone else was living with Petitioner as the time  
2 he was arrested. A third witness who would have corroborated that the searched residence  
3 contained women's clothing and other items likely to belong to a woman was scheduled to  
4 testify. However, she did not appear at the time she indicated she would be present. Trial  
5 Counsel also convinced Judge Kephart to allow Petitioner to call Officer Henry to testify in  
6 the defense case-in-chief – something Petitioner desired to show the differences between  
7 Officer Henry's memory of events and Officer Lopez'.

8 The trial record also reflects Petitioner wanted to call witnesses to testify about  
9 Petitioner's character. Mr. Frizzell indicated he would not recommend that as it would allow  
10 the State to use Petitioner's prior felony convictions during cross-examination of those  
11 witnesses. The character witnesses were not called for strategic reasons.

12 Trial counsel talked with located witnesses and had one witness ready to testify. As  
13 noted above, other witnesses had no personal knowledge about who was in the townhouse or  
14 used Petitioner's vehicle. So, they were not called. Moreover, trial counsel, over the State's  
15 objection, convinced Judge Kephart to allow Petitioner to call witnesses who had not been  
16 properly noticed.

17 THE COURT: Okay. Notwithstanding the fact that the State was not put on notice of  
18 these witnesses, I'm going to allow you to call her if you choose to. But you need to  
19 make her available to the State to give them an opportunity to question her to see what,  
20 if anything, she's going to be offering.

21 MR. FRIZZELL: And that is fine, Your Honor. I actually just learned of her potential  
22 as a witness yesterday evening from an e-mail, which I received.

23 THE COURT: Okay. So –

24 MR. FRIZZELL: And --

25 THE COURT: -- she wasn't even somebody that defendant was telling you previously  
26 that we discussed before we started the trial?

27 MR. FRIZZELL: No, Your Honor.

28 A review of the record demonstrates that trial counsel had one witness waiting to testify.  
This witness, a woman named Mary Silva, cleaned Petitioner's residence a few times,  
allegedly before the house search occurred. She would have testified that when she cleaned,

1 she saw female items in the condo and that a female hired her.

2 From the trial record, Ms. Silva apparently got tired of waiting and left. This discussion  
3 appears in the record of the fourth day of the trial:

4 MR. FRIZZELL: -- what happened here. While you were probably walking down the  
5 hallway to come in, I was on the phone with the witness that you said you would allow  
6 to testify, Mary Silva, who was on the road ostensibly heading home, she told me. I  
7 asked her -- I said, we're ready and it's now time and the judge isn't going to wait. How  
8 long was it going to take you to get back? And she said she could be back here by 3:00  
o'clock, when I told her it was 1:55.

9 The record then reflects that, although Judge Kephart delayed the proceedings for her to return,  
10 Ms. Silva never appeared.

11 Finally, even if some unknown and unnamed woman had been located and came  
12 forward to testify that she lived at the condo and used Petitioner's car, there is no reasonable  
13 probability of a different result at trial. The residence and car were owned by Petitioner. The  
14 location of the drugs in the car, behind concealed panels, belie they were put there by an  
15 occasional user of the car. The location and amount of the drugs and the gun in the residence,  
16 together with Petitioner's paystub found in the home, were sufficient for a jury to conclude,  
17 beyond a reasonable doubt, that the items were Petitioner's or that he knew they were there  
18 and had access to them. There was more male clothing in the residence than female. At most,  
19 the testimony would most likely lead to the conclusion Petitioner had a partner in crime, not  
20 reasonable doubt on his innocence.

21 Thus, this claim is partially belied by the record, it is a bare and vague allegation and,  
22 even had such a witness testified, there is no reasonable probability of a different result at trial.  
23 Therefore, this claim is denied.<sup>27</sup>

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27 <sup>27</sup> Judge Kephart found reached the same result, but based part of his ruling on the evidentiary hearing  
28 testimony, rather than just the trial record.

1                                   **D.       K-9 Evidence Issues**

2           Petitioner alleges that trial counsel was ineffective for failing to establish through cross-  
3 examination that the front passenger door was closed when officers first encountered him, and  
4 they opened the door to allow the K-9 dog access to the interior of the vehicle. In addition,  
5 Petitioner asserts trial counsel should have subpoenaed the dog's certification records and  
6 called the K-9 officer in charge of the dog to testify about its qualifications.

7           Trial counsel did object to other officers' asserting the K-9 dog was certified to detect  
8 drugs. However, the objection was overruled.

9           Petitioner failed to present any evidence on how these actions would have changed the  
10 outcome of the case. There is no evidence the dog was not qualified. Petitioner merely asserts  
11 that because direct evidence of the dog's qualifications was not presented, it was error to use  
12 the dog's reactions to be the basis for additional searches. Moreover, Officer Lopez' testimony  
13 regarding his belief as to the dog's reliability would still have been admissible on the issues  
14 of his probable cause determination and good faith reliance on the two formal warrants. There  
15 is no reasonable probability that such evidence would alter the outcome of the trial. Therefore,  
16 this claim is denied.<sup>28</sup>

17                                   **E.       Mental Health Allegations**

18           Petitioner alleges he was taking medications during the pre-trial phase of the  
19 proceedings. Petitioner supported this claim with vague statements he was on medication, but  
20 does not give specifics about what medication, at what time, what effect such medication  
21 would have on his mental state or other information on how the result of the proceeding would  
22 change if that information was presented. Nothing in the record suggests Petitioner was  
23 unable, as opposed to unwilling, to assist counsel. In fact, the record belies this claim as  
24 Petitioner wrote numerous requests and filed many pro per documents suggesting he was well  
25 aware of the proceedings. This is a bare and naked allegation.

26           Therefore, this claim is denied.<sup>29</sup>

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27 <sup>28</sup> Judge Kephart did not address this claim.

28 <sup>29</sup> Judge Kephart agreed that Petitioner failed to indicate, either in the Petition or the evidentiary

1                   **F.      Call Witnesses at Penalty Hearing**

2           Petitioner claims trial counsel should have presented live witness testimony at his  
3 sentencing. Petitioner fails to state specifics on names of witnesses and the nature of their  
4 testimony. The record reflects that several letters from community members and family were  
5 submitted to the Judge prior to sentencing.

6           First, Petitioner did not have a penalty hearing as that term is normally understood.  
7 Defendants have no right to call witnesses during sentencing hearings unless they are  
8 convicted of First-Degree Murder. NRS 176.015; NRS 175.552. This was a normal judicial  
9 sentencing proceeding, not a murder case.

10          Second, while a judge can permit live testimony, a judge is not required to, and such  
11 requests are not normally granted. There is no reasonable probability that Judge Kephart  
12 would grant such a request. Moreover, as Judge Kephart already had a number of written  
13 statements requesting leniency, there is no reasonable probability that live testimony would have  
14 produced a different sentencing result, especially considering Petitioner's prior criminal  
15 record and the amount of narcotics involved.

16          Therefore, this Court finds that counsel cannot be deemed ineffective for failing to call  
17 family and witnesses to speak on his behalf at his sentencing. This claim is denied.<sup>30</sup>

18                   **G.      Habitual Criminal Sentence Challenges**

19          Petitioner alleges trial counsel should have: 1) contested the underlying felonies  
20 supporting the habitual offender finding; 2) that the habitual criminal finding was required to  
21 be made by the jury; 3) that two of the felonies arose out of the same factual background; 4)  
22 that the State failed to amend the information to add habitual criminal charges; and 5) that his

23                   \_\_\_\_\_

24 hearing, the nature of his mental illness, provide any support for his statements other than identifying  
25 he was taking certain medications or state he was confused during the pre-trial process. Judge Kephart  
26 concluded these were naked allegations. Judge Kephart also concluded, based on the record of pre-  
27 trial and trial proceedings that nothing indicated Petitioner was incompetent. Judge Kephart also relied  
28 on Mr. Frizzell's testimony. Judge Kephart denied this claim for those reasons and that Petitioner did  
not demonstrate how this information would change the outcome.

<sup>30</sup> Judge Kephart addressed and denied this claim for the same reasons.

1 habitual criminal sentence could not be run consecutively.

2 Other than asserting that two of the felony convictions arise from the same fact pattern,  
3 Petitioner fails to state how any of the felony convictions are constitutionally infirm. The  
4 sentencing record reflects counsel examined the documents supporting the convictions and he  
5 had no basis for contesting them. Petitioner fails to present any evidence of infirmity, so this  
6 is a bare and naked allegation, and is denied.

7 In Nevada, only findings relating to certain murder convictions and sentencing require  
8 findings by a jury. The habitual criminal sentencing statutes are penalty enhancements, not  
9 separate offenses. They are not elements of criminal offenses. While the prior convictions  
10 must be established by the State, a properly authenticated copy of a conviction establishes this  
11 fact. The underlying facts of the criminal offense evidenced by the conviction are not retried,  
12 rather the defense may contest the convictions on legal grounds – a matter for the judge not  
13 the jury. The caselaw cited by Petitioner is distinguishable and does not support his assertions.  
14 Counsel cannot be ineffective for failing to make futile motions or objections. Therefore, this  
claim is denied.

15 Petitioner asserts that the State failed to give proper notice of its intent to seek habitual  
16 criminal enhancement at sentencing. Petitioner bases this claim on the fact that the State did  
17 not amend the charging document to include “habitual criminal charges.” The State is not  
18 required to include notice that it is seeking habitual criminal treatment in the charging  
19 document, though it may do so. It simply must provide adequate notice before sentencing of  
20 this intent. NRS 207.010(2). The State did this in March and July of 2016. Therefore, this  
21 claim is belied by the record and denied.

22 Multiple convictions can arise out of the same factual scenario so long as one crime is  
23 not a lesser included of another offense. Thus, one can be convicted of kidnapping and robbery  
24 arising out of the same convenience store incident. Again, the cases cited do not stand for the  
25 proposition Petitioner asserts. Of course, a defendant can always argue that a judge use  
26 discretion and discount a prior felony arising from the same factual transaction. To the extent  
27 no argument was made in this case, the Court finds there is no reasonable probability if an  
28 argument was made it would have changed Judge Kephart’s mind, given the totality of

1 Petitioner's criminal history and the amount of narcotics involved in this case. Judge Kephart  
2 considered all the sentencing evidence and determined to run most of the sentences together  
3 concurrently, but clearly believed Petitioner needed to spend considerable time in custody  
4 before parole eligibility.

5 Finally, while case law indicates a defendant cannot receive the normal sentence on the  
6 underlying criminal offense and be additionally sentenced as an habitual criminal, nothing  
7 prevents a judge from imposing habitual criminal sentences on separate crimes or from  
8 running a habitual criminal sentence consecutive to other distinct convictions. That is what  
9 happened in this instance. The record belies Petitioner's assertion that his habitual criminal  
10 sentences were to run consecutively.

11 Because Petitioner cites to inapplicable law and the record belies his claims, any  
12 argument counsel could make regarding the habitual criminal sentencing is not supported by  
13 the law and would be futile. Therefore, counsel was not ineffective, and the claim is denied.<sup>31</sup>

#### 14 **H. Failure to Cross-Examine Lopez with Prior Inconsistent Statements**

15 Trial counsel did point out and cross-examine Officer Lopez on differences between  
16 the arrest declaration and his testimony at various pre-trial proceedings. Counsel pointed out  
17 that aspects of the traffic stop, *Terry* frisk, three-hour delay between the stop and vehicle  
18 search warrant and other matters got more detailed from the earlier statements until the trial  
19 testimony. Counsel also noted where testimony from Officer Henry differed from Officer  
20 Lopez. The Petition asserts certain inconsistency and argues this is evidence that Officer  
21 Lopez gave false testimony, and the State encouraged such testimony.

22 This claim is belied by the record and there is no reasonable probability of a different  
23 result if trial counsel more aggressively cross-examined Officer Lopez or argued his testimony  
24 on the traffic stop and probable cause search was fabricated. It is true that additional detail is  
25 added between the declaration and the preliminary hearing and between those events and trial.

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26  
27 <sup>31</sup> Judge Kephart only addressed these issues as substantive claims, not as ineffective assistance of  
28 trial counsel.

1 However, the consistent statements provide more than enough grounds for a traffic stop,  
2 probable cause for the initial vehicle search and the decision to request a K-9 dog. In addition,  
3 the consistent statements also support probable cause for the vehicle warrant and the results  
4 of the vehicle warrant provided the grounds for the house search. Finally, trial counsel did  
5 point out issues of inconsistency between the photographs of the searches, Officer Henry's  
6 testimony and Officer Lopez' testimony. For example, counsel argued that such differences  
7 created reasonable doubt concerning ownership or knowledge of the narcotics and guns.  
8 Moreover, even if Petitioner testified in opposition to Officer Lopez' version of the events,  
9 Petitioner's own credibility would be severely damaged by his felony convictions.

10 For these reasons, the claim is denied.<sup>32</sup>

### 11 I. Body Camera Footage

12 Petitioner claims trial counsel was ineffective for failing to take more action with  
13 respect to the lost or destroyed footage from Officer's Henry's body camera. Officer Henry  
14 was wearing a camera on his glasses. The camera recorded whatever Officer Henry saw when  
15 he looked in a certain direction. Arguably, it recorded the state of the glove box when it was  
16 opened, what happened when the unknown woman approached the car inquiring about a purse  
17 and other matters. Officer Henry testified that it was a new device. At the end of his shift, he  
18 placed the camera into a recharging/upload station. The video from the camera should then  
19 have uploaded into a central database. It would remain in the base for 45 days and then would  
20 be automatically deleted.<sup>33</sup> If an officer wanted to preserve the recording, he or she needed to  
21 tag the file, so it would not be automatically erased. Officer Henry indicated he thought he  
22 tagged the file, but he assumed he was mistaken because it was not in the system when Defense

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23 <sup>32</sup> Judge Kephart did not rule on this claim.

24 <sup>33</sup> Petitioner asserts he made a request for the body camera footage within 45 days of his arrest at one  
25 of his initial Justice Court appearances. The record reflects that defense counsel did make a request  
26 for the footage at some point because the lack of video footage was discussed at the February 22,  
27 2017, Calendar Call. The State continually represented in hearings that no video footage existed, and  
28 they did not know what happened to it. For purposes of these Findings, the Court assumes defense  
counsel made a request for the footage within the 45-day period.

1 made a request for a copy of the footage. He also indicated he didn't know if the video  
2 uploaded properly. No evidence demonstrates the database was tampered with or the footage  
3 deliberately destroyed.

4 Many of the issues Petitioner alleges would be shown on the tape were, in fact, testified  
5 to by Officer Henry or other officers. Officer Henry indicated the concealed compartment in  
6 the glove box was not noticeable immediately upon opening the box. Rather, a false side wall  
7 fell when one of the officers reached into the glove box. At that point the concealed hole was  
8 revealed. The same is true of the woman asking about a purse, as Officer Henry testified to  
9 that event.

10 Although not specifically argued by Petitioner, it appears he asserts that trial counsel  
11 should have moved to dismiss the charges, suppress the evidence, or ask for other relief based  
12 on lost or destroyed evidence. While case law does permit these remedies, the standard for  
13 imposing them depends upon how the evidence was lost. Evidence lost because of routine  
14 records destruction may warrant some type of jury instruction but will not warrant dismissal  
15 of a case or suppression of evidence. If the evidence was deliberately destroyed, dismissal or  
16 suppression is more likely to be granted.

17 Here, even if trial counsel made such requests, there is no reasonable probability the  
18 case would be dismissed, or the evidence suppressed. At most, trial counsel may have received  
19 a jury instruction that the jury could infer the tape would show what Officer Henry saw. If  
20 Officer Henry looked in an area, but could not remember what he saw, the jury might be able  
21 to infer the area contained no incriminating evidence. However, Officer Henry did not search  
22 the entire vehicle, nor was he always present or looking at the same sections as Officer Lopez.  
23 Moreover, Officer Henry testified to most of the points Petitioner wanted to make and, at  
24 times, differently from Officer Lopez. All of this was pointed out to the jury.

25 Therefore, this claim is denied.<sup>34</sup>

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26  
27 <sup>34</sup> Judge Kephart did not rule on this claim, although it was discussed at the evidentiary hearing.  
28

1                                   **J.       Owe Sheets**

2           Petitioner claims in his Reply to the State’s Opposition to his Petition that trial counsel  
3 should have admitted the “owe sheets” recovered in the residence search.<sup>35</sup> Petitioner alleges  
4 the documents are clearly in a woman’s handwriting and not the Petitioner’s, although  
5 Petitioner presents no specific facts to support this assertion. Nonetheless, assuming this is  
6 true, there is no reasonable possibility of a different result if the evidence were admitted.  
7 Petitioner also claims this unnamed woman was arrested for separate narcotic charges while  
8 he was in custody. First, by admitting the documents in Petitioner’s case, Petitioner would be  
9 effectively admitting narcotics were being sold from his residence. The same would be true  
10 of an arrest of this woman, if admissible. Given where narcotics were found in Petitioner’s  
11 car and residence, there is no reasonable probability that a jury would believe Petitioner knew  
12 nothing about the narcotics and was simply a dupe of this unknown woman.<sup>36</sup> The greater  
13 probability is that the jury would conclude Petitioner had a female partner in crime. Therefore,  
14 this claim is denied.<sup>37</sup>

15                                   **K.       Improper Advice Regarding Effect of Guilty Plea and Hearing**  
16                                   **Testimony**

17           In his Petition and Reply, Petitioner claims that trial counsel was ineffective when he:  
18 1) advised Petitioner that if he accepted a plea offer, he would waive his right to appeal the  
19 suppression issues; 2) advised Petitioner that if he testified at the suppression hearing his  
20 felony convictions could be admitted at trial. Assuming these assertions are true, they do not  
21 warrant relief.

22           First, trial counsel correctly advised Petitioner that a guilty plea would be a waiver of  
23

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24 <sup>35</sup> “Owe sheets” are documents which officers’ identify as evidence of narcotic sale transactions (as  
25 opposed to personal use). Officers will testify that, based upon their training and experience, a  
26 document or documents are “owe sheets”.

27 <sup>36</sup> Petitioner has never identified the name of the woman who allegedly lived with him.

28 <sup>37</sup> Judge Kephart did not address this claim.

1 direct appeal and he could not challenge the suppression rulings on appeal. Petitioner  
2 complains because he rejected the State's offers so he could raise the suppression issues and  
3 then appellate counsel failed to raise them. However, this failure amounts to an allegation of  
4 ineffective assistance of appellate counsel. Trial Counsel cannot be ineffective for correctly  
5 advising Petitioner on the law.

6 Second, if Petitioner testified at the suppression hearing his felonies convictions could  
7 be used to impeach and there is no reasonable probability of a different result on the  
8 suppression motion. While Petitioner's testimony would not necessarily be admitted at trial,  
9 there are circumstances where it might be admissible together with the felony impeachment  
10 evidence. This is especially true if Petitioner testified at trial or attempted to use the  
11 suppression hearing testimony to support his defense at trial. Counsel is not ineffective  
12 because the attorney correctly advises a defendant of the pros and cons of specific decisions.  
Therefore, this claim is denied.<sup>38</sup>

### 13 **Conclusion**

14 For all the reasons set forth above, Petitioner's claims of ineffective assistance of trial  
15 counsel are denied.

### 16 **III. Ineffective Assistance of Appellate Counsel Claims**

17 To succeed on an ineffective assistance of appellate counsel claim, a petitioner must  
18 satisfy the two- prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923  
19 P.2d 1102, 1114 (1996). To satisfy Strickland, the defendant must show that the omitted issue  
20 would have had a reasonable probability of success on appeal. Id. There is a strong  
21 presumption that appellate counsel's performance was reasonable and fell within the "wide  
22 range of reasonable professional assistance." See, United States v. Aguirre, 912 F.2d 555, 560  
23 (2nd Cir. 1990) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065).

24 The professional diligence and competence required on appeal involves "winnowing  
25 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a  
26

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27 <sup>38</sup> Judge Kephart did not address these issues.  
28

1 few key issues.” Jones v. Barnes, 463 U.S. 745, 751-752, 103 S. Ct. 3308, 3313 (1983). In  
2 particular, a “brief that raises every colorable issue runs the risk of burying good arguments. .  
3 .in a verbal mound made of strong and weak contentions.” Id. at 753, 103 S.Ct. at 3313. “For  
4 judges to second-guess reasonable professional judgments and impose on appointed counsel a  
5 duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of  
6 vigorous and effective advocacy.” Id. at 754, 103 S.Ct. at 3314.

7 Petitioner asserts appellate counsel should have raised the following issues on appeal:  
8 a) alleged illegality of habitual-criminal sentences (Items 1-4 under waived claims); b)  
9 whether the search of Petitioner’s vehicle violated the 4<sup>th</sup> Amendment (Items 6, 8-12, 14-18);  
10 c) whether the three hour delay between the time of the initial stop and the obtaining of a  
11 warrant to search Petitioner’s vehicle rendered the vehicle stop invalid (Item 7); d) whether  
12 the case was subject to dismissal for failure of the police to preserve body camera footage  
13 (Item 19); e) whether the district court erred by not excluding all or a part of Officer Lopez’  
14 testimony (Items 10 and 20); 6) the district court should have excluded the male DNA on a  
15 gun and arguments based on the same (Items 21 and 22) and 7) whether the district court erred  
16 by denying a continuance to allow Petitioner to retain new counsel.<sup>39</sup>

#### 17 **A. Issues Not Preserved for Appeal**

18 Issues not raised in the trial court cannot be assert on direct appeal Peke Res.,Inc. v.  
19 Fifth Jud. Dist. Ct., 113 Nev. 1062, 1068 n.5, (1997), Hooper v. State, 95 Nev. 924, 926 (1979).  
20 Items 1-4, 8, 15, 17, 18, 20, 21 and 22 were not raised at the trial level. Therefore, they could  
21 not be raised on appeal and appellate counsel was not ineffective. However, even if raised,  
22 there is no reasonable probability of a different result on appeal.

---

23 <sup>39</sup> Petitioner also asserts that he did not accept the negotiations offered by the State because he wanted  
24 to raise every issue of suppression on appeal. When appellate counsel refused to raise every issue, he  
25 was stuck because his Motions to Dismiss Counsel and represent himself on appeal were denied. The  
26 record reflects Judge Kephart granted the pro se representation request, but limited it to after opening  
27 briefs were filed. Regardless, the Nevada Supreme Court did not let Petitioner represent himself.  
28 Appellate Counsel is under no obligation to simply do whatever the client wants or raise every issue.  
However, even if such issues were raised, as discussed in the main body of this Order, there is no  
reasonable probability of a different result on appeal.

1 As noted above under ineffective assistance of trial counsel, Petitioner was properly  
2 sentenced under the habitual criminal statutes. On the Fourth Amendment search issues, also  
3 discussed above, this was not a search incident to arrest and failure to prosecute the traffic  
4 offenses does not invalidate the searches, so these issues would not constitute grounds for  
5 invalidating the vehicle and residences searches on appeal. Also, as noted above, even if  
6 Petitioner presented evidence below that he requested a lawyer immediately when *Mirandized*,  
7 such a request would not affect search and seizure issues not based on interrogation. Such a  
8 claim had no reasonable probability of success on appeal. The same is true of the permission  
9 to remove the wallet issue – even if preserved, it would not be an abuse of discretion for the  
10 trial judge to believe officer testimony vis-à-vis Petitioner’s testimony on consent. Thus, this  
11 issue would not reasonably lead to a different result on appeal.

12 Based upon the trial and hearing records, differences in Officer Lopez’s trial or  
13 evidentiary hearing testimony from his statements in arrest reports or declarations, prior  
14 testimony, crime scene photographs or testimony from other officers, do not demonstrate  
15 Officer Lopez was giving false testimony. In some instances, the information was not  
16 necessary to the purpose of the document (probable cause for arrest), hearing (scintilla of  
17 evidence for preliminary hearing); therefore, not every fact relating to the searches may have  
18 been presented. In addition, the majority of Officer Lopez’ testimony was supported by the  
19 physical evidence and Officer Henry’s testimony.

20 Petitioner argues that Officer Lopez was testifying falsely when he said he smelled a  
21 marijuana odor coming from the car and Petitioner’s person. Petitioner correctly indicates no  
22 marijuana was found in the car or on his person; the car did not contain lighters, matches,  
23 rolling papers, pipes, or other smoking apparatus; no marijuana residue (ashes, butts, etc.) was  
24 inside the vehicle. Petitioner asserts absent all of this; Officer Lopez must have been lying.  
25 Trial counsel pointed out this discrepancy through cross-examination and in the suppression  
26 motion. Nonetheless, lying is not the only explanation.

27 Assuming marijuana odor can only be produced from recent smoking activity, Officer  
28 Lopez may have been mistaken. However, the issue is not whether the odor actually existed,  
but whether Officer Lopez believed he smelled an odor. This is a question of credibility. Such

1 questions are left to the trier of fact. Given Officer Henry's corroboration of most of Officer  
2 Lopez' testimony, the large amount of marijuana found in Petitioner's residence (178 grams)  
3 and all the other evidence, the judge (at the suppression hearing) and the jury (at trial) could  
4 find Officer Lopez' was mistaken about the odor but was still being truthful about what he  
5 thought he smelled.

6 Finally, there is no evidence that the State had any reason to believe Officer Lopez was  
7 lying and not just mistaken. Other than the "bare" allegation that Lopez' was lying, based  
8 almost entirely on Petitioner's assertion that he did not consent to have his wallet removed and  
9 there could be no marijuana odor because there was no evidence anything was smoked, there  
10 is no reasonable probability that the Nevada Supreme Court would reach a different result if a  
11 claim of prosecutorial misconduct were raised.

12 The final two items involve DNA testing done on the guns seized from the car and the  
13 residence. The results were inconclusive. They showed a mixture of partial DNA reflecting  
14 more than one person handled the items and, on one gun, that one of the persons was male.  
15 The major defense strategy involved stressing evidence that another person, a woman, was  
16 connected to the car and the residence. Therefore, defense counsel argued, reasonable doubt  
17 existed regarding whether Petitioner had actual or constructive possession of the controlled  
18 substances or guns. The fact that the weapons demonstrated a mixture of DNA profiles  
19 supported this defense. Although the State, at one point, indicated male DNA on both  
20 weapons, the Prosecutor amended this statement to reflect only one gun. Finally, Defense  
21 counsel did object to the DNA evidence, but the objection was overruled. Defense counsel  
22 also argued the lack of conclusive DNA evidence and the failure of the police to take DNA  
23 from anything else as grounds for reasonable doubt.

24 On appeal, the district court's decision to admit the evidence would be reviewed under  
25 an abuse of discretion standard. Harkins v. State, 122 Nev. 974, 980, 143 P.3d. 706, 709  
26 (2006). The issue was relevancy. In pre-trial hearings, it was evident the defense would  
27 involve assertions that the drugs and guns belonged to some unknown woman. The evidence  
28 was relevant to demonstrate that at least one weapon had male DNA and that the State was not  
denying someone else could equally be in actual or constructive possession of the drugs and

1 guns. Rather, the State was demonstrating the unlikelihood that Petitioner was ignorant of  
2 their existence and was the dupe of this unknown woman. There is no reasonable probability  
3 that the Nevada Supreme Court would find an abuse of discretion in permitting the DNA  
4 evidence. Moreover, even if the Supreme Court did find an abuse, the admission of the  
5 evidence would be harmless error given the remainder of the evidence.

6 For the reasons state above, these ineffective assistance of appellate counsel claims are  
7 denied.<sup>40</sup>

### 8 **B. Preserved Suppression Issues – Not Raised on Appeal**

9 The following vehicle and residence search issues were raised at trial, but not on appeal:  
10 Item 6 – lack of exigency; Item 9 – lack of probable cause for the traffic stop; Item 10 – lack  
11 of probable cause to search with K-9 unit; Item 11 – the traffic stop was pretextual; Item 12 –  
12 even if the initial look in the car and pat down were proper as a search incident to an arrest,  
13 any further searches exceeded the scope of that search once Petition was handcuffed and  
14 secured in the police vehicle; Item 14 – no smoking apparatus or residue in car negates odor  
15 of marijuana, so there was a lack of probable cause for the initial car search; and, Item 16 – no  
16 basis for *Terry* pat down.

17 As noted in the Supreme Court direct appeal decision, denials of motions to suppress  
18 are reviewed for an abuse of discretion on factual findings and de novo on legal conclusions.  
19 The facts demonstrate the trial court did not abuse its discretion in denying the Motion to  
20 Suppress the results of the vehicle search. And, as there was probable cause for the initial  
21 vehicle and K-9 searches, there is no reasonable probability the Nevada Supreme Court would  
22 reach a different conclusion on appeal if the issues were raised.

23 As discussed under the ineffective assistance of trial counsel claims, Officer Lopez  
24 observed several traffic violations that justified a vehicle stop. So long as the officer  
25 reasonably believed the vehicle traveled 300' in a turn lane and the rear light was broken, the  
26 fact that he may have been mistaken does not negate grounds for a stop nor does it support

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27 <sup>40</sup> Judge Kephart did not address these issues.  
28

1 pretextual stop arguments.

2       Petitioner relies on obsolete case law on vehicular searches in Nevada. As pointed out  
3 in the State's Opposition to the motion to suppress, a warrant is not required to search a stopped  
4 vehicle so long as the vehicle was moving at the time of the stop. See State v. Lloyd, 312 P.3d  
5 467 (Nev. 2013). So long as an officer has probable cause to believe the vehicle may contain  
6 evidence of crimes beyond the minor vehicle violations, exigent circumstances exist to search  
7 the vehicle. Of course, once a person is under arrest, express or implied, a warrant should be  
8 obtained for continued evidentiary searches.

9       Here, the following evidence constitutes probable cause for the initial vehicle search -  
10 the odor of marijuana, cash amounts and folding, Petitioner's hasty exit from the vehicle and  
11 the bits of green leafy substance in plain view on the floor of the driver's seat. The lack of  
12 smoking apparatus or residue after the vehicle was searched is irrelevant to this inquiry. While  
13 Officer Henry did not notice the odor and Officer Lopez could have been mistaken, the cash,  
14 exit, and leafy substance alone would lead a reasonable person to suspect Petitioner was  
15 dealing in controlled substances and that the vehicle contained contraband. Indeed, the  
16 Nevada Supreme Court pointed this out in the Order of Affirmance when it considered the  
17 suppression argument raised on appeal.

18       Once a quick search was made of the interior, additional items connected with narcotic  
19 sales were located. This justified bringing in the K-9 unit. When the K-9 dog focused on the  
20 glove compartment and it was opened, the secret panel was dislodged. When items in the  
21 secret compartment could not be easily seen or retrieved, the probable cause search ended. It  
22 is clear at this point; Petitioner's was being detained on drug charges, under de facto arrest and  
23 a search warrant was requested and obtained.

24       Finally, with respect to the *Terry* frisk, Officer Lopez initiated the pat down based on  
25 Petitioner's demeanor, quick exit from the vehicle and Petitioner's clothes. Officer Lopez  
26 says the clothes were loose enough it would be hard to detect a gun visually – Petitioner asserts  
27 his clothes were not “baggy” as evidenced by his booking photo. Under *Terry*, an officer  
28 needs only minimal facts to conduct a weapons pat down. The trial judge concluded from  
the evidence that the pat down was permissible. Nothing in the booking photo negates Officer

1 Lopez' impression. Moreover, Officer Lopez did not grab the cash while retrieving what he  
2 thought might be a weapon, instead he was reaching for Petitioner's wallet and the cash came  
3 out while he was removing the wallet. There is no reasonable probability the Nevada Supreme  
4 Court would conclude the frisk was improper and suppress the cash that came out with  
5 Petitioner's wallet or that the Court would reverse the trial verdict based on this claim.

6 In conclusion, there is no reasonable probability these issues, if raised on appeal, would  
7 have led to a different result and the ineffective assistance of appellate counsel claims based  
8 on these assertions are denied.<sup>41</sup>

9 **C. Three Hour Delay Issues – NRS 171.123 and NRS 171.1771**

10 Petitioner asserts the evidence seized from the vehicle should have been suppressed for  
11 violations of NRS 171.123 and NRS 171.1771. (Item 7 under issues waived). Trial counsel  
12 asserted this argument in the motion to suppress below. NRS 171.123 specifies that an officer  
13 may detain an individual for no more than 60 minutes based upon reasonable suspicion that  
14 the person has, is or is about to commit a crime. The stop allows the officer to identify the  
15 individual and conduct a preliminary investigation into the crime(s). Detention beyond 60  
16 minutes is not permissible unless there is probable cause for an arrest. However, if probable  
17 cause for arrest exists, the statute no longer applies. NRS 171.1231. State v. Beckman, 305  
18 P.3d. 912, 915 (Nev. 2013).

19 NRS 171.1771 relates to the preference for the issuance of a citation in lieu of arrest  
20 for misdemeanor crimes.

21 The record reflects that approximately three hours passed from the initial traffic stop  
22 until the application for a search warrant on the vehicle. However, the record is also clear that  
23 Petitioner was not detained on reasonable suspicion grounds for the whole of that time.  
24 Petitioner was initially placed into handcuffs almost immediately after he jumped out of the  
25 vehicle. Officer Lopez did this to prevent Petitioner from leaving the scene and for officer

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26 <sup>41</sup> Judge Kephart, based on the record below and the evidentiary hearing, concluded appellate counsel  
27 made a strategic choice on which suppression issues to appeal and that Petitioner also failed to show  
28 prejudice.

1 safety while the *Terry* pat down was completed. Petitioner was clearly detained, but not under  
2 arrest at this point.

3 Shortly after the pat down, as Officer Henry arrived at the scene, five shots were fired  
4 in the complex. This caused considerable delay in processing the traffic stop as well as the  
5 probable cause search of the vehicle. At this point, Petitioner was placed in a patrol vehicle,  
6 still handcuffed, for his safety and to prevent him fleeing during the confusion. The officers  
7 had no idea whether the shots were connected to Petitioner or completely unrelated.<sup>42</sup> It took  
8 some time to investigate the shots and clear the scene as multiple patrol cars and a police  
9 helicopter conducted a search for the shooter.

10 Once the shooting investigation ended, Officer Lopez and Officer Henry conducted a  
11 probable cause search of the vehicle. Based on the items found, the K-9 unit was called, and  
12 a sniff search was done, and the glove box opened. By this time, the detention exceeded the  
13 60-minute time frame for the initial stop.

14 When the shots started, under NRS 171.123, the officers had reasonable suspicion that  
15 Petitioner may have been involved given the location and timing vis-à-vis the traffic stop. This  
16 extends the detention deadline beyond the interrupted initial traffic and reasonable suspicion  
17 period of the initial stop as a new crime was being investigated. Once the shot investigation  
18 ceased, the narcotic investigation continued. Baggies consistent with narcotics sales were  
19 found in the vehicle. Then, the K-9 unit arrived, and the false wall of the glove box was  
20 discovered. At this point, the record supports an inference that the initial investigation before  
21 the shooting and the remaining investigation after the shooting did not exceed the 60-minute  
22 period.<sup>43</sup> When the 60-minutes was exceeded, the officers had reasonable grounds to arrest

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23 <sup>42</sup> In fact, intercepted jail calls between Petitioner and a woman indicated the woman saw the stop and  
24 fired the shots to create confusion in the hopes Petitioner would get away. However, there is no  
25 evidence that Petitioner was aware of, or instigated, her actions.

26 <sup>43</sup> Electronic records from the police department were part of the record, but they only note times for  
27 certain events. The precise time between the initial stop and the shots, the shots and the initial probable  
28 cause search, the initial probable cause search and the K-9 search and the K-9 search to the warrant  
are not clear.

1 Petitioner.

2 When the glove compartment false wall was discovered, the officers had probable cause  
3 for a search warrant and grounds to continue the detention.

4 As for NRS 171.1771, it only applies to misdemeanor offenses. Here, Petitioner was  
5 never arrested for the traffic offenses, so the citation statute is inapplicable.

6 There is no reasonable probability, based on the totality of the circumstances, that the  
7 Nevada Supreme Court would find the trial court erred in not suppressing evidence seized  
8 after the shooting. Therefore, appellate counsel was not ineffective for failing to raise this  
9 argument.<sup>44</sup>

#### 10 **D. Body Camera Issues**

11 Trail counsel did not move to dismiss the charges based on the failure of the State to  
12 preserve the video taken by Officer Henry's body camera. (Item 19 under waived issues).  
13 Counsel only raised this issue in regarding to credibility determinations at the suppression  
14 hearing. Thus, this issue was not preserved for appeal and appellate counsel was not  
15 ineffective.

16 This claim is discussed under the ineffective assistance of trial counsel section above.  
17 Even if trial counsel preserved the issue, for the reasons cited in that section, there is no  
18 reasonable probability that the Nevada Supreme Court would find the failure to upload or tag  
19 the video warranted dismissal of the charges. At most, it might have found a jury instruction  
20 was warranted, but any error was harmless beyond a reasonable doubt given the totality of the  
21 evidence and Officer Henry's testimony.

22 Therefore, this claim is denied.<sup>45</sup>

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25 <sup>44</sup> Judge Kephart did not rule on this issue specifically. It was included in his general ruling that  
26 Petitioner failed to show prejudice and Counsel made strategic decisions on what to raise in the appeal.

27 <sup>45</sup> Judge Kephart did not rule on this issue save for his general ruling discussed in fn. 41.

1                                   **E.      Failure to Exclude K-9 Qualification Testimony**

2           Petitioner asserts appellate counsel should have challenged the admission of the K-9  
3 dog's qualifications and results of the K-9 inspection on appeal. Some of the testimony was  
4 objected to and the issue preserved for appeal. Other parts of the testimony were not preserved  
5 by objection. Essentially, Petitioner alleges the trial court erred in admitting the K-9 testimony  
6 because the State failed to call the K-9 Officer and the remaining testimony was inadmissible  
7 hearsay. And, without the K-9 testimony, the evidence seized pursuant to the vehicle search  
8 warrant would have been suppressed.

9           Even assuming all these arguments were preserved for appeal, there is no reasonable  
10 probability of a different result if appellate counsel raised them. First, Officer Lopez and  
11 Officer Henry witnessed what the dog did. So, their testimony was not hearsay. Officer  
12 Lopez' testimony about his belief that the dog was properly certified was admissible to show  
13 probable cause for the vehicle warrant. Perhaps an objection would gain a limiting jury  
14 instruction, but not the suppression of the evidence located pursuant to the warrant. Second,  
15 assuming the K-9 Officer directly testified, there is no reason to believe the dog was not  
16 certified and Petitioner presents no evidence to the contrary. Third, even if the dog were not  
17 certified, the warrant was obtained in good faith and the evidence would still not be  
18 suppressed. United States v. Leon, 468 U.S. 897 (1984); State v. Allen, 119 Nev. 166 (2003).

19           Appellate counsel was not ineffective, and the claim is denied.<sup>46</sup>

20                                   **F.      Gun DNA Testimony**

21           This issue was discussed under the non-preserved issues above. Essentially, Petitioner  
22 asserts appellate counsel failed argue on appeal that the district court erred in admitting the  
23 DNA results from the guns found in the vehicle and the residence. Even if preserved, this  
24 issue would not succeed on appeal. Decisions on the admission of evidence are subject to an  
25 abuse of discretion standard on appeal. Harkins, Id. The evidence was relevant and the

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26           <sup>46</sup> Judge Kephart addressed the K-9 issues in his ineffective assistance of trial counsel analysis. He  
27 did not rule on it in the appellate context save for his general ruling discussed in fn. 41.  
28

1 probative value was not outweighed by the prejudicial value. Given the defense that a woman  
2 owned and controlled the guns, the presence of mixed DNA on one gun and male DNA on  
3 another gun was relevant together with the placement of the guns in the vehicle and the  
4 residence owned by Petitioner to demonstrate Petitioner had knowledge and control of the  
5 weapons.

6 As there is no reasonable probability of a different result on appeal, the failure to raise  
7 this issue is not ineffective assistance of counsel, and the claim is denied.<sup>47</sup>

#### 8 **G. Trial Court Erred in Denying Continuances for New Counsel**

9 This issue was raised by appellate counsel and denied in the Order of Affirmance.  
10 Moreover, the Order of Affirmance also addressed that the trial court did not err in finding no  
11 actual conflict existed between Petitioner and Mr. Frizzell. Therefore, the trial court did not  
12 err in refusing to dismiss Mr. Frizzell. Therefore, this claim is denied.<sup>48</sup>

#### 13 **Conclusion**

14 For the reasons cited above, Petitioner's claims of ineffective assistance of appellate  
15 counsel are denied.

#### 16 **IV. Cumulative Error Is Not A Cognizable Claim for Habeas Relief**

17 The Nevada Supreme Court has never held that instances of ineffective assistance of  
18 counsel can be cumulated. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009).  
19 Further, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim  
20 of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of  
21 the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d  
22 845, 855 (2000).

23 As the Nevada Supreme Court found in affirming Petitioner's convictions:

24 The totality of the circumstances supports finding probable cause to search Keller's  
25

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26 <sup>47</sup> Judge Kephart did not rule on this issue.

27 <sup>48</sup> Judge Kephart did not address this issue.  
28

1 home. Inside Keller's car, officers found 344.29 grams of methamphetamine, 33.92  
2 grams of heroin, .537 grams of cocaine, a mixture of the three controlled substances,  
3 and a gun. The quantity of methamphetamine and heroin exceed personal use levels,  
4 and the discovery of 1-inch by 1-inch baggies, a large amount of cash, as well as a gun,  
5 fairly indicated to the officers that Keller was trafficking in drugs. Further, when  
6 Officer Lopez initiated the traffic stop, Keller tried to exit the car parked in front of his  
7 condo, which in conjunction with Keller's evasive driving, Officer Lopez took as an  
8 attempt to escape. Taken as a whole, these circumstances supported a finding of  
9 probable cause that Keller was a drug dealer and that more drugs and guns would be  
10 found inside his condo.

11  
12 Order of Affirmance at page 5.

13 The Nevada Supreme Court also determined that the issue of guilt was not close in this  
14 case. In addressing Petitioner's claim of cumulative error on appeal, the Nevada Supreme  
15 Court further found overwhelming evidence of guilt:

16 Keller summarily argues that cumulative error requires reversal. But, Keller fails to  
17 establish any error on appeal, and the evidence presented at trial against him was  
18 overwhelming. See *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)

19  
20 Order of Affirmance at pages 8-9.

21 Finally, even if any of Petitioner's ineffective assistance of counsel allegations had  
22 merit, this Court finds that Petitioner has failed to establish a reasonable likelihood that, when  
23 aggregated, those errors deprived him of a better outcome at trial or on appeal. Since the issue  
24 of guilt was not close, and because Petitioner failed to sufficiently undermine confidence in  
25 the outcome of his case, this Court concludes the Petitioner's claim of cumulative error is  
26 without merit.<sup>49</sup>

27  
28 

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<sup>49</sup> Judge Kephart made the same ruling.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED, Petitioner Christopher Keller's Petition for Post-Conviction for Writ of Habeas Corpus shall be, and is, DENIED.

DATED this 8 day of April, 2022.

Day & Becker

**CERTIFICATE OF MAILING**

I hereby certify that service of the above and foregoing was made this \_\_\_\_\_ day of \_\_\_\_\_, 2022, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

CHRISTOPHER R. KELLER, BAC #81840  
LOVELOCK CORRECTIONAL CENTER  
1200 PRISON ROAD  
LOVELOCK, NV, 89419

BY \_\_\_\_\_

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**December 09, 2019**

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A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

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**December 09, 2019      8:30 AM      Petition for Writ of Habeas  
Corpus**

**HEARD BY:** Kephart, William D.      **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** Tia Everett

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES**

**PRESENT:**      Zadrowski, Bernard B.      Attorney

**JOURNAL ENTRIES**

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court stated a written opposition has not been filed. Mr. Zadrowski advised the State is requesting 45 days to file a written response. COURT ORDERED, State's Response shall be due on or before 1/22/2020; Defendant's Reply shall be due on or before 2/26/2020 and matter CONTINUED.

NDC

CONTINUED TO: 3/11/2020 8:30 AM

CLERK'S NOTE: The above minute order has been distributed to:

CHRISTOPHER KELLER # 81840  
LOVELOCK CORRECTIONAL CENTER  
1200 PRISON RD  
LOVELOCK, NV 89419

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**March 11, 2020**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

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**March 11, 2020      8:30 AM      Petition for Writ of Habeas  
Corpus**

**HEARD BY:** Kephart, William D.      **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** Tia Everett

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES**

**PRESENT:** Brooks, Parker      Attorney

**JOURNAL ENTRIES**

- Court noted Defendant not present and in custody with the Nevada Department of Corrections. Further, Court noted Defendant has made a number of claims and COURT ORDERED, as to claims 1 - 7 are substantive claims which should have been raised on direct appeal and have therefore been those claims have been waived. FURTHER ORDERED, matter SET for Evidentiary Hearing as to 3, 4, 5, 7 & 8 regarding ineffective of counsel as follows;

3 - counsel failing to use a different investigator based on his parents

4 - counsel failing to visit while preparing

5 - failure to subpoena and/or call certain witnesses regarding living arrangements he had

7 - failure to ask for testimony of canine handlers records

8 - failure to relay Defendant's mental health history and the fact Defendant was on and off medication.

Court noted as to claims 1, 2 & 6 the Court will not need to hear any information regarding these claims.

NDC

4/23/2020 8:30 AM EVIDENTIARY HEARING

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**October 01, 2020**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**October 01, 2020      8:30 AM      All Pending Motions**

**HEARD BY:** Kephart, William D.      **COURTROOM:** RJC Courtroom 16B

**COURT CLERK:** Tia Everett

**RECORDER:** Christine Erickson

**REPORTER:**

**PARTIES**

**PRESENT:**      Dickerson, Michael      Attorney  
Keller, Christopher R      Plaintiff

**JOURNAL ENTRIES**

- PLAINTIFF'S MOTION TO APPOINT COUNSEL:

COURT ORDERED, Motion DENIED as Defendant is not entitled to counsel at this point.

PETITION FOR WRIT OF HABEAS CORPUS ... EVIDENTIARY HEARING

Court reviewed Defendant's claims for the record. Kenneth Frizzell sworn and testified. Court FINDS, Defendant's claims 1 - 7 were claims which could have been raised on direct appeal and therefore WAIVED; and Defendant has failed to establish how counsel's representations fell below a reasonable standard as well as but for counsel's errors how the outcome would have been different. COURT ORDERED, Petition DENIED.

NDC

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**January 27, 2021**

---

A-19-800950-W	Christopher Keller, Plaintiff(s)
	vs.
	State of Nevada, Defendant(s)

---

**January 27, 2021      8:30 AM      Motion**

**HEARD BY:** Trujillo, Monica      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Kathryn Hansen-McDowell

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Iscan, Ercan E      Attorney

**JOURNAL ENTRIES**

- Defendant not present, in custody of the Nevada Department of Corrections.

COURT FINDS the minutes from the 10/1/2020 evidentiary hearing were sufficiently clear and ORDERED, Motion DENIED. State to prepare the order.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Christopher Keller, #81840, HDSP, PO Box 650, Indian Springs, NV 89070. 2/3/21km

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**December 20, 2021**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**December 20, 2021      8:30 AM      Motion**

**HEARD BY:** Becker, Nancy      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Waters, Steven L      Attorney

**JOURNAL ENTRIES**

- Court NOTED this case was remanded by the Court of Appeals because the issue that was present in the post-conviction petition did not make it into the Order. Court ADVISED it would review the record and the petition to determine whether or not the absent findings could be made if not a Evidentiary Hearing would need to be set, therefore, ORDERED, matter CONTINUED.

NDC

12/29/21 8:30 AM - PLAINTIFF'S REQUEST FOR SUBMISSION OF MOTION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**December 29, 2021**

---

A-19-800950-W	Christopher Keller, Plaintiff(s)
	vs.
	State of Nevada, Defendant(s)

---

**December 29, 2021      8:30 AM      Motion**

**HEARD BY:** Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:** Demonte, Noreen C. Attorney

**JOURNAL ENTRIES**

- Court NOTED Mr. Keller filed a Pro Per Petition for Post-Conviction Relief that was handled by Judge Kephart. The findings of facts and conclusions of law was filed, however did not include all of the Deft's causes of action in the petition, as a result Deft. filed a Notice of Appeal, due to the denial of the petition, the Court of Appeals determined it was not a final order, they lacked jurisdiction, and referred the matter back to District Court to address those additional issues so there could be a final order to be appealed. Court ADVISED it would review the entire post-conviction record, evidentiary hearing conducted by Judge Kephart, and trial court proceedings, therefore, ORDERED, matter taken UNDER ADVISEMENT to determine (1) whether the appropriate findings could be made to address the entirety of the petition or (2) whether a new Evidentiary Hearing would need to be conducted. COURT FURTHER ORDERED, matter SET for status check on decision.

NDC

1/19/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**January 19, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**January 19, 2022      8:30 AM      Status Check**

**HEARD BY:** Cherry, Michael A.

**COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Norma Ramirez

**REPORTER:**

**PARTIES**

**PRESENT:**      Zadrowski, Bernard B.      Attorney

**JOURNAL ENTRIES**

- COURT ORDERED, matter CONTINUED for Judge Becker's to review the matter.

NDC

2/2/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**February 02, 2022**

---

A-19-800950-W Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**February 02, 2022 8:30 AM Status Check**

**HEARD BY:** Bixler, James **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:** Zadrowski, Bernard B. Attorney

**JOURNAL ENTRIES**

- Court NOTED Judge Becker was in the process of drafting an Order, therefore, ORDERED, matter CONTINUED.

2/9/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**February 09, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**February 09, 2022      8:30 AM      Status Check**

**HEARD BY:** Bixler, James      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Michele Tucker

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- Court NOTED Senior Judge Becker is writing the decision on this matter. COURT ORDERED,  
Matter CONTINUED.

CONTINUED TO: 2/16/22

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**February 16, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**February 16, 2022      8:30 AM      Status Check**

**HEARD BY:** Thompson, Charles      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Zadrowski, Bernard B.      Attorney

**JOURNAL ENTRIES**

- COURT ORDERED, matter CONTINUED for Judge Becker's decision.

NDC

2/23/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**February 28, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**February 28, 2022      8:30 AM      Status Check**

**HEARD BY:** Bonaventure, Joseph T.      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Zadrowski, Bernard B.      Attorney

**JOURNAL ENTRIES**

- COURT ORDERED, matter CONTINUED for Judge Becker's decision.

NDC

3/7/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**March 07, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**March 07, 2022      8:30 AM      Status Check**

**HEARD BY:** Bonaventure, Joseph T.      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Scarborough, Michael J.      Attorney

**JOURNAL ENTRIES**

- COURT ORDERED, matter CONTINUED for Judge Becker's decision.

NDC

3/7/22 8:30 AM - STATUS CHECK: DECISION

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**March 16, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**March 16, 2022      8:30 AM      Status Check**

**HEARD BY:** Trujillo, Monica      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Grecia Snow

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Zadrowski, Bernard B.      Attorney

**JOURNAL ENTRIES**

- The Court noted Judge Becker needed more time; ORDERED, matter CONTINUED.

NDC

CONTINUED TO 03.30.2022 8:30 AM

CLERK'S NOTE: This Minute Order was prepared using JAVS./ /rh03.25.22

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**March 30, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**March 30, 2022      8:30 AM      Status Check**

**HEARD BY:** Trujillo, Monica      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Shelley Boyle

**RECORDER:** Rebeca Gomez

**REPORTER:**

**PARTIES**

**PRESENT:**      Heap, Hilary      Attorney

**JOURNAL ENTRIES**

- Deft. not present.

COURT NOTED, Senior Judge Nancy Becker will be taking the case; she will issue her decision with the findings of fact and conclusions of law. COURT ORDERED, matter CONTINUED.

CONTINUED TO: 04.13.22 8:30 A.M.

CLERK'S NOTE: A copy of this minute order was mailed to Deft. (Christopher Keller, 81840, Lovelock Correctional Center, 1200 Prison Rd, Lovelock, NV 89419). / sb 04.02.22

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

**Writ of Habeas Corpus**

**COURT MINUTES**

**April 13, 2022**

---

A-19-800950-W      Christopher Keller, Plaintiff(s)  
vs.  
State of Nevada, Defendant(s)

---

**April 13, 2022      8:30 AM      Status Check**

**HEARD BY:** Trujillo, Monica      **COURTROOM:** RJC Courtroom 11C

**COURT CLERK:** Louisa Garcia

**RECORDER:** Grecia Snow

**REPORTER:**

**PARTIES  
PRESENT:**

**JOURNAL ENTRIES**

- Court noted Judge Becker issued a decision on April 12, 2022; therefore, matter OFF CALENDAR.

# Certification of Copy

State of Nevada }  
County of Clark } SS:

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

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

CHRISTOPHER R. KELLER,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

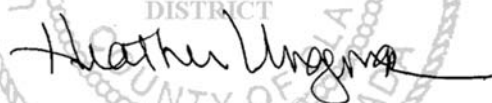
Case No: A-19-800950-W

Dept No: III

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 27 day of April 2022.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk