IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

CHRISOPHER ROBERT KELLER,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-19-800950-W

Docket No: 84643

RECORD ON APPEAL
VOLUME
2

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

I N D E X

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

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State of Nevada, Defendant(s)

I N D E X

because you had an opportunity to directly cross-examine the officer that was wearing the body camera, that they didn't have the footage, it's just something that happens.

So -- and I know you're saying that he's lying, but there's nothing that you've shown to establish that. So, the record's clear as to the argument with regarding body camera footage. So, do you have any further questions or any other questions that you may have of Mr. Frizzell at this time?

MR. KELLER: No, sir. Not necessarily, no.

THE COURT: Mr. Dickerson?

MR. DICKERSON: Thank you, Your Honor.

MR. KELLER: I mean, I -- I guess the -- yeah, the thing with mental health and stuff, when I talked to him, I mean, I was -- maybe at one point I was on a medication, another point I was off. But when -- the fact that I was using drugs at the time, you know, and then I come into jail and I've used on and off different medication, I just wasn't in the right -- you know what I mean? Like, my mind wasn't normal at the time and I look back, I wasn't nowhere near in the right state of mind but -- [indiscernible].

THE COURT: You talking about at the time of trial? Are you talking about at the time of trial --

MR. KELLER: No, prior to that when I first--

THE COURT: -- or what point in time --

MR. KELLER: Yeah -- well, yeah that --

THE COURT: What point --

MR. KELLER: -- around that time, too, they had switched me medications and I wasn't even sleeping the whole week prior to trial, like -- and that's when I started talking to him, that Friday before the -- when I found out I couldn't -- when I found out I couldn't use the attorney, Feliciano.

THE COURT: Okay. All right. Okay. Mr. --

MR. DICKERSON: All right.

THE COURT: -- Dickerson?

MR. DICKERSON: Thank you, Your Honor. Just for a bit of background --

THE COURT RECORDER: Hey Mike, I can't hear you.

DIRECT EXAMINATION

BY MR. DICKERSON:

Q Just for a bit of background, Mr. Frizzell, how long have you been practicing law?

A Total of 26 years.

Q And how long have you been practicing, specifically, criminal law?

A About 20 years.

Q During that 20 years, what percentage has criminal law made up of your law practice?

A About 85 percent.

Q And during that whole time, generally?

A Yes.

Q And is that true, at the time in 2016, 2017 when you were

representing Mr. Keller as well?

A Yes.

Q As well as today?

A Yes.

Q And during that time, what sort of practice did you have as far as it applied in Clark County?

A I was on -- I've been on my own for 22 years, since August of 1998, is when I opened my own practice.

Q And you've had a contract to represent criminal defendants with the County since 2005?

A Yes, there was a brief period of time of about two years when I did not have a contract.

Q That was approximately 2012 to 2014?

A Yes, however, I had a contract in North Las Vegas Municipal Court straight through from about '04 until today, so --

Q And you estimated to me when we spoke before, that you've got probably -- approximately four to five appointed criminal cases a month?

A Roughly, yes.

Q As well as three to four paid cases a month, is that right?

A On the average, yeah.

Q And throughout your 20 years of practicing criminal law, have you tried and defended criminal defendants in very serious cases?

A Yes.

Q Including murders?

A Yes.

Q What about cases involving drugs and guns?

A Many.

Q Many? And that's actually what Mr. Keller's case was, drugs and guns?

A Yes.

Q And so, you were -- by the time you received this case in 2016, very familiar with the criminal law as it related to the crimes at hand, here in this case?

A Yes.

Q And specifically you ended up getting on this case, confirming on May 4th, 2016; is that right?

A Yes.

Q And that's -- was well after this case originated from Mr. Keller's arrest in approximately January -- January 28th of 2016; is that right?

A Yes.

Q As you were the second attorney to come onto it?

A That I knew of, yes.

Q Okay. Through that time, you had discussed previously filing several motions?

A Yes.

Q Including a suppression motion?

A Yes.

Q Regarding the evidence that was located within the vehicle --

within Mr. Keller's vehicle and his home?

A Yes.

Q A bail motion for Mr. Keller?

A Yes.

Q As well as a discovery motion?

A Yes.

Q And were those things that you had discussed with Mr. Keller?

A Absolutely.

Q Okay. And he wanted you to file those motions?

A Yes.

Q So you were in communication with Mr. Keller about how he thought his case should be defended?

A Yes.

Q And you were making decisions as to what was appropriate; is that right?

A That's correct.

Q And you found that those multiple motions that you filed were appropriately raised?

A Yes.

Q Ultimately, there was some discussion about Mr. Keller -- his issues with your investigator. Is that -- you remember that?

A Yes.

Q So, had Mr. Keller ever said to you that there was some issue with his mother and your -- investigator?

A I don't know that he said mother, specifically. I think he said

my parents. I'm almost positive it was in regard to both of his parents.

Q And what did he say about that?

A Just that because my investigator knew his parents, that he had a conflict.

Q Did he ever tell you that your investigator had disparaged his mother?

A Never.

Q Okay. Did you ever get that indication at all from your investigator?

A No.

Q And when Mr. Keller had brought that issue up -- the issue of your investigator that is, what did it appear his grievance was with your investigator?

A That because he didn't get -- get along with private counsel, that there would be some level of animosity towards him that would come over if I used the same investigator.

Q Okay. And you're speaking about Mr. Sanft that previously represented the Defendant?

A Yes.

Q So, the Defendant had relayed to you that he felt that it was possible because the same investigator that worked for -- on his case under Mr. Sanft, and was now working under you, that somehow that could be an issue?

A Yes.

Q What about the actual communications that were occurring

between your investigator and the Defendant? Had he ever expressed any sort of feelings about what was occurring there? The Defendant, that is.

A He would relate to me if Mr. Keller was, for lack of a better term, a little more excitable on a particular occasion when he visited him. However, Mr. Keller's demeanor, as he's sitting here today, has been pretty much the same demeanor that he had with me, and at least with me and my investigator when I -- when we both went over to the jail together.

Q Okay.

A There was no high pitched yelling. There was no altercation that was escalated other than, I'm not going to talk to you anymore. But it was all basically how he's sitting here today.

Q And throughout that time, did Mr. Keller appear to understand the factual background of his case and discuss that with you?

A Absolutely.

Q And in fact, he discussed the filing of the suppression motion with you; is that right?

A Yes, and actually he told me why he felt that -- he felt that that motion was warranted.

Q So, what if anything, was it that was aggravating Mr. Keller in your conversations and your investigator's conversations with him?

A I think it's like a lot of the defendants that I have that want you to come over every week and just hold their hand even if there's nothing to talk about. I've always made my clients aware that because -- when

they call my office on a collect call, if I'm not available or I'm not there, that I'm not going to accept the call and they can -- but my office will let me know that, hey, this person or that person called.

And if there's something, I'll either go over or I'll send my investigator over to see what it is that that particular defendant, or in this case, Mr. Keller, wanted.

Q So, throughout that time, did you and your investigator discuss the potential consequences that Mr. Keller was facing due to these charges and his habitual criminal status?

A Yes.

Q And you discussed that with Mr. Keller?

A Yes, on multiple occasions, both at the jail and in court.

Q And did that appear to be something that made him feel any sort of way during those conversations?

A Just that he wanted to try -- he wanted me to try and get a deal.

Q Okay. And was he -- did Mr. Keller appreciate hearing about the consequences that he potentially faced?

A Yes -- he relayed to me that he understood that if he was convicted after a jury trial, that if he was habitualized, that yes, he could be facing even a lot more, potentially, a lot more years than what he ultimately got.

Q And having practiced criminal law for such a long time in cases that are similar in nature of charges as this, what was your assessment of the strength of the evidence of this case?

A I thought it was pretty strong, especially after we filed our suppression motion and it was basically unsuccessful.

Q And did you discuss that with your investigator?

A Yes.

Q And your investigator, did he share those same sentiments?

A Based on his training as a police officer, yes.

Q And did you and your investigator discuss that with Mr. Keller, the strength of the case?

A I don't know if it necessarily was together that we did it.

Q No, no, no.

A I know that wasn't together, but I know that both of us --

Q And did you discuss it with Mr. Keller?

A Yes.

Q And your investigator, are you aware of whether he discussed it with Mr. Keller?

A Yes.

Q Did Mr. Keller actually not like hearing the reality of how strong his -- how strong the case was against him?

A No, he didn't like it.

Q Okay. And did that become some sort of issue that had been going on between your investigator and him?

A Yes. I'll admit that my investigator went over more than me. So every time my investigator would come back to my office to kind of download and debrief, that he would relay that Mr. Keller wasn't happy, that sort of thing, sure.

Q And specifically, are you saying Mr. Keller wasn't happy about hearing how strong the case was against him?

A That's correct, yes.

Q Okay. Not that -- nothing else of -- that Mr. Keller wasn't happy about?

A I mean, he wasn't happy that we lost the suppression motion. He -- while he was happy that we won the -- that the *Brady* motion was granted, he was angry about bodycam footage and all that type of thing.

Q And so, fair to say that most of his grievance towards you or your investigator in this case stemmed from his view of the facts -- the Defendant's view of the facts?

A Yes, and the fact that I was not -- I did not come into the case for over a year after it had happened.

Q And when -- so, the first time that you ever heard this allegation about there being some personal conflict between your investigator and Mr. Keller was when you became aware of this post-conviction petition for writ of habeas corpus?

A The specific statements that he put in there.

Q Okay.

A He had relayed that because Mr. Mastin had been Mr. Sanft's investigator, that because he didn't like Mr. Sanft, he didn't feel that Mr. Mastin was going to be fair with him either. And I relayed to him that simply is not the case. I've known Mark for a lot of years and he was good police officer and he's a fine investigator, and he's working for me now, not Mr. Sanft.

Q You discussed that you had talked with the Defendant about his mental health and him being on medication; is that right?

A Yes.

Q At any time during your representation of him, did it seem like he didn't understand the charges against him?

A Never.

Q Did it seem that he didn't understand what the roles of the parties were in the courtroom?

A I never had that feeling he didn't know that, no.

Q Did it ever appear that he didn't understand the penalties that he would face after being convicted at trial?

A No.

Q Did it ever appear that he didn't understand what going to trial meant?

A No.

Q And you had indicated that the Defendant had decided that he wasn't going to cooperate with you anymore?

A That's correct.

Q And did that appear to be anything related to him -- his medication or his mental health? Or was that something he was just agitated with you and your investigator?

A Yes and that his family was -- that he said his family was -- his mother was going to be looking for him another attorney and he didn't want to talk to me anymore.

Q Okay.

THE COURT: Hold on, hold on. I need to clarify that.

THE WITNESS: Sure.

THE COURT: Did it have anything to do with -- that you could see, he was agitated because of his medication?

THE WITNESS: No, no.

THE COURT: Okay.

THE WITNESS: Nothing because --

THE COURT: The question was asked --

THE WITNESS: I'm sorry.

THE COURT: -- in a -- like a two part question, but your answer was yes. And I wanted to make sure that I understood whether or not that was correct with regards to his medication.

THE WITNESS: Okay, I am sorry.

THE COURT: Okay, so -- it's your opinion based on your discussion with him, it had nothing to do with any medication issue?

THE WITNESS: No, no.

THE COURT: It had to do with the investigator and the hiring of the new attorney not being allowed to come in the case?

THE WITNESS: That's correct.

THE COURT: Okay. Go ahead, Mr. --

BY MR. DICKERSON:

Q And during this time --

A I think I need to clarify --

THE COURT: Okay.

THE WITNESS: -- your question.

THE COURT: All right.

THE WITNESS: Because it was before Amy ever tried to come into the case.

THE COURT: Okay.

THE WITNESS: Because I was informed before -- I think it was in November of 2016, by his mother --

THE COURT: Mm-hmm.

THE WITNESS: -- that they were not going to be using me and they were going to be hiring private counsel.

THE COURT: Okay.

THE WITNESS: But it wasn't until end of January, first of February that I learned that they -- his mother called me and said we hired Amy Feliciano, get her your files.

THE COURT: Okay.

THE WITNESS: So then I contacted Amy and got her my files.

THE COURT: Okay.

THE WITNESS: And we talked a little bit about the case and whatnot. But that was -- really I put the case out of my mind --

THE COURT: Okay.

THE WITNESS: -- at that time.

THE COURT: By the time you were ready to go to -- by the time you were going to trial though, were you prepared to go forward with the trial?

THE WITNESS: Yes, because I was prepared to go -- at least

at the -- setting before that, which was not the one where I said that I was fighting the suppression motion --

THE COURT: Mm-hmm.

THE WITNESS: -- that was early on.

THE COURT: Okay. All right. Go ahead, Mr. Dickerson.

BY MR. DICKERSON:

Q And during this time you've been actively negotiating this case with the District Attorney's office; is that right?

A Yes, at all points throughout the representation.

Q And the offers that you had received were being conveyed to the Defendant; is that right?

A Yes, every one of them.

Q And those offers originally were stipulated habitual criminal offers?

A Yes.

Q And the Defendant did not like that?

A No. And candidly, he asked my opinion and I said, you might as -- you know, you might as well go to trial with that kind of offer.

Q You -- it's -- did Defendant -- did he like the fact that that was the prospects, is go to trial?

A At the time of that -- at the time of that particular offer, yes.

Q Okay. And you continued to negotiate this case?

A Yes.

Q And you ultimately get negotiations that you considered favorable; is that right?

A Very.

Q And you relayed those to the Defendant?

A Yes.

Q Those were non habitual offers?

A Non habitual offers. I think the last -- very last one that you gave to me was a three-year sentence on the bottom.

Q And you conveyed those to the Defendant?

A Yes.

Q But he still wasn't happy with any of those?

A No.

Q Okay. And did that appear to be the source of much of his agitation towards you and you investigator?

A Yes.

Q That he didn't like the offers that were coming from the State that you had been able to negotiate?

A Yes. That I wasn't doing my job and I should have been able to get him a gross misdemeanor.

Q And that was never on the table. There was never a gross demeanor offer?

A No.

Q It was always felonies and prison?

A Yes.

Q And you relayed those offers that you considered favorable to the Defendant, you said?

A Yes.

Q And did you relay to him that you believe that it would be in his best interest to take those offers?

A Yes, given what he was potentially facing.

Q And that there as well, was the source of his agitation with you, that you were recommending that he take these offers that he didn't like?

A Yes.

Q Okay. Because in your professional experience, it was in his best interest to accept one of those?

A At that point, when we were talking about three years on the bottom end on a high level trafficking case, yes.

Q You appeared month after month in this case; is that right?

A Yes.

Q And the Defendant was housed at the Clark County Detention Center at the time, right?

A Yes.

Q So he was always present in court?

A Yes.

Q And when you would come to court, you would meet with him every time; is that right?

A Yes.

Q And do you have a recollection of some of those dates?

A Off the top of my head, no.

Q Do you have a time sheet that you prepared in this case?

A Yes.

Q And is -- does that -- would looking at that help refresh your recollection as to exactly which dates those were?

A Yes.

MR. DICKERSON: Okay. May I approach, Your Honor?

THE COURT: Yes.

THE WITNESS: There were quite a few so I don't even know if after --

BY MR. DICKERSON:

Q That there that's in front of you, is that the time sheet that you were discussing that would help refresh your recollection?

A Yes.

Q So, what dates was it that you met with the Defendant in court and discussed the case with him?

A May 18th, 2016, which was basically two weeks after I was originally appointed. June 13th, 2016 and June 20th, 2016, July 20th, 2016, July 21st, 2016, August 17th, 2016, August 22nd, 2016, September 14th, 2016, two times on October 1st, 2016, once in court and then later that day with the -- with my investigator at the jail. February 1st, 2017, March 1st, 2017, and then that Friday before trial, which I believe was March 3rd, 2017, I think that was the Friday.

Q And you also visited him in jail on March 1st, 2019?

A Yes.

Q And that was -- or 2017, I'm sorry.

A Yes.

Q And that was when you were preparing for trial?

A Yes.

I'm sorry, I think 3/3 was a Sunday, 3/1 was the Friday and I used that weekend to reacquaint myself with the case.

Q Okay. The trial lasted several days; is that right?

A Yes.

Q During the trial, you -- your client had full access to each other; is that right?

A Yes.

Q And throughout the trial, you met with him outside the presence of the Court and the State?

A Yes. Every time before Judge Kephart would come out and then after he would leave for the day before the jail took him back over.

Q And you and him would meet in private?

A Yes.

Q And discuss the case?

A Yes.

Q Jumping back real quickly to the mental health and medication stuff --

A Sure.

Q Fair to say you never saw any mental health related competency issues arising with the Defendant?

A Never. He was just stubborn sometimes, but never -- never not lucid.

Q Okay. So, nothing that you saw about his behavior appeared to you to be mental health issues?

A No.

Q Okay. And in being aware of his mental health history or medications he was on, did you see any viable defense that could have been raised in this case based upon that?

A No. By his own admissions to me anyway, he wasn't on that medication at the time that this -- at the time of the alleged incident because he was self-medicating.

Q Okay.

A But, once he was arrested, he got on medications while he was on the inside.

Q So, you made the determination that not only was Defendant competent to proceed, correct?

A Yes.

Q But that there was no other reason to raise his mental health issues as it may have related to any defense in this case?

A That's correct.

Q Okay.

THE WITNESS: And if I may add --

THE COURT: No, no.

MR. DICKERSON: The state has -- State will pass the witness, Your Honor.

THE COURT: Mr. Frizzell, before we move on with this, you had indicated from your records that you had seen him. I want to talk about -- in 2017, what dates were they that you saw him in 2017?

THE WITNESS: February 1st at -- that was a court

appearance.

THE COURT: Okay.

THE WITNESS: March 1st --

THE COURT: Okay.

THE WITNESS: -- that was a calendar call. I also -- we also talked in court and he wanted me to come over with my investigator later that afternoon, and so --

THE COURT: Did you do that?

THE WITNESS: -- we talked -- yes.

THE COURT: Okay. Now you -- you testified earlier that you were told by the Defendant's mother that they had possibly hired another attorney as early as January of 2017 and that you provided them with a file.

THE WITNESS: I did.

THE COURT: Okay. Did you have a file that you could go to trial on?

THE WITNESS: Yes. My investigator puts everything -- scans everything and puts it in Dropbox.

THE COURT: Okay, so --

THE WITNESS: So, I had a --

THE COURT: So, it's a duplicate?

THE WITNESS: -- I had an electronic copy of everything.

THE COURT: So, it's a duplicate?

THE WITNESS: Yes.

THE COURT: Okay. So, as of the record, the parties were

announcing ready on March 6th, 2017 -- the actual trial date. You were going to trial. And on that date, do you recall Ms. Feliciano appearing and asking to substitute?

THE WITNESS: Yes.

THE COURT: Okay. And that was denied, correct?

THE WITNESS: Yes.

THE COURT: All right. So, is there anything with regards to that that you think affected your ability to defend in this case?

THE WITNESS: No, because all that previous week I was prepping just in case and obviously that came to pass.

THE COURT: When you met with the Defendant the Friday before to discuss the case with him with your investigator, did you -- was it a meaningful -- did you have any discussion with him or what -- happened?

THE WITNESS: I mean it started out that way. We were going over -- he kept asking about why is this coming in? Why is that coming in? We talked about the suppression motion and how --

THE COURT: Okay.

THE WITNESS: -- you know, we argued that. The Judge denied it and so, these issues are coming in. So, we've got to talk about, is there any way that you have that we're going to combat this, so --

THE COURT: Okay. All right.

Do you have any further questions from my questions?

MR. DICKERSON: I don't, Your Honor.

THE COURT: Mr. Keller, do you have any further questions of Mr. Frizzell?

MR. KELLER: Yes, I want to say that how is --

THE COURT: Do you have a -- but do you have a question, Mr. Keller?

MR. KELLER: Yes.

THE COURT: Okay. Ask the question.

CROSS EXAMINATION

BY MR. KELLER:

Q I would like to ask Frizzell that he had someone face -- with a case facing a life sentence and he's tried asking you for a gross misdemeanor, how you would think that there's not something wrong with this person, for one.

For two, you're saying you came to visit me and all these things but I provided the visiting logs with the Court through the Metropolitan Police Department visiting, and that's just not true. We never -- we never had any visits or discussions. I never once spoke to his investigator, so I provided proof that what he's saying is not true. So --

THE COURT: Mr. Keller, if you -- if you heard his testimony, a number of those dates he's talking about are dates that he met you actually in the courtroom. And then there was like a few dates, I guess, that he pointed out about --

MR. DICKERSON: Correct.

THE COURT: -- his investigator coming to talk to you and he

coming to talk to you. That would appear on your log. And there is consistent -- inconsistent dates with that.

But the dates he's talking about, precisely, were dates that you met with him in the courtroom. And that was on those different -- I mean, it seemed to me at least twice a month you were meeting with him. And often times, attorneys meet with people in the courtroom, so --

MR. KELLER: But he's saying --

THE COURT: Okay.

MR. KELLER: He's saying that -- excuse me -- he was saying that I was meeting with him, but then he said that I wouldn't speak with him. But how is he meeting with me and he's also saying that I wouldn't speak with him. I mean, it's contradictory.

MR. DICKERSON: I'm just going to object --

THE COURT: Okay.

MR. DICKERSON: -- Your Honor. I would ask that he frame it as a question.

THE COURT: No, I'm going that route. Mr. Keller, you need to ask a question. So, I guess the question would be, is there -- was there points in time, Mr. Frizzell, that you met with me and I did speak with you, okay? Is that --

MR. KELLER: All right.

THE COURT: -- is that fair? And then --

MR. KELLER: Sorry. It's hard to ask him a question -- I don't see -- I'm not even looking at him on the screen. Sorry about that.

THE COURT: Okay, well just -- just ask -- he's here, so ask

the question, okay? If you --

MR. KELLER: All right.

THE COURT: You can hear him can't you?

BY MR. KELLER:

Q Yeah. So, Mr. Frizzell, how do you say I wasn't speaking with you and you also say that we were speaking about the case? I don't understand that.

A You told me you were not going to assist me in your defense. That doesn't mean that I wasn't still on the case and obligated to represent you. And yes, we would talk. And yes, you would talk with me. You just said that you were not going to -- that you were not going to assist with your case anymore.

Q Well, what would we be speaking about if I'm not assisting you with the case, then what would we be speaking about, family life?

A No, we were speaking about the case because I was approaching you about it. You said that you would not help me with the defense of your case. But every time we were in court for something --

Q All right, so --

A -- you would tell me -- you would -- I would go over to talk to you, maybe based on something the Court said from the bench or that your mother called me, or something like that. I don't remember specifically every single thing we talked about. But yes, we did talk about -- we did talk about your case and I basically relayed things to you.

Q Okay, so -- so when I -- so when you -- how come you never

did the -- any of the -- how come you never appealed any of the suppression motions?

MR. DICKERSON: Objection.

BY MR. KELLER:

Q Any of the things that were put on the suppression motion, how come you only -- the only thing that you appealed about the suppression motion was why they searched the house, which there was really nothing of significance in the house.

A Because the remainder -- you have to have a reason to appeal. You can't just appeal for purposes of appeal. And based on the -- what occurred at the suppression motion, the only thing that I felt that there was any ground to pursue further was that issue regarding the house.

Q Why when the officer said -- testified that a female came up and asked for her purse out of the car, how come you never made that apparent to the -- in doing closing arguments or anything? You never put emphasis on that and you never put emphasis -- and you -- how come you never put emphasis on the fact that they never had any proof of any K-9 hit or anything like that occurring?

A Well, that's -- as far as the K-9, that's not true. As far as the girl with the purse, I determined that to not be relevant to what you were charged with and how we were going to defeat that. That, to me, was what I call a red herring.

Q We're going to repeat that, I mean -- all right, how come you never asked for any of the K-9 reliability records?

A Because --

Q You thought that wasn't going to be --

A Because after speaking with the officer at the suppression hearing, I didn't determine that there was any reason that that would reveal anything relevant when the -- when it was testified to that the dog had a hit. And when they checked the glove box, they found illegal items.

Q How come you never questioned them about the door being open and them allowing the K-9 to access the interior of the vehicle?

A Well, because --

Q How come you never questioned the K-9 handler?

A Because at that point when they found it -- when they found the drugs in open plain view in your vehicle, that's when they -- that's when that gave them probable cause to go further and they actually got warrants and that's why --

Q Do you not recall that the --

A -- there was a time difference. That's why there was period of time in between.

Q Do you not recall -- do you not recall that the 2nd officer on the scene testified he did not recall seeing any marijuana in open sight, and also, do you remember that during the suppression hearing that you, yourself, got him to admit that, no, that it might have not been marijuana, that it could have been any other green leafy substance, like a leaf from a tree?

So, if they -- so, if they might not have seen any drugs in plain

sight, which you got the officer to admit that there might not -- that there wasn't any drugs in plain sight, why then would you not cross-examine the K-9 handler, or get any reliability records, or why would -- order the camera -- the -- the, you know, the body camera footage that would have showed all this? But since you couldn't have got the -- since you couldn't have got that footage, why would you not have cross-examined the K-9 handler or gotten the K-9 reliability records, or found out if the -- why the door was left open, allow the K-9 access to the interior of the vehicle?

A Okay. You've asked me about 20 questions, so I'm going to do my best to try and answer what I can recall. But the bottom --

Q I'll just ask you the first one. Why did you not --

MR. DICKERSON: Objection. I'd ask that the witness -

THE COURT: Hold on -- he's --

MR. KELLER: Why didn't you question the K-9 handler?

THE COURT: All right. There you go.

MR. KELLER: I'll do one at a time.

THE COURT: All right.

THE WITNESS: Okay.

THE COURT: He's doing it one at a time.

BY MR. KELLER:

A Because I determined that there was not going to be any relevant evidence gleaned from that.

Q How did you determine that?

A By the facts in the case that the other officers testified to

regarding how all of these drugs and guns were found.

Q There's only one officer that testified during --

THE COURT: We're not --

MR. KELLER: -- the case, and that was the officer on the scene.

THE COURT: Mr. Keller, Mr. Keller, we're not arguing now.

MR. KELLER: All right.

THE COURT: Ask a question.

BY MR. KELLER:

Q All right. So the question two would be why did you not get the dog reliability records, which I would be entitled to?

A Because again, based on the --

Q The whole --

A Let me answer. Based on the other evidence that was testified to, I felt that it would not lead to any -- anything that would assist us in our case.

Q Well, what evidence is that? Can you be more specific because I'm not following you?

A As I recall, after the officers pulled you over and they noticed what appeared to be a green leafy substance, that was later ODV tested and it was determined to be marijuana. That gave them --

Q No, it was never -- that -- all right. You can continue --

THE COURT: Mr. Keller --

MR. KELLER: -- but that was not even part of the case.

THE COURT: Mr. Keller --

MR. KELLER: Yes, Your Honor.

THE COURT: We're not here to argue. You asked a question, he's telling you what he believes, okay? Let him finish.

MR. KELLER: All right.

BY MR.KELLER:

A Then that gave the officers probable cause to look throughout the open compartments of the vehicle and when they came across -- something that they knew to be drugs, that's when they stopped everything and got the appropriate warrants and the K-9 came out. The dog immediately went to the glove box first.

The officers reached into the glove box. You had a hole cut in the back of the glove box that went down into some other compartment area in the vehicle to which they reached in and I believe that's where they found a gun and some drugs.

And so, at that point, they just went further and so, to go get records regarding the dog based on that evidence, the dog did its job and found what he was trained to find. And whether or not he's had some -- the dog would have had some negative hits in the past, he obviously hit on your vehicle. And when it was looked at, there was -- it was a positive hit.

So, I determined that there was not -- there was no -- based on the other -- based on that evidence that going after the dog's records of past hits or misses was irrelevant.

THE COURT: Next question, Mr. Keller.

BY MR. KELLER:

Q So, how come -- so all right, so how come if you're -- if you admit that the case is based off of the dog's hits and that the warrant was given to search the vehicle because of the dog hit, how come you wouldn't, not only get the K-9 reliability record, but why wouldn't you check to see if the K-9 sniff was done properly? Why -- how come you never questioned whether it was done properly or whether the dog was allowed access to the interior of the vehicle which they testified to?

A Because the officers got a warrant for the K-9 and when the K-9 came out, the K-9 went directly to your glove box and it was a -- when the officers looked and reached back into that hole, they -- I believe they got a gun and some drugs. And so then, that's probable --

Q Okay --

A -- cause for the rest of the car. So, there's no reason --

Q Okay. Do you recall --

A -- to go get the dog records.

Q Okay. Do you recall at the suppression hearing that the -- when we were -- when we -- I asked you to do the NRS 171.123, was because they had me for more than a hour? Do you recall that they actually didn't apply for a warrant until 2 hours and 59 minutes? Do you recall that?

A I recall that there was a period of --

Q So they --

A I recall there was a period of time that passed in between your actual arrest and getting a warrant. But as you will recall, it's because your people on the other side of the apartment fired some shots to try

and distract the police officers. So that's when they put you in cuffs, put you in the back of the cruiser for your safety, and went to investigate what the shots were.

Q Okay. Do you recall --

A So, that was part of the reason --

Q Go ahead. Do you recall that the warrant came long after the dog sniff?

A Yes.

Q That in actuality -- yeah so -- so I'm saying, since the dog -- since the warrant came long after the dog sniff, not prior to, I'm asking why would you -- why did you not think to question the K-9 -- search his records or the manner in which it was done?

A Okay. I've answered this already. But the bottom line is, is there was -- when there was probable cause, that's when they got a warrant for the K-9. You're talking about -- the second warrant, essentially --

Q Okay.

A -- that expanded things into your apartment or your condo or --

Q No --

A -- whatever it was.

Q I'm trying to get you to remember -- do you remember that the warrant was after the dog sniff, not prior to? Do you recall that the warrant was after the dog sniff, not prior to? That it was actually 2 hours and 50 minutes into the search that they called for the --

UNIDENTIFIED SPEAKER: The conference is about to end.

THE COURT: We're about ready to lose you, Mr. Keller. It's been going on for --

MR. KELLER: Okay.

THE COURT: Okay, so --

THE WITNESS: Well, I believe I've --

THE COURT: -- close it up.

THE WITNESS: I believe I've answered that question three times now.

THE COURT: Okay, Mr. Keller, anything further?

MR. KELLER: No, I just -- I just think that he's confused as to the -- some of the events that happened. I didn't know what was going to happen here. There was a lot of things that he said, Your Honor, that I would have questioned at first, but when he got going, I don't have anything to take --- I don't have any pen or anything --

THE COURT: Okay.

MR. KELLER: -- to take notes with because I didn't know what was going to be going on --

THE COURT: All right.

MR. KELLER: -- so I lost track.

THE COURT: Okay.

MR. KELLER: I wasn't able to question him really properly.

THE COURT: Okay, so you don't have any further questions?

MR. KELLER: No.

THE COURT: Okay. Anything further Mr. Dickerson?

MR. DICKERSON: No, Your Honor.

THE COURT: All right. Thank you, Mr. Frizzell.

THE WITNESS: Thank you, Your Honor.

THE COURT: All right. Mr. Keller, did you want to say anything further?

MR. KELLER: Your Honor, I would just like to appeal to you -- that I -- there was obviously some misunderstandings in my case and that, I mean -- I don't know.

THE COURT: Okay.

MR. KELLER: That's all I have to say.

THE COURT: All right. Anything?

MR. DICKERSON: And Your Honor, just that he hasn't established that defense counsel's representations fell below the standard of reasonableness and definitely hasn't shown that any errors -- assuming that there were, would have changed anything here. So he hasn't met either prong. And with that, we'd submit it.

THE COURT: Okay, with regards to his --

MR. KELLER: Can I say one last thing, Your Honor?

THE COURT: No, we're --

MR. KELLER: One last thing real quick?

THE COURT: Okay, go ahead, Mr. Keller.

MR. KELLER: Did you receive my -- because I got a copy back of my answer to the State's response --

THE COURT: I --

MR. KELLER: -- in which I --

THE COURT: I did, I did. Your supplemental response --

MR. KELLER: Okay.

THE COURT: -- I have it, yes.

MR. KELLER: Because that's why -- that's where I show that it would have been a different outcome if I would have been heard on my claims one through seven, which you denied --

THE COURT: Yup. Yeah, those --

MR. KELLER: I mean it would have been --

THE COURT: -- those were all --

MR. KELLER: If he would have --

THE COURT: One through seven --

MR. KELLER: I've been trying to get --

THE COURT: Mr. Keller --

MR. KELLER: I've been trying to get a way for my counsel being barred.

THE COURT: All right. Mr. Keller, one through seven are all matters that should have been raised in direct appeal. You could have raised them at that point and they weren't raised, so they are waived in the proceeding. So, that's why I addressed just the ineffective assistance claims.

For you to overcome your challenges of ineffective assistance, you must establish that -- that your counsel was -- his performance fell below that of a reasonable standard. And if you were able to do that, then you also must show that -- but for his errors, there would have been a different outcome of the proceeding, and I can't see specifically under the second standard.

The first standard, I do not believe that based on the discussion and the testimony here that his actions fell below a reasonable standard -- objective standard of reasonableness. And if the Court -- if another Court disagrees with me, I do not believe that but for those errors the -- under this totality of the circumstances and the totality of the evidence in this case, that the results would have been different.

So, for that reason, I'm denying the petition, Mr. Keller. Thank you so much, Mr. Keller. Good luck with this, okay? Thank you.

MR. KELLER: Will I get a --

THE COURT: Yeah, the --

MR. KELLER: Can I get a -- can you please have a copy of the denial sent to me, please?

THE COURT: Yes, the State's going to prepare an order consistent with my decision and we'll have one sent to you, okay?

MR. KELLER: All right. Thank you.

THE COURT: All right. Thank you. You have a good day now.

[Hearing concluded at 10:27 a.m.]

******

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Brittany Amoróso
Court Recorder/Transcriber

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ROBERT KELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 81988
District Court Case No. A800950;~~C312717~~

FILED

OCT 28 2021

CLERK OF COURT

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"ORDER this appeal DISMISSED."

Judgment, as quoted above, entered this 28th day of September, 2021.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this October 26, 2021.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

A-19-800950-W
CCJD
NV Supreme Court Clerks Certificate/Judgn
4972121

5

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHRISTOPHER ROBERT KELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81988-COA

FILED

SEP 28 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER DISMISSING APPEAL

Christopher Robert Keller appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on August 26, 2019, and a supplemental pleading filed on February 12, 2020. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Our review of this appeal reveals a jurisdictional defect. The November 20, 2020, order purportedly denying Keller's petition and supplemental pleading did not resolve all of the claims Keller raised. Specifically, the order did not address the following ineffective-assistance-of-trial-counsel claims: whether counsel should have objected to Keller's consecutive habitual-criminal sentence; whether trial counsel should have objected to the use of Keller's prior felonies; whether trial counsel should have impeached Officer Lopez with prior inconsistent statements; whether trial counsel should have filed a motion to dismiss Keller's case and requested an evidentiary hearing; whether trial counsel should have considered the importance of the "owe sheets" as evidence; and whether

COURT OF APPEALS
OF
NEVADA

21-27882

trial counsel was ineffective for advising Keller he would lose his right to appeal if he pleaded guilty.[1]

Additionally, the order did not address whether appellate counsel was ineffective for failing to raise the following claims: whether Keller's consecutive habitual-criminal sentence was illegal; whether the search of Keller's vehicle violated his 4th Amendment right against unreasonable search and seizure; whether the three-hour delay between Keller's apprehension and officers obtaining a search warrant made the vehicle stop invalid; whether the district court erred in allowing the State to proceed despite the destroyed or lost body camera footage; whether the district court erred by allowing Officer Lopez's testimony; and whether the district court erred by failing to continue the case to allow Keller to retain new counsel. The order was thus not a final order. *See Sandstrom v. Second Judicial Dist. Court*, 121 Nev. 657, 659, 119 P.3d 1250, 1252 (2005) ("[A] final order [is] one that disposes of all issues and leaves nothing for future consideration."). Accordingly, we lack jurisdiction to consider this appeal, *see* NRS 177.015(3), and we

ORDER this appeal DISMISSED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

[1]The district court should also reduce to writing its oral disposition regarding Keller's claim of ineffective assistance of trial counsel as to the body camera footage.

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 19
Christopher Robert Keller
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER ROBERT KELLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 81988
District Court Case No. A800950;~~G312717~~

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: October 26, 2021

Elizabeth A. Brown, Clerk of Court

By: Sandy Young
Deputy Clerk

cc (without enclosures):
William D. Kephart, District Judge
Christopher Robert Keller
Clark County District Attorney \ Alexander G. Chen, Chief Deputy District Attorney

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on OCT 28 2021.

HEATHER UNGERMANN
Deputy District Court Clerk

RECEIVED
APPEALS
OCT 28 2021
CLERK OF THE COURT

Electronically Filed
11/19/2021 1:30 PM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Christopher Keller, Plaintiff(s) vs. State of Nevada, Defendant(s)	Case No.: A-19-800950-W Department 3

NOTICE OF HEARING

Please be advised that the Plaintiffs Request for Submission of Motion in the above-entitled matter is set for hearing as follows:

Date: December 20, 2021

Time: 8:30 AM

Location: RJC Courtroom 11C
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

No._____ Dept. No._____

IN THE 8th **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 # A-19-800950-W
Dept. # XIX
Docket #
TELECONFERENCE HEARING REQUESTED IF NECESSARY.

REQUEST FOR SUBMISSION OF MOTION

It is requested that the Motion entitled Motion to Amend "Findings of Facts, Conclusions of Law & Order", which was submitted/filed on the 15th day of October, 2021, in the above-entitled matter, be submitted to the Court for it's consideration.

The undersigned Petitioner/Plaintiff, certifies that a copy of the motion noted above and this pleading, have been served upon the Respondent/Defendant.

Dated this 15th day of October, 2021.

Christopher R. Keller #81840
Petitioner/Plaintiff
H.D.S.P. ~~Ely State Prison~~
P.O. Box 650 ~~P.O. Box 1989~~
Indian Springs, NV ~~Ely, Nevada 89301-1989~~
89070

COMES NOW PETITIONER; Christopher R. KELLER, AND MOVES THIS HONORABLE COURT TO AMEND IT'S "FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER" FROM IT'S OCTOBER 1, 2020 HEARING, TO COMPORT AND ADDRESS ALL UNRESOLVED ISSUES WHICH THE NEVADA SUPREME COURT NOTED WERE NOT FINALIZED IN IT'S ORDER FILED SEP. 28th, 2021 IN THE COURT OF THE STATE OF NV, CASE# 81988-COA NAMELY; WHETHER COUNSEL SHOULD HAVE OBJECTED TO KELLER'S CONSECUTIVE HABITUAL-CRIMINAL SENTENCE, WHETHER TRIAL COUNSEL SHOULD HAVE OBJECTED TO THE USE OF ONE OF KELLER'S PRIOR FELONIES; WETHER TRIAL COUNSEL SHOULD HAVE OBJECTED TO IMPROPER STATMENTS ISSUED BY ASS. D.A. DICKERSON TO JURY TO INFER INCONCLUSIVE DNA RESULTS POINTS TO KELLER; WHETHER TRIAL COUNSEL SHOULD HAVE IMPEACHED OFFICED LOPEZ FOR PRIOR INCONSISTANT STATEMENTS, (GOING BACK TO PRELIM HEARING TESTIMONY); WHETHER TRIAL COUNSEL SHOULD HAVE DEMANDED THAT ALLEGED PHONE CALL, WHICH WAS USE TO DENY KELLER'S SUBSTITUTION OF ATTORNEY BE MADE PART OF THE RECORD; WHETHER TRIAL COUNSEL SHOULD HAVE FILED A MOTION TO DISMISS KELLER'S CASE & REQUEST AN EVIDENTIARY HEARING; WHETHER TRIAL COUNSEL SHOULD HAVE CONSIDERED THE IMPORTANCE OF THE "OWE SHEETS" AS EVIDENCE; & WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR ADVISING KELLER HE WOULD LOSE HIS RIGHT TO APPEAL IF HE PLEADED GUILTY.

ADDITIONALLY, THE ORDER DID NOT ADDRESS THE FOLLOWING CLAIMS: WHETHER KELLER'S CONSECUTIVE HABITUAL-CRIMINAL

SENTENCE WAS ILLEGAL; WHETHER THE SEARCH OF KELLER'S VEHICLE VIOLATED HIS 4TH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH & SEIZURE; WHETHER THE THREE-HOUR DELAY BETWEEN KELLER'S APPREHENSION & OFFICERS OBTAINING A SEARCH WARRANT MADE THE VEHICLE STOP INVALID; WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE STATE TO PROCEED DESPITE THE DESTROYED OR LOST BODY CAMERA FOOTAGE; WHETHER THE DISTRICT COURT ERRED BY ALLOWING OFFICER LOPEZ'S TESTIMONY; AND WHETHER THE DISTRICT COURT ERRED BY FAILING TO CONTINUE THE CASE TO ALLOW KELLER TO USE NEWLY RETAINED COUNSEL. THE ORDER WAS THUS NOT A FINAL ORDER & IS PREVENTING KELLER FROM MOVING ON TO THE FEDERAL SUPREME COURT. SEE SANDSTROM V. SECOND JUDICIAL DISC. COURT, 121 NEV. 657, 659, 119 P.3d 1250, 1252 (2005) ("A FINAL ORDER IS ONE THAT DISPOSES OF ALL ISSUES AND LEAVES NOTHING FOR FUTURE CONSIDERATION."). ACCORDINGLY, THE SUPREME COURT LACKS JURISDICTION TO CONSIDER KELLER'S APPEAL.

DATED THIS 15TH DAY OF OCTOBER, 2021.

I, CHRISTOPHER R. KELLER, DO SOLEMLY SWEAR, UNDER THE PENALTY OF PERJURY, THAT THE ABOVE MOTION TO AMEND "FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER" IS ACCURATE, CORRECT, & TRUE TO THE BEST OF MY KNOWLEDGE. NRS.171.102 & NRS.208.165

RESPECTFULLY SUBMITTED,

CHRISTOPHER KELLER

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 Motion to Amend "Findings of Fact, Conclusions of Law & Order.,

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

DATED THIS 15th DAY OF October, 2021.

SIGNATURE: Chris Keller

INMATE PRINTED NAME: Christopher R. Keller

INMATE NDOC # 81840

INMATE ADDRESS: ~~ELY STATE PRISON P. O. BOX 1989 ELY, NV 89301~~ (H.D.S.P) P.O. Box # 650 Indian Springs, NV 89070

CHRistopher R. KELLER #81840
(Name)
(H.D.S.P) P.O. BOX #650
(Address)
INDIAN SPRINGS, NV 89070
(City, State, Zip)

(Telephone)
☑ Plaintiff/ ☐ Defendant, *Pro Se*

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER R. KELLER,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s).

Case No.: A-19-800950-W
Dept. No.: XIX

Date of Hearing:
Time of Hearing:

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15th day of October, 2021, I placed a true and correct copy of the following document:

in the United States Mail, with first-class postage prepaid, addressed to the following:

STEVEN D. GRIERSON (COURT CLERK)
200 LEWIS AVE, 3rd FLOOR
LAS VEGAS, NV 89155-1160

Per NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

(signature)
CHRISTOPHER KELLER (print name)
☑ Plaintiff/ ☐ Defendant, *Pro Se*

Christopher Keller #81840
(H.D.S.P.) P.O. Box #650
Indian Springs, NV 89070

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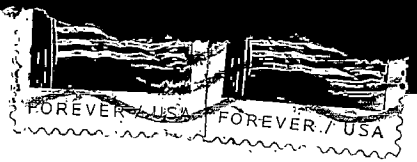

STEVEN D. GRIERSON (D.C. 19 COURT CLERK)
200 Lewis Ave, 3rd floor
Las Vegas, NV 89155-1160

89101-630000

291

CASE No. A-800950-W

Dept. No. 3

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12/23/2021
CLERK OF THE COURT

IN THE 8th 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.

TELEPHONIC HEARING REQUESTED IF NECESSARY

REQUEST FOR SUBMISSION OF MOTION

It is requested that the Motion entitled Motion TO AMEND FINDINGS OF FACT, CONCLUTIONS of LAW & ORDER, which was submitted/filed on the 25 day of NOVEMBER, 2021, in the above-entitled matter, be submitted to the Court for it's consideration.

The undersigned Petitioner/Plaintiff, certifies that a copy of the motion noted above and this pleading, have been served upon the Respondent/Defendant.

Dated this 22ND day of NOVEMBER, 2021.

Christopher R. Keller #81840
Petitioner/Plaintiff
(HDSP) P.O. Box 650 ~~Ely State Prison~~
INDIAN SPRINGS, NV ~~P.O. Box 1989~~
89070 Ely, ~~Nevada 89301-1989~~

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CLERK OF THE COURT

Comes now petitioner; Christopher R. Keller; and moves this Honorable Court to Amend it's "Findings of Fact, Conclusions of Law & Order" from it's October 1, 2020 Hearing, to comport and address all unresolved issues which the Nevada Supreme Court noted were not finalized in it's Order filed September 28th 2021, in the Court of Appeals of the State of Nevada, Case # 81988-COA

Namely; whether counsel should have objected to Kellers consecutive Habitual-Criminal sentence; whether trial counsel should have objected to the use of one of Keller's prior felonies; whether trial counsel should have objected to improper statements by D.A. Dickerson to jury to infer that inconclusive DNA results point to Keller; whether trial counsel should have attempted to impeach officer Lopez for prior inconsistant statements (going back to prelim testimony); whether trial counsel should have demanded that alleged phone call, which was used to deny Keller's substitution of attorney be made part of the record; wheather trial counsel should filed a motion to

DISMISS KELLER'S CASE AND REQUEST AN EVIDENTIARY HEARING; WHETHER TRIAL COUNSEL SHOULD HAVE CONSIDERED THE IMPORTANCE OF THE "OWE SHEETS" AS EVIDENCE; AND WHETHER TRIAL COUNSEL WAS INEFFECTIVE FOR ADVISING KELLER HE WOULD LOSE HIS RIGHT TO APPEAL IF HE PLEADED GUILTY.

ADDITIONALLY, THE ORDER DID NOT ADDRESS THE FOLLOWING CLAIMS: WHETHER KELLER'S CONSECUTIVE HABITUAL CRIMINAL SENTENCE WAS ILLEGAL; WHETHER THE SEARCH OF KELLER'S VEHICLE VIOLATED HIS 4th AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH & SEIZURE; WHETHER THE THREE-HOUR DELAY BETWEEN KELLER'S APPREHENSION AND OFFICERS OBTAINING A SEARCH WARRANT MADE THE VEHICLE STOP INVALID; WHETHER THE DISTRICT COURT ERRED IN ALLOWING THE STATE TO PROCEED DESPITE THE DESTROYED OR LOST BODY CAMERA FOOTAGE; WHEATHER THE DISTRICT COURT ERRED BY ALLOWING OFFICER LOPEZ'S TESTIMONY; AND WHETHER THE DISTRICT COURT ERRED BY FAILING TO CONTINUE THE CASE TO ALLOW KELLER TO USE NEWLY RETAINED COUNSEL. THE ORDER WAS THUS NOT A FINAL ORDER & IS PREVENTING KELLER FROM MOVING TO FEDERAL SUPREME COURT. SEE SANDSTROM V. SECOND JUD. DIST. COURT, 121 NEV. 657, 659, 119 P.3d 1250, 1250 (2005) ("A FINAL ORDER IS ONE THAT DISPOSES OF ALL ISSUES AND LEAVES NOTHING FOR FUTURE CONSIDERATION") ACCORDINGLY, THE SUPREME COURT LACKS JURISDICTION TO CONSIDER KELLER'S APPEAL.

DATED THIS 22nd DAY OF NOVEMBER, 2021.
I; Christopher R. Keller, DO solemly SWEAR, UNDER THE PENALTY of PERJURY, that the ABOVE MOTION TO AMEND FINDINGS OF FACT, CONCLUTIONS OF LAW & ORDER IS ACCURATE, CORRECT, AND TRUE TO THE BEST OF MY KNOWLEDGE.
NRS 171.102 AND NRS 208.165

Respectfully Submitted,

Christopher Keller
PETITIONER ~~DEFENDANT~~

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FORE GOING MOTION TO AMEND FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER WAS mailed to:

STEVEN D. GRIERSON (COURT CLERK)
200 LEWIS AVE., 3rd FLOOR
LAS VEGAS, NV 89155-1160

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 Motion to AMEND FINDINGS OF FACT, CONCLUTIONS of LAW & ORDER,

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

DATED THIS 22nd DAY OF NOVEMBER, 2021.

SIGNATURE: [signature]

INMATE PRINTED NAME: Christopher KELLER

INMATE NDOC # 81840

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

Christopher Keller #81840
(H.D.S.P) P.O. Box #650
Indian Springs, NV 89070

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LAS VEGAS, NV 89155-1160

89101-630000

297

CASE # A-800950-W DEPT # 3

IN THE 8th JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

Christopher Keller,
PETITIONER,
v.
State of Nevada
RESPONDANT

TELEPHONIC HEARING REQUESTED
IF NECESSARY

REQUEST FOR SUBMISSION OF MOTION.

IT IS REQUESTED THE MOTION ENTITLE "Motion to CONVERT ANY FURTHER HEARINGS TO TELEPHONIC VIDEO," which WAS SUBMITTED ON THE 5th DAY OF MARCH, 2022, IN THE ABOVE-ENTITLED MATTER, BE SUBMITTED TO THE COURT FOR IT'S CONSIDERATION.

IN ORDER TO SAVE THE STATE THE COST OF TRANSPORT & KELLER THE SIGNIFICANT UNDERTAKING WHICH GOES INTO THE PROCESS OF TRANSPORTATION. COMES NOW PETITIONER, CHRISTOPHER KELLER, AND MOVES THIS HONORABLE COURT TO CONVERT ANY FUTURE HEARINGS, IN THE ABOVE MENTIONED CASE, TO BE CONVERTED TO VIDEO-TELEPHONIC.

THE UNDERSIGNED PETITIONER, CERTIFIES THAT A COPY OF THE MOTION NOTED ABOVE AND THIS PLEADING, HAVE BEEN SERVED UPON THE RESPONDANT.

DATED THIS 5th DAY OF MARCH, 2022.

Chris Keller

Christopher Keller #81810
(LCC) 1200 PRISON RD.
LOVELOCK, NV 89419

UNDER PENALTY OF PERJURY, THE ABOVE MOTION IS TRUE & CORRECT PER. NRS 171.102 AND NRS 208.165

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING MOTION WAS MAILED TO;

STEVEN D. GRIERSON (COURT CLERK)
200 LEWIS AVE, 3rd FLOOR
LAS VEGAS, NV 89155-1160

AFFIRMATION PURSUANT TO NRS 239B.030

I, CHRISTOPHER R. KELLER #81840 CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE ATTACHED DOCUMENT ENTITLED MOTION TO CONVERT TO VIDEO-TELECONFRENCE, DOES NOT CONTAIL THE SOCIAL SECURITY NUMBER OF ANY PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY. DATED THIS 5th DAY OF MARCH, 2022.

Christopher Keller #81840
(LCC) 1200 PRISON RD.
LOVELOCK, NV 89419

Christopher Keller #81840
(LCC) 1200 Prison Rd.
Lovelock, NV 89419

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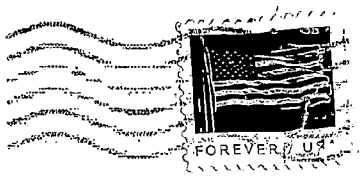

STEVEN D. GRIERSON (DEPT #3 COURT CLERK)
200 Lewis Ave. 3rd floor
Las Vegas, NV 89155-1160

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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[1], 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

[1] 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.

herein and without oral argument[2], the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

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

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

[2] Because the matter was taken under advisement, Senior Judge Becker heard no oral argument. The Court did review the arguments made by both sides at the Evidentiary Hearing conducted by Judge 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.

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

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

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

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

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

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

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

August 18, 2016.

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

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

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

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

On July 24, 2017, Ms. Feliciano requested a fourth sentencing continuance, and 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] No formal order reflecting these rulings was filed.

[5] Judge Kephart's oral rulings found that the substance claims 1-7 in the Petition were waived. He indicated that Petitioner's claims regarding ineffective assistance or trial and appellate counsel on suppression issues were naked allegations. Judge Kephart indicated Petitioner failed to specify what suppression issues should have been raised and how Petitioner was prejudiced. Regarding claims involving uncalled witnesses, Judge Kephart found Petitioner failed to identify the witnesses in the 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.

trial proceedings and any mental health issues.

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

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

On November 19, 2020, Petitioner filed a motion for production of the transcripts of the October 1 evidentiary hearing. No decision was made on this motion.[6]

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

[6]Judge Kephart left the bench in early 2021. The case was reassigned to Department 3, the Honorable Monica Trujillo. Although the District Court records reflect that the motion was heard on January 27, 2021, the minutes reflect the motion on calendar that day had something to do with appointment of post-conviction counsel, not the motion for transcripts. The Order entered on March 9, 2021, simply 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.

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

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

The matter was remanded for the district court to address these issues. On remand, Petitioner filed two motions to have the matter calendared so the district court could decide the remaining issues. The matter first appeared on calendar on December 20, 2021. Upon review of the file, Senior Judge Becker concluded that as Judge Kephart was no longer available to make additional findings, the successor judge was required to review the entire record to address the unresolved issues. Given the extensive nature of the record, Senior Judge Becker took the matter under advisement on December 29, 2021. Having completed the review of the record, these Amended Findings are issued.[7]

[7] As it is impossible to consider the issues specified by the Court of Appeals and simply incorporate Judge Kephart's prior findings, to avoid confusion, Senior Judge Becker reviewed all of Petitioner's claims and made an independent determination on each issue. Where both Judge Becker and Judge Kephart addressed an issue, this is reflected by footnote in these findings.

STATEMENT OF FACTS[8]

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.[9]

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.[10] 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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[8] 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.

[9] The information concerning the vehicle speed vis-a-vis the stop sign was not stated at the preliminary hearing but was made at trial.

[10] 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.

front of the patrol car and the Petitioner complied.

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

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

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

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

While Officer Henry moved around the building to the location where it appeared the

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[11] In post-conviction proceedings, Petitioner now asserts he did not give consent.

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

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

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

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

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

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

[12] Officer Lopez' testimony differed from Officer Henry's in that Officer Lopez indicated he opened the glove box, and the hole was immediately noticeable.

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

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

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

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

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

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[13] Several times in the Petition, Petitioner asserts the drugs found in the car were all in a purse and suggests it was the woman' purse. This is belied by the record. There was no purse in the car and the testimony established the drugs were found in mesh and colored bags, not a purse.

[14] Evidence was presented that NDMV also had the car registered at a different address.

[15] Testimony indicated the building nearest to the parking space where the Dodge stopped was Unit F although it was mismarked with the wrong letter.

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

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

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

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

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

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

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[16]Petitioner's counsel, through cross-examination and photographs of various areas in the residence established that there were male and female clothing and/or personal items in the residence. Officers' testimony differed. Some indicated there was no female items, others said they didn't pay attention to clothes or that there may have been some female clothing. Pictures established there were female 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.

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

Petitioner called one witness, Officer Henry. Petitioner did not testify.[17]

ANALYSIS

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

> 1. The court shall dismiss a petition if the court determines that:
>
> . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
>
> (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 both good cause for the failure to present the grounds and actual prejudice to the petitioner.
>
> . . .
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

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

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[17] Because Petitioner believed his family were hiring private counsel to represent him, he chose not to reveal witness information to Mr. Frizzell until his motion to continue was denied on the first day of trial. Judge Kephart, over the State's objection, indicated the unnoticed witnesses would be allowed 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.

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

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

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

In addition, a proper petition for post-conviction relief must set forth specific factual allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, that a defendant must allege specific facts supporting the claims in a petition seeking relief from any conviction or sentence. Failure to raise specific facts and reliance on vague allegations or generalized statements may cause a petition to be dismissed. "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A 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.[18] 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

[18] 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.

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

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

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

[19] At various points in the Petition, it is asserted that the parking space where the vehicle was parked constituted curtilage, therefore a search warrant was necessary and exigent vehicle stop law does not apply. As the space was not attached to the building and is, at most, simply an assigned space in a common parking lot, it is not curtilage. As a substantive claim it is barred. To the extent it was 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.

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

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

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

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

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

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

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

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

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

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

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

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

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

The Nevada Supreme Court 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;[21] 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

[21] 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.

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

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

A. Suppression Issues

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

[22] The Court independently reviewed the district court and appellate records. After reviewing the Petition, the Supplement and the State's Opposition, the pre-trial and trial transcripts, and all the pre-trial and post-trial motions, but not considering the transcript of the post-conviction evidentiary hearing testimony, the Court concludes the Petition should be denied without an evidentiary hearing. An appellant is entitled to an evidentiary hearing if he raises claims supported by factual assertions that, if true, would entitle him to relief, and those claims are not belied by the record on appeal. 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.

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

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

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

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

The allegations that Petitioner asked for a lawyer immediately and did not give Officer Lopez permission to get his wallet from his pocket are bare allegations not supported by the record. However, even if Petitioner had testified at the suppression hearing and asserted these allegations, there is no reasonable probability of a different result. A request for a lawyer only 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

testimony regarding the wallet credible considering his prior felony convictions.

Thus, Petitioner's ineffective assistance of counsel claims relating to suppression of evidence fail.[23]

B. Investigator, Jail Visits and Motions Requesting New Counsel

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

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

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

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

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[23] Judge Kephart did not specifically address any of the issues. He found trial counsel filed a suppression motion and raised many of the issues, so those claims were belied by the record. As to 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.

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

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

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

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

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

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

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

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

Therefore, this claim is denied.[25]

C. Failure to Call Witnesses

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

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

The record reflects that Petitioner waited until the trial date to supply witness information to trial counsel. For at least one witness, Petitioner's information was insufficient to locate that person.[26] Another witness and Petitioner's mother were interviewed, but neither

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[25] Judge Kephart came to the same conclusion, but also relied on evidence at the evidentiary hearing to reach that conclusion.

[26] Petitioner had the name of a woman who was arrested after Petitioner was arrested and who would allegedly testify that she stayed at Petitioner's house and used his car.

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

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

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

> THE COURT: Okay. Notwithstanding the fact that the State was not put on notice of these witnesses, I'm going to allow you to call her if you choose to. But you need to make her available to the State to give them an opportunity to question her to see what, if anything, she's going to be offering.
> MR. FRIZZELL: And that is fine, Your Honor. I actually just learned of her potential as a witness yesterday evening from an e-mail, which I received.
> THE COURT: Okay. So –
> MR. FRIZZELL: And --
> THE COURT: -- she wasn't even somebody that defendant was telling you previously that we discussed before we started the trial?
> MR. FRIZZELL: No, Your Honor.

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,

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

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

> MR. FRIZZELL: -- what happened here. While you were probably walking down the hallway to come in, I was on the phone with the witness that you said you would allow to testify, Mary Silva, who was on the road ostensibly heading home, she told me. I asked her -- I said, we're ready and it's now time and the judge isn't going to wait. How 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.

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

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

Thus, this claim is partially belied by the record, it is a bare and vague allegation and, even had such a witness testified, there is no reasonable probability of a different result at trial. Therefore, this claim is denied.[27]

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[27] Judge Kephart found reached the same result, but based part of his ruling on the evidentiary hearing testimony, rather than just the trial record.

D. K-9 Evidence Issues

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

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

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

E. Mental Health Allegations

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

Therefore, this claim is denied.[29]

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[28] Judge Kephart did not address this claim.

[29] Judge Kephart agreed that Petitioner failed to indicate, either in the Petition or the evidentiary

F. Call Witnesses at Penalty Hearing

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

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

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

Therefore, this Court finds that counsel cannot be deemed ineffective for failing to call family and witnesses to speak on his behalf at his sentencing. This claim is denied.[30]

G. Habitual Criminal Sentence Challenges

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

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hearing, the nature of his mental illness, provide any support for his statements other than identifying he was taking certain medications or state he was confused during the pre-trial process. Judge Kephart concluded these were naked allegations. Judge Kephart also concluded, based on the record of pre-trial and trial proceedings that nothing indicated Petitioner was incompetent. Judge Kephart also relied 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.

[30] Judge Kephart addressed and denied this claim for the same reasons.

habitual criminal sentence could not be run consecutively.

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

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

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

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

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

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

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

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

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

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

[31] Judge Kephart only addressed these issues as substantive claims, not as ineffective assistance of trial counsel.

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

For these reasons, the claim is denied.[32]

I. Body Camera Footage

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

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[32] Judge Kephart did not rule on this claim.

[33] Petitioner asserts he made a request for the body camera footage within 45 days of his arrest at one of his initial Justice Court appearances. The record reflects that defense counsel did make a request for the footage at some point because the lack of video footage was discussed at the February 22, 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.

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

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

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

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

Therefore, this claim is denied.[34]

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[34] Judge Kephart did not rule on this claim, although it was discussed at the evidentiary hearing.

J. Owe Sheets

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

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

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

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

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[35] "Owe sheets" are documents which officers' identify as evidence of narcotic sale transactions (as opposed to personal use). Officers will testify that, based upon their training an experience, a document or documents are "owe sheets".

[36] Petitioner has never identified the name of the woman who allegedly lived with him.

[37] Judge Kephart did not address this claim.

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

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

Conclusion

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

III. Ineffective Assistance of Appellate Counsel Claims

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

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

[38] Judge Kephart did not address these issues.

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

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

A. Issues Not Preserved for Appeal

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

[39] Petitioner also asserts that he did not accept the negotiations offered by the State because he wanted to raise every issue of suppression on appeal. When appellate counsel refused to raise every issue, he was stuck because his Motions to Dismiss Counsel and represent himself on appeal were denied. The record reflects Judge Kephart granted the pro se representation request, but limited it to after opening briefs were filed. Regardless, the Nevada Supreme Court did not let Petitioner represent himself. 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.

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

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

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

Assuming marijuana odor can only be produced from recent smoking activity, Officer 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

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

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

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

On appeal, the district court's decision to admit the evidence would be reviewed under an abuse of discretion standard. Harkins v. State, 122 Nev. 974, 980, 143 P.3d. 706, 709 (2006). The issue was relevancy. In pre-trial hearings, it was evident the defense would involve assertions that the drugs and guns belonged to some unknown woman. The evidence 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

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

For the reasons state above, these ineffective assistance of appellate counsel claims are denied.[40]

B. Preserved Suppression Issues – Not Raised on Appeal

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

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

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

[40] Judge Kephart did not address these issues.

pretextual stop arguments.

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

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

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

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

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

In conclusion, there is no reasonable probability these issues, if raised on appeal, would have led to a different result and the ineffective assistance of appellate counsel claims based on these assertions are denied.[41]

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

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

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

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

[41] Judge Kephart, based on the record below and the evidentiary hearing, concluded appellate counsel made a strategic choice on which suppression issues to appeal and that Petitioner also failed to show prejudice.

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

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

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

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

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[42] In fact, intercepted jail calls between Petitioner and a woman indicated the woman saw the stop and 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.

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

Petitioner.

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

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

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

D. Body Camera Issues

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

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

Therefore, this claim is denied.[45]

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

[45] Judge Kephart did not rule on this issue save for his general ruling discussed in fn. 41.

E. Failure to Exclude K-9 Qualification Testimony

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

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

Appellate counsel was not ineffective, and the claim is denied.[46]

F. Gun DNA Testimony

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

[46] Judge Kephart addressed the K-9 issues in his ineffective assistance of trial counsel analysis. He did not rule on it in the appellate context save for his general ruling discussed in fn. 41.

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

As there is no reasonable probability of a different result on appeal, the failure to raise this issue is not ineffective assistance of counsel, and the claim is denied.[47]

G. Trial Court Erred in Denying Continuances for New Counsel

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

Conclusion

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

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

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

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

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

[47] Judge Kephart did not rule on this issue.

[48] Judge Kephart did not address this issue.

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

Order of Affirmance at page 5.

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

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

Order of Affirmance at pages 8-9.

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

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[49] 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.

Dan 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 _____

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

CHRISTOPHER KELLER,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-19-800950-W

Dept No: III

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

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

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on April 18, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

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

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Christopher Keller # 81840
1200 Prison Rd.
Lovelock, NV 89419

/s/ Amanda Hampton
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[1], 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

[1] 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.

herein and without oral argument[2], the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT, CONCLUSIONS OF LAW

STATEMENT OF THE CASE

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

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

[2] Because the matter was taken under advisement, Senior Judge Becker heard no oral argument. The Court did review the arguments made by both sides at the Evidentiary Hearing conducted by Judge 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.

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

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

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

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

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

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

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

August 18, 2016.

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

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

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

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

On July 24, 2017, Ms. Feliciano requested a fourth sentencing continuance, and 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] No formal order reflecting these rulings was filed.

[5] Judge Kephart's oral rulings found that the substance claims 1-7 in the Petition were waived. He indicated that Petitioner's claims regarding ineffective assistance or trial and appellate counsel on suppression issues were naked allegations. Judge Kephart indicated Petitioner failed to specify what suppression issues should have been raised and how Petitioner was prejudiced. Regarding claims involving uncalled witnesses, Judge Kephart found Petitioner failed to identify the witnesses in the 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.

trial proceedings and any mental health issues.

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

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

On November 19, 2020, Petitioner filed a motion for production of the transcripts of the October 1 evidentiary hearing. No decision was made on this motion.[6]

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

[6]Judge Kephart left the bench in early 2021. The case was reassigned to Department 3, the Honorable Monica Trujillo. Although the District Court records reflect that the motion was heard on January 27, 2021, the minutes reflect the motion on calendar that day had something to do with appointment of post-conviction counsel, not the motion for transcripts. The Order entered on March 9, 2021, simply 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.

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

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

The matter was remanded for the district court to address these issues. On remand, Petitioner filed two motions to have the matter calendared so the district court could decide the remaining issues. The matter first appeared on calendar on December 20, 2021. Upon review of the file, Senior Judge Becker concluded that as Judge Kephart was no longer available to make additional findings, the successor judge was required to review the entire record to address the unresolved issues. Given the extensive nature of the record, Senior Judge Becker took the matter under advisement on December 29, 2021. Having completed the review of the record, these Amended Findings are issued.[7]

[7] As it is impossible to consider the issues specified by the Court of Appeals and simply incorporate Judge Kephart's prior findings, to avoid confusion, Senior Judge Becker reviewed all of Petitioner's claims and made an independent determination on each issue. Where both Judge Becker and Judge Kephart addressed an issue, this is reflected by footnote in these findings.

STATEMENT OF FACTS[8]

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.[9]

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.[10] 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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[8] 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.

[9] The information concerning the vehicle speed vis-a-vis the stop sign was not stated at the preliminary hearing but was made at trial.

[10] 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.

front of the patrol car and the Petitioner complied.

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

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

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

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

While Officer Henry moved around the building to the location where it appeared the

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[11] In post-conviction proceedings, Petitioner now asserts he did not give consent.

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

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

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

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

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

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

[12] Officer Lopez' testimony differed from Officer Henry's in that Officer Lopez indicated he opened the glove box, and the hole was immediately noticeable.

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

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

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

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

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

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[13] Several times in the Petition, Petitioner asserts the drugs found in the car were all in a purse and suggests it was the woman' purse. This is belied by the record. There was no purse in the car and the testimony established the drugs were found in mesh and colored bags, not a purse.

[14] Evidence was presented that NDMV also had the car registered at a different address.

[15] Testimony indicated the building nearest to the parking space where the Dodge stopped was Unit F although it was mismarked with the wrong letter.

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

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

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

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

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

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

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[16]Petitioner's counsel, through cross-examination and photographs of various areas in the residence established that there were male and female clothing and/or personal items in the residence. Officers' testimony differed. Some indicated there was no female items, others said they didn't pay attention to clothes or that there may have been some female clothing. Pictures established there were female 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.

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

Petitioner called one witness, Officer Henry. Petitioner did not testify.[17]

ANALYSIS

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

> 1. The court shall dismiss a petition if the court determines that:
>
> . . .
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> (1) Presented to the trial court;
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or
>
> (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 both good cause for the failure to present the grounds and actual prejudice to the petitioner.
>
> . . .
>
> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

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

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[17] Because Petitioner believed his family were hiring private counsel to represent him, he chose not to reveal witness information to Mr. Frizzell until his motion to continue was denied on the first day of trial. Judge Kephart, over the State's objection, indicated the unnoticed witnesses would be allowed 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.

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

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

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

In addition, a proper petition for post-conviction relief must set forth specific factual allegations that would entitle the petitioner to relief. NRS 34.735(6) states, in pertinent part, that a defendant must allege specific facts supporting the claims in a petition seeking relief from any conviction or sentence. Failure to raise specific facts and reliance on vague allegations or generalized statements may cause a petition to be dismissed. "Bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A 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.[18] 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

[18] 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.

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

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

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

[19] At various points in the Petition, it is asserted that the parking space where the vehicle was parked constituted curtilage, therefore a search warrant was necessary and exigent vehicle stop law does not apply. As the space was not attached to the building and is, at most, simply an assigned space in a common parking lot, it is not curtilage. As a substantive claim it is barred. To the extent it was 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.

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

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

II. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

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

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

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

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

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

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

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

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

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

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

The Nevada Supreme Court 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;[21] 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

[21] 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.

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

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

A. Suppression Issues

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

[22] The Court independently reviewed the district court and appellate records. After reviewing the Petition, the Supplement and the State's Opposition, the pre-trial and trial transcripts, and all the pre-trial and post-trial motions, but not considering the transcript of the post-conviction evidentiary hearing testimony, the Court concludes the Petition should be denied without an evidentiary hearing. An appellant is entitled to an evidentiary hearing if he raises claims supported by factual assertions that, if true, would entitle him to relief, and those claims are not belied by the record on appeal. 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.

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

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

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

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

The allegations that Petitioner asked for a lawyer immediately and did not give Officer Lopez permission to get his wallet from his pocket are bare allegations not supported by the record. However, even if Petitioner had testified at the suppression hearing and asserted these allegations, there is no reasonable probability of a different result. A request for a lawyer only 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

testimony regarding the wallet credible considering his prior felony convictions.

Thus, Petitioner's ineffective assistance of counsel claims relating to suppression of evidence fail.[23]

B. Investigator, Jail Visits and Motions Requesting New Counsel

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

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

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

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

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[23] Judge Kephart did not specifically address any of the issues. He found trial counsel filed a suppression motion and raised many of the issues, so those claims were belied by the record. As to 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.

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

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

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

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

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

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

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

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

Therefore, this claim is denied.[25]

C. Failure to Call Witnesses

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

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

The record reflects that Petitioner waited until the trial date to supply witness information to trial counsel. For at least one witness, Petitioner's information was insufficient to locate that person.[26] Another witness and Petitioner's mother were interviewed, but neither

[25] Judge Kephart came to the same conclusion, but also relied on evidence at the evidentiary hearing to reach that conclusion.

[26] Petitioner had the name of a woman who was arrested after Petitioner was arrested and who would allegedly testify that she stayed at Petitioner's house and used his car.

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

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

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

> THE COURT: Okay. Notwithstanding the fact that the State was not put on notice of these witnesses, I'm going to allow you to call her if you choose to. But you need to make her available to the State to give them an opportunity to question her to see what, if anything, she's going to be offering.
> MR. FRIZZELL: And that is fine, Your Honor. I actually just learned of her potential as a witness yesterday evening from an e-mail, which I received.
> THE COURT: Okay. So –
> MR. FRIZZELL: And --
> THE COURT: -- she wasn't even somebody that defendant was telling you previously that we discussed before we started the trial?
> MR. FRIZZELL: No, Your Honor.

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,

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

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

> MR. FRIZZELL: -- what happened here. While you were probably walking down the hallway to come in, I was on the phone with the witness that you said you would allow to testify, Mary Silva, who was on the road ostensibly heading home, she told me. I asked her -- I said, we're ready and it's now time and the judge isn't going to wait. How 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.

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

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

Thus, this claim is partially belied by the record, it is a bare and vague allegation and, even had such a witness testified, there is no reasonable probability of a different result at trial. Therefore, this claim is denied.[27]

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[27] Judge Kephart found reached the same result, but based part of his ruling on the evidentiary hearing testimony, rather than just the trial record.

D. K-9 Evidence Issues

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

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

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

E. Mental Health Allegations

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

Therefore, this claim is denied.[29]

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[28] Judge Kephart did not address this claim.

[29] Judge Kephart agreed that Petitioner failed to indicate, either in the Petition or the evidentiary

F. Call Witnesses at Penalty Hearing

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

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

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

Therefore, this Court finds that counsel cannot be deemed ineffective for failing to call family and witnesses to speak on his behalf at his sentencing. This claim is denied.[30]

G. Habitual Criminal Sentence Challenges

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

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hearing, the nature of his mental illness, provide any support for his statements other than identifying he was taking certain medications or state he was confused during the pre-trial process. Judge Kephart concluded these were naked allegations. Judge Kephart also concluded, based on the record of pre-trial and trial proceedings that nothing indicated Petitioner was incompetent. Judge Kephart also relied 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.

[30] Judge Kephart addressed and denied this claim for the same reasons.

habitual criminal sentence could not be run consecutively.

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

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

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

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

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

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

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

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

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

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

[31] Judge Kephart only addressed these issues as substantive claims, not as ineffective assistance of trial counsel.

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

For these reasons, the claim is denied.[32]

I. Body Camera Footage

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

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[32] Judge Kephart did not rule on this claim.

[33] Petitioner asserts he made a request for the body camera footage within 45 days of his arrest at one of his initial Justice Court appearances. The record reflects that defense counsel did make a request for the footage at some point because the lack of video footage was discussed at the February 22, 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.

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

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

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

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

Therefore, this claim is denied.[34]

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[34] Judge Kephart did not rule on this claim, although it was discussed at the evidentiary hearing.

J. Owe Sheets

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

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

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

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

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[35] "Owe sheets" are documents which officers' identify as evidence of narcotic sale transactions (as opposed to personal use). Officers will testify that, based upon their training an experience, a document or documents are "owe sheets".

[36] Petitioner has never identified the name of the woman who allegedly lived with him.

[37] Judge Kephart did not address this claim.

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

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

Conclusion

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

III. Ineffective Assistance of Appellate Counsel Claims

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

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

[38] Judge Kephart did not address these issues.

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

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

A. Issues Not Preserved for Appeal

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

[39] Petitioner also asserts that he did not accept the negotiations offered by the State because he wanted to raise every issue of suppression on appeal. When appellate counsel refused to raise every issue, he was stuck because his Motions to Dismiss Counsel and represent himself on appeal were denied. The record reflects Judge Kephart granted the pro se representation request, but limited it to after opening briefs were filed. Regardless, the Nevada Supreme Court did not let Petitioner represent himself. 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.

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

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

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

Assuming marijuana odor can only be produced from recent smoking activity, Officer 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

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

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

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

On appeal, the district court's decision to admit the evidence would be reviewed under an abuse of discretion standard. Harkins v. State, 122 Nev. 974, 980, 143 P.3d. 706, 709 (2006). The issue was relevancy. In pre-trial hearings, it was evident the defense would involve assertions that the drugs and guns belonged to some unknown woman. The evidence 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

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

For the reasons state above, these ineffective assistance of appellate counsel claims are denied.[40]

B. Preserved Suppression Issues – Not Raised on Appeal

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

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

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

[40] Judge Kephart did not address these issues.

pretextual stop arguments.

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

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

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

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

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

In conclusion, there is no reasonable probability these issues, if raised on appeal, would have led to a different result and the ineffective assistance of appellate counsel claims based on these assertions are denied.[41]

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

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

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

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

[41] Judge Kephart, based on the record below and the evidentiary hearing, concluded appellate counsel made a strategic choice on which suppression issues to appeal and that Petitioner also failed to show prejudice.

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

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

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

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

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[42] In fact, intercepted jail calls between Petitioner and a woman indicated the woman saw the stop and 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.

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

Petitioner.

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

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

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

D. Body Camera Issues

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

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

Therefore, this claim is denied.[45]

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

[45] Judge Kephart did not rule on this issue save for his general ruling discussed in fn. 41.

E. Failure to Exclude K-9 Qualification Testimony

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

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

Appellate counsel was not ineffective, and the claim is denied.[46]

F. Gun DNA Testimony

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

[46] Judge Kephart addressed the K-9 issues in his ineffective assistance of trial counsel analysis. He did not rule on it in the appellate context save for his general ruling discussed in fn. 41.

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

As there is no reasonable probability of a different result on appeal, the failure to raise this issue is not ineffective assistance of counsel, and the claim is denied.[47]

G. Trial Court Erred in Denying Continuances for New Counsel

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

Conclusion

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

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

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

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

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

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[47] Judge Kephart did not rule on this issue.

[48] Judge Kephart did not address this issue.

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

Order of Affirmance at page 5.

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

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

Order of Affirmance at pages 8-9.

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

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[49] 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.

Dan 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 _____

No. A-19-800950-W

Dept. No. 3

IN THE 8th 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.

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 19th day of April, 2022.

Dated this 19th day of April, 2022.

Christopher R. Keller

Appellant

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

~~Ely State Prison~~
~~P.O. Box 1989~~
~~Ely, Nevada 89301-1989~~

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: _____

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

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CLERK OF THE COURT

No. A-19-800950-W Dept. No. 3

IN THE 8th 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: Hearing Clerks & 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 compliant 1/28/16

Dated this _____ day of _____, 20__.

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

CERTIFICATE OF SEVICE 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__.

ASTA

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

CHRISTOPHER R. KELLER,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-19-800950-W

Dept No: III

CASE APPEAL STATEMENT

1. Appellant(s): Christopher R. Keller

2. Judge: Nancy Becker

3. Appellant(s): Christopher R. Keller

Counsel:

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

4. Respondent (s): State of Nevada

Counsel:

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

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

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

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

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

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

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

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

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

11. Previous Appeal: Yes

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

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 27 day of April 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

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

cc: Christopher R. Keller

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	COURT MINUTES	December 09, 2019

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

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)

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 and Transmittal of Record

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

Pursuant to the Supreme Court order dated May 4, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises two volumes with pages numbered 1 through 421.

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 9 day of May 2022.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk