IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR GOMEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83690

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is assigned to the Nevada Supreme Court because this case is a denial of a Petition of Writ of Habeas Corpus (Post-Conviction) requesting relief from a criminal conviction based on a guilty plea.

STATEMENT OF THE ISSUES

1. Whether the district court did not abuse its discretion in finding that counsel adequately explained to Appellant that his sentences were consecutive.
2. Whether the district court did not abuse its discretion in finding that counsel was not ineffective for failing to investigate and file pretrial motions.

3. Whether the district court did not abuse its discretion in finding that counsel was not ineffective for not filing a motion to withdraw guilty plea.

STATEMENT OF THE CASE

On August 3, 2016, OSCAR GOMEZ, JR. (hereinafter "Appellant") was charged by way of Information with one count of MURDER WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030, 193.165) for actions committed on or about June 24, 2016. Appellant's Appendix Volume 1 ("1 PCR") 003.

On October 17, 2017, at status check, the district court confirmed with Appellant that he was aware of the State's offer and continued the matter to allow him time to review the offer with counsel. Respondent's Appendix ("RA") 023. On November 7, 2017, Appellant confirmed with the district court that he rejected the State's offer. RA 025.

On April 19, 2018, Appellant accepted negotiations in the underlying case and, pursuant to a Guilty Plea Agreement ("GPA"), Appellant pled guilty to MURDER (SECOND DEGREE) WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.010, 200.030.2, 193.165). 1 PCR 24-26. In so doing, Appellant acknowledged:

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> …

> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
> …
> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

1 PCR 8-9. Appellant was also canvassed by the court regarding the voluntariness of Appellant's plea, during which Appellant affirmed:

> THE COURT: …you had a full and ample opportunity to discuss your plea of guilty and the charge of second degree murder with use of a deadly weapon that you're going to be pleading to. Is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?
>
> DEFENDANT GOMEZ: They did.
>
> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

1 PCR 21. The court further asked:

> THE COURT: …Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which you are pleading guilty with your attorneys?
>
> DEFENDANT GOMEZ: I did.
>
> THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?

DEFENDANT GOMEZ: That's right.

…

THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?

DEFENDANT GOMEZ: No, no questions.

1 PCR 23-24. Following its canvass of Appellant, the court found that his guilty plea was freely and voluntarily entered and referred the matter to the Division of Parole and Probation for the preparation of a Presentence Investigation Report ("PSI"). 1 PCR 27.

On June 14, 2018, Appellant was adjudicated guilty of Murder (Second Degree) With Use of a Deadly Weapon and was sentenced to ten (10) years to LIFE in the Nevada Department of Corrections, with a consecutive term of ninety-six (96) to two hundred forty (240) months for the use of a deadly weapon. 1 PCR 47. Appellant was also ordered to pay $18,800.00 in restitution. 1 PCR 47-48. Appellant received 716 days credit for time served. 1 PCR 48. The Judgment of Conviction was filed on June 22, 2018. 1 PCR 47.

On July 18, 2018, Appellant filed a Notice of Appeal in the underlying case. 1 PCR 49. On May 15, 2019, the Nevada Court of Appeals affirmed Appellant's Judgment of Conviction. PCR 51. Remittitur issued on June 11, 2019. RA 034.

On May 14, 2020, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of Writ of Habeas Corpus (Post-Conviction), a Motion for Appointment of Counsel and Request for

Evidentiary Hearing. 1 PCR 55-124. The State filed its Response to the pleadings on June 23, 2020. 1 PCR 125. On September 22, 2020, the court considered the matter on the briefings, and stated that it rejected all of Appellant's arguments, except for the argument about whether counsel adequately discussed concurrent or consecutive prison time with Appellant. 1 PCR 158-159. Thereafter, on October 13, 2020, the court issued a Minute Order, scheduling an evidentiary hearing "on the sole issue of whether counsel informed [Appellant] that he faced consecutive time for the deadly weapon enhancement." RA 035.

On September 14, 2020, Appellant filed a pro per Petition for Writ of Habeas Corpus. 1 PCR 142-157.

On February 4, 2021, Appellant filed the "Original" Petition for Writ of Habeas Corpus (Post-Conviction) (his "Supplement"). 1 PCR 160-187. For the purposes of their Response, the State construed Appellant's Petition as a supplemental pleading to the Petition that he filed on May 14, 2021, and filed a response on March 23, 2021. 1 PCR 195.

On February 12, 2021, at status check regarding setting of the evidentiary hearing, the district court noted that Appellant had filed a Petition for Writ of Habeas Corpus on September 2020 and thereafter filed two more petitions. RA 036-37. Appellant's September 2020 Petition was never heard and thus still pending. RA 036-37. The district court ordered Appellant's "Motion to Join" filed on February 4,

2021, stricken. RA 036-37. Noting that the previous judge had decided to hold a limited evidentiary hearing, the court continued the matter to have Appellant be appointed counsel. RA 036-37.

On March 5, 2021, the court granted Appellant's request for counsel, and Mr. James Hoffman, Esq. confirmed as counsel. RA 038. On March 23, 2021, the State filed its Response to the Supplement. 1 PCR 195. On August 20, 2021, the district court held an evidentiary hearing to determine whether Appellant understood he was pleading to consecutive time between counts. 1-2 PCR 208-269. On September 17, 2021, the district court issued its decision denying Appellant's Petition and finding that the sentence and its consequences were explained to Appellant. 2 PCR 270. On December 6, 2021, the district court filed its Decision. 2 PCR 273-87.

On October 21, 2021, Appellant filed a Notice of Appeal concerning the denial of his Petition. 2 PCR 271. On May 9, 2022, Appellant filed Appellant's Opening Brief.

STATEMENT OF THE FACTS

On June 24, 2016, friends, Shawn Manemules ("Shawn") and Jonathan Coleman ("Jonathan") went to a mini-mart after work. RA 002. Jonathan noticed Defendant inside the store; Defendant wore a tank top and had a tattoo sleeve on his left arm. RA 002-3. Upon exiting the store, Defendant and his friend ("co-Defendant") were standing by the door. RA 003.

In an instigating manner, Defendant said to Shawn, "nice tattoos." RA 003, 12. Shawn had "LV," which stood for Las Vegas on the left-side of his face and a Nevada map on his right-side. RA 003. Defendant continued instigating Shawn by saying, "You're not from around here. Where you from, what city you from? This is my town. You're on the wrong turf." RA 012. Shawn called co-Defendant "Sureño punto," and told him "Let's go fight." RA 004, 009, 008, 012. "Sureño punto" means "Southside Bitch." 010. Defendant then pulled out a semiautomatic firearm from his waistline and pointed the gun at Shawn and Jonathan. RA 004, 009. Shawn did not have any weapons. RA 011.

Co-Defendant and Shawn began fist fighting in the parking lot while Jonathan and Defendant watched. RA 004-5, 009, 012. Through the entirety of the five-minute fight, Defendant had his gun out. RA 009. The fight ended because a mini-mart customer told them the police were called. RA 004, 009-10. Shawn did not say anything to Defendant after the fight ended. RA 012.

Shawn and Jonathan walked towards an alley and Defendant followed them. RA 005. Defendant was two and three and a half feet away from Jonathan and Shawn, respectively, when Defendant – pointing his gun at Shawn – asked Jonathan if Jonathan "gang banged." RA 005, 013-14. Jonathan responded, "I don't gang bang." RA 005. Shawn told Defendant, "You're not going to use it." RA 006. Defendant then shot Shawn once in the stomach. RA 006, 010, 013.

Shawn ran a few feet before falling to the ground. RA 006. Jonathan tried talking to Shawn, but Shawn was unresponsive. RA 006. Jonathan, not having a cell phone, attempted to call 911 from Shawn's cell phone but could not so he ran inside the store and told them to call 911. RA 006, 011.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) as Appellant failed to satisfy either Strickland prong. Appellant claims his trial counsel was infective for several reasons: (1) for failing to adequately explain that he would serve consecutive sentences; (2) for failing to investigate and file pretrial motions; and (3) for failing to file a motion to withdraw his guilty plea.

Appellant's first claim fails because it is belied by the record. The district court held an evidentiary hearing specifically to determine whether counsel adequately explained the sentencing structure to Appellant. At the evidentiary hearing, trial counsel testified that she met with Appellant over twenty times always with either her investigator or another attorney from her office. On multiple occasions counsel explained sentencing to Appellant and that he demonstrated he understood he would serve consecutive sentences. This is corroborated by Appellant's own witnesses – his sisters. Both of Appellant's sisters testified that they understood that Appellant would serve his second-degree murder and then a few

more years for the weapon enhancement. Appellant's and his family's understanding is further evidenced by one of the sister's letter who wrote it was her and Appellant's understanding "that he would be sentenced for 10 years, *plus an added two for gun enhancement charges*." Thus, the district court appropriately found that counsel was not deficient in explaining the sentencing structure to Appellant.

Appellant's second claim contained sub-claims – counsel's failure to investigate an alternative suspect and interview a witness and file pretrial motions. The district court appropriately denied Appellant's claim regarding the alternative suspect because he failed to raise the issue on direct appeal. Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). The rest of the claims were denied because they were belied by the record and/or meritless. The record, including the GPA, plea canvass, and testimony at the evidentiary hearing, demonstrated Appellant and counsel discussed possible defenses and Appellant's satisfaction with counsel's representation. Notwithstanding Appellant's own admission of strategizing with counsel and his satisfaction with her performance, Appellant failed to show how counsel's failure to investigate or file motions would have been successful given that Appellant was identified as the shooter and caught on surveillance video holding a gun.

Lastly, Appellant attempted to show counsel failed to file a motion for withdrawal of guilty plea prior to sentencing at his request by providing an undated

and unaddressed letter. The letter stated he had been transferred to a different prison, which contradicted his claim that he requested counsel to file the motion prior to sentencing. The self-serving letter amounted to nothing but a bare and naked assertion.

Therefore, this Court should affirm the district court's denial of Appellant's Petition as the district court properly found Appellant failed to prove either Strickland prong in any of his claims.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT COUNSEL ADEQUATELY EXPLAINED TO APPELLANT THAT HIS SENTENCES WERE CONSECUTIVE

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court if they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

Appellant contends his trial counsel, Ms. Monti Levy, was ineffective for failing to adequately explain that his sentences for second-degree murder and weapon enhancement would run consecutively. Appellant's Opening Brief ("AOB") at 7-9. Appellant further contends counsel's error prejudiced him because but for this mistake, Appellant would have gone to trial. AOB at 9. The district court did not abuse its discretion in denying this claim because the claim is belied by the GPA, plea canvass transcript, and the evidentiary hearing specifically held to determine this matter.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under Strickland, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable

probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002). Further, 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 probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). A defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983).

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made

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

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

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). This portion of the test is slightly modified when the convictions occurs due to a guilty

plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988 (1996). For a guilty plea, a defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Kirksey, 112 Nev. at 998 (quoting Hill, 474 U.S. at 59).

Nevada precedent reflects "that where a guilty plea is not coerced and the defendant [is] competently represented by counsel at the time it [is] entered, the subsequent conviction is not open to collateral attack and any errors are superseded by the plea of guilty." Powell v. Sheriff, Clark County, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969) (citing Hall v. Warden, 83 Nev. 446, 434 P.2d 425 (1967)). In Woods v. State, the Nevada Supreme Court determined that a defendant lacked standing to challenge the validity of a plea agreement because he had "voluntarily entered into the plea agreement and accepted its attendant benefits." 114 Nev. 468, 477, 958 P.2d 91, 96 (1998).

Furthermore, the Nevada Supreme Court has explained:

> "[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (quoting Tollet v. Henderson, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608 (1973)). Indeed, entry of a guilty plea "waive[s] all constitutional claims based on events occurring prior to the entry of the plea[], except those involving voluntariness of the plea[] [itself]." Lyons, 100 Nev. at 431, 683 P.2d 505; see also, Kirksey, 112 Nev. at 999, 923 P.2d at 1114 ("Where the defendant has pleaded guilty, the only claims that may be raised thereafter are those involving the voluntariness of the plea itself and the effectiveness of counsel.").

The district court did not abuse its discretion in denying Appellant's ineffective assistance of counsel claim regarding sentencing structure because a review of the record in its entirety belies the claim. Beginning with the GPA and plea canvass transcript, both reflect that Appellant was aware of the potential range of punishment and that the sentences were consecutive. Appellant acknowledged, by signing the GPA:

> I understand that as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada State Prison for Life with the possibility of parole with eligibility for parole beginning at ten (10) years; OR a definite term of twenty-five (25) years with eligibility for parole beginning at ten (10) years, *plus a consecutive* one (1) to twenty (20) for the deadly weapon enhancement.

1 PCR 6 (emphasis added). Appellant also acknowledged, "I have not been promised or guaranteed any particular sentence by anyone." 1 PCR 7. The court also engaged

Appellant in a discussion about the potential sentence before accepting Appellant's guilty plea:

> THE COURT: …The least amount of time I could give you on the bottom end is 11 years. Do you understand that?
>
> DEFENDANT GOMEZ: I -- I understand.
>
> …
>
> THE COURT: …Now Mr. Palal can argue for the maximum time, which is a 10 to life and a consecutive 8 to 20. And obviously your lawyers are going to argue for the least amount of time. And then it' [sic] going to be up to me to look at everything and determine what, in my opinion, a fair sentence is. Do you understand that?
>
> DEFENDANT GOMEZ: I understand.
>
> THE COURT: So you understand that those are the ranges?
>
> DEFENDANT GOMEZ: Yes.
>
> THE COURT: All right. And obviously it's not an easy thing to look at a plea where the least -- *the best you're going to do is 11 years*. That's the very best you can do. You understand that?
>
> DEFENDANT GOMEZ: I understand.

1 PCR 068-69. (emphasis added). Thus, the record demonstrates that Appellant understood his sentences were consecutive and accordingly, counsel was not deficient.

Notably, the district court appointed an attorney to Appellant and held an evidentiary hearing to determine this exact claim - whether trial counsel explained

to Appellant that he would serve consecutive sentences. RA 038; 1-2 PCR 208-69. Ms. Levy testified at the evidentiary hearing that she visited Appellant over twenty times between the time she was appointed counsel and sentencing, always visiting Appellant with either her investigator or another attorney from her office. 1 PCR 215. Counsel testified under oath,

> [W]e had gone over it, like I said, many, many times. I quizzed him on what the 40 percent rule was and the mandatory consecutive. I wrote it down for him. Mr. Retke and I, Mr. Marsh and I, Mariteresa from my office, all of us had gone over with him the range of penalties for a first with use, a second with use, voluntary with use, multiple, multiple times. So he understood the offer…I went over it…more times than I have with any other defendant in my 19 years of practice.

1 PCR 230. In addition to explaining to Appellant the different potential sentencing ranges, counsel also explained what "deadly weapon" meant and that it carried a consecutive sentence. 1 PCR 218. Appellant's counsel stated multiple times throughout her testimony that she explained the offer, potential consequences of accepting the offer or going to trial, and the details of the plea agreement. See generally 1 PCR 215-38.

Counsel's testimony that Appellant understood his sentences were consecutive was corroborated by Appellant's own witnesses – his sisters, Isabel and Maria Gomez. On direct examination, Isabel Gomez ("Isabel") testified that on the day Appellant pled guilty, counsel told her that there were two separate sentences

and "the max [Appellant] would be doing is about 10 years and then for the gun enhancement at least 2 to 4 years." 2 PCR 253. Further, on cross-examination, the State introduced a letter Isabel wrote, stating it was her and Appellant's understanding "that he would be sentenced for 10 years, *plus an added two for gun enhancement charges*." 2 PCR 255 (emphasis added). Isabel knew this was Appellant's understanding because that was what Appellant explained to her when she spoke to him over the phone. 2 PCR 255-56. Other than the day Appellant pled guilty, Isabel did not speak with Ms. Levy regarding sentencing. 2 PCR 253, 256.

Maria Gomez ("Maria") testified she was a primary person whom Ms. Levy spoke about Appellant's potential sentences. 2 PCR 259. One of the possibilities counsel discussed was "10 to 25, possibility of parole at 10. For the gun charges, she said 2 to 4 years. The maximum he would do was 12 years, 12 to 14 years." 2 PCR 259. Maria also testified that she understood Appellant would get out of imprison in ten to twenty-five years with the possibility of parole. 2 PCR 260. On cross-examination, Maria testified that she understood there was additional time because of the weapon enhancement:

> Q: And your understanding was when the plea was done, he would have to do 10 years, 10 to 25 years; is that right?
>
> A: Yes.
>
> Q: Okay. And then he would have to do an additional 2 or 4 years?
>
> A: Yes.

2 PCR 262. Maria spoke to counsel whereas Isabel did not; instead, Isabel communicated with Appellant regarding his sentence. Yet, both Maria and Isabel, understood that Appellant's sentence was consecutive. Thus, the district court did not abuse its discretion in finding that counsel adequately explained to Appellant that he would serve consecutive sentences.

Appellant represented to the district court orally, and affirmed by signing the GPA, that he was aware of the sentencing structure; Appellant's counsel testified she reviewed the plea agreement with Appellant until she was confident he understood the potential range of punishments (See 1 PCR 215-38); Appellant's own witnesses stated it was their and Appellant's understanding that he would receive additional time because of the gun enhancement. 2 PCR 255-56, 262. Therefore, the district court did not abuse its discretion in denying Appellant's claim that counsel did not adequately explain that Appellant would serve consecutive sentences.

To the extent Appellant argues he only had fifteen minutes to review and understand the offer (AOB at 5), this contention is also belied by the record. The record shows that Appellant had more than one day to consider the offer and equally importantly, that counsel reviewed the offer with him at length prior to plea canvass.

> Q [STATE]: So, Ms. Levy, I'm going to direct your attention to October 17th of 2017. I had sent you some transcripts of proceedings, have you reviewed them?

A: I did prior to the last time we were set, but I have not looked at them since that time.

Q: Okay. Well, let me ask you this, do you remember at that hearing that an offer was put on record by the State of a second with use, right to argue?

A: Yes.

Q: And do you remember indicating that you had received that offer earlier and that you had talked to Mr. Gomez about that?

A: Yes.

Q: And is that true, did you -- had you in fact talked to Mr. Gomez about the offer of a second with use?

A: Multiple times.

Q: When you spoke to him about the offer, did you talk to him about the sentencing ranges?

A: Yes, multiple times.

Q: And how did you explain what the sentencing range was on a second degree murder with use of a deadly weapon?

A: So even prior to the offer, I went over with Mr. Gomez multiple times at the jail what he was facing. If he was convicted of a first degree with a deadly weapon, second degree with a deadly weapon, voluntary manslaughter, and I went through the whole range and I would write it down for him. And I would go through, you know, that the minimum that you can get is always on a first would be 21 years because you would have 20 on bottom, plus the enhancement, which was 1 to 20 years. I explained to him he could get life without, I didn't think he would get life without. But even if he got life without, it would also include the deadly weapon enhancement for an additional 1 to 20 years, so it was mandatory consecutive.
So I wrote it down for him, I left those papers with him many times.

1 PCR 216-18. Indeed, counsel did not simply "hand[] him the [GPA] copy, told him to read it, and walked away." AOB at 5. The State extended their offer on October 17, 2017, and Appellant after initially rejecting the offer, accepted the offer on April 19, 2018, at calendar call – four days prior to trial commencing. 1 PCR 14-15, 216-22. Counsel reviewed the offer with Appellant multiple times prior to April 19, 2018. 1 PCR 18. For clarification, the GPA was not typed out at calendar call because Appellant's last-minute decision to accept the plea was unexpected given that he had already rejected the offer. 1 PCR 14. Nonetheless, even before Appellant was canvassed and the GPA was typed out, the district court inquired of Appellant whether he wanted to enter the agreement and discussed the potential sentencing ranges with Appellant. 1 PCR 17-20. Accordingly, the district court found:

> There is no evidence to support Mr. Gomez's claims that he was coerced into accepting the plea or that his attorney abandoned him during the time he decided to enter into the GPA. Mr. Gomez acknowledged that he was entering into the guilty plea both freely and voluntarily, and after consultation with his attorney, during the plea hearing and when signing of the GPA. See GPA at 5. ("I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion…"); T. at 11. Further, Mr. Gomez entered into the plea after discussing the GPA and other others with his counsel on several occasions, and after he had time to consider whether or not to accept it and to discuss potential defenses at the calendar call on April 19, 2018.

Decision, 2 PCR 284-85.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILURE TO INVESTIGATE AND FILE PRETRIAL MOTIONS

Appellant asserts counsel was ineffective for failing to investigate two factual issues and file two pretrial evidentiary motions that Appellant requested. AOB at 11. Appellant specifically alleges counsel failed to investigate an alternative suspect and interview a witness who described the shooter as wearing different clothes from what Appellant wore. AOB at 11. Regarding the motions, Appellant asserts counsel failed to challenge the photographic lineup used to identify Appellant and failed to file a motion to exclude a bullet found in Appellant's home. AOB at 11. The district court did not abuse its discretion in denying Appellant's claims as "[t]he evidence before the Court also demonstrates that trial counsel adequately and reasonably investigated the case and discussed the potential outcomes with [Appellant]." Decision, 2 PCR 283.

As a preliminary matter, the district court found Appellant's claim regarding the alternate suspect waived for purposes of Appellant's Petition because he failed to raise the claim on direct appeal, citing Bolden v. State, 99 Nev. 181, 659 P.2d 886 (1983). 2 PCR 284 n. 5. Nonetheless, the district court still addressed the merits of the claim and found the GPA, evidentiary hearing, and Appellant's own admission that he was present doing the shooting undermined his claim. Decision, 2 PCR 284.

Regarding Appellant's other claims, the district court found that trial counsel and Appellant "clearly under[stood] the evidence and the permutations of proof and outcome" such that counsel was "not required to unnecessarily exhaust all available public or private resources." Decision, 2 PCR 283 (citing Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004)).

Appellant, in executing the GPA, specifically asserted, "I have discussed with my attorney *any possible defenses, defense strategies and circumstances which might be in my favor*" and "I am satisfied with the services provided by my attorney." PCR 8-9; Decision, 2 PCR 283. (emphasis added). Additionally, the court specifically inquired as to counsel's efforts in discovery:

> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

1 PCR 21; Decision, 2 PCR 284. Therefore, Appellant's allegations that he was unhappy with counsel's investigation and explanation of the evidence in the case are expressly belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, the district court found Appellant had acknowledged that counsel sufficiently answered all his questions, "and that she and her co-counsel spent sufficient time reviewing the case and discovery with him."

> THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?
>
> DEFENDANT GOMEZ: They did.
>
> THE COURT: Okay. Do you feel like Ms. Levy and her co-counsel have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

Decision, 2 PCR 284. Further, during the evidentiary hearing, counsel testified that in preparing for trial, counsel reviewed with Appellant the offer and the pros and cons associated with pleading guilty versus going to trial. 1 PCR 227. Counsel also explained to Appellant that she believed their best defense was voluntary manslaughter based on his account as to why he "snapped" but it required Appellant's mother to testify about her mental health, which is why Appellant ultimately chose not to pursue that defense. 1 PCR 227-28. The district court also found the need to investigate an alternate suspect questionable as Appellant admitted to being present during the shooting and a surveillance video showed Appellant holding a firearm. Decision, 2 PCR 284; 1 PCR 30.

Moreover, Appellant failed to specifically assert what a better investigation would have yielded, instead relied on vague references to preparation for trial. 1 PCR 76-78. Appellant's failure to raise specific assertions made his claim bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6). Furthermore, Appellant's failure to indicate what a sufficient investigation would have produced

left his claim deficient as specifically expressed in Molina, 120 Nev. at 192, 87 P.3d at 538. Thus, the district court correctly denied Appellant's claims. Decision, 2 PCR 284.

Appellant makes the vague assertion that, had counsel investigated an alternative suspect, counsel could have "develop[ed] the evidence into a viable defense." 1 PCR 76-77. However, Appellant fails to acknowledge that it was squarely within counsel's purview to determine which defenses to develop. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Furthermore, Appellant overlooks that, in the face of overwhelming evidence of guilt, counsel may have made the strategic determination that it might "disserve [Appellant's] interests [] by attempting a useless charade." Cronic, 466 U.S. at 657 n.19, 104 S. Ct. at 2046 n.19; Ford, 105 Nev. at 852, 784 P.2d at 952 (after investigation of the evidence, defense counsel "reasonably believed that his only defense was the insanity defense and did not want to detract from it by asserting a *meritless defense*." (Emphasis added)); Dawson, 108 Nev. at 117, 825 P.2d at 596 ("Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable.").

Likewise, given that Appellant was identified as the shooter and captured on video holding a gun (1 PCR 30), the district court correctly found that Appellant failed to explain how challenging the photographic line up would have altered the case's outcome. Decision, 2 PCR 284. Similarly, Appellant failed to provide a legal

basis for which counsel should have filed a motion to exclude the bullet – which was not used at all in convicting or sentencing Appellant. See 1 PCR 28-46 (no mention of bullet at sentencing). As discussed supra, Appellant was identified as the shooter by Shawn's friend; was caught on surveillance video holding a firearm; and admitted guilt, including at sentencing:

> THE DEFENDANT: I'd like to apologize to the family. I don't know how you guys feel 'cause I never lost a loved one before. I'm sorry for it. That night I was under the influence of drugs and alcohol, just watching a fight break out between a friend and somebody you don't know and seeing your friend get beat on, you know, I just reacted and I shouldn't of went down like that. I'm sorry for it. That night shouldn't have happened.
>
> To this day I pray and ask some forgiveness. I hope one day you guys can forgive me. Your Honor.

1 PCR 32.

Thus, the district court did not abuse its discretion in finding counsel was not deficient and denying Appellant's claims.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT COUNSEL WAS NOT INEFFECTIVE FOR NOT FILING A MOTION TO WITHDRAW GUILTY PLEA

Appellant finally claims that counsel was ineffective for failing to file a presentence Motion to Withdraw Guilty Plea. AOB at 12. The district court did not abuse its discretion in denying Appellant's claim as Appellant cannot satisfy either Strickland prong.

Appellant first states that he felt pressured into pleading guilty. AOB at 12. At the plea canvass, the district court specifically advised Appellant that he did not have to plead guilty, the court – if Appellant wished – would give him more time to consider the offer. 1 PCR 15-16. And as discussed above, Appellant received the offer on October 17, 2017, rejected the offer and then accepted the offer on April 19, 2018. RA 025, 1 PCR 14. Appellant had more than six months to consider the offer, which wholly undermines his contention that he felt pressured into pleading guilty.

Additionally, the district court found no evidence to support Appellant's contention that he requested from his counsel to file a motion prior to being sentenced. Decision, 2 PCR 285. In support of his claim, Appellant attached as "Exhibit D" an undated and unaddressed letter that he allegedly sent to Ms. Levy requesting she file a motion to withdraw his guilty plea. 1 PCR 120. The district court appropriately "approached the letter with extreme caution for a number of reasons[:]

> First, it is not dated or signed. And second, it is unclear [] how Mr. Gomez has a copy of this handwritten letter if it was mailed to Ms. Levy. Even if the Court accepts the representations in the suspect letter as true, it would not support his allegations that Ms. Levy was ineffective at the time he took the plea. The letter was allegedly mailed *after* sentencing because it states he had been transferred to Arizona. The letter reflects regret for entering into the plea, as well as bare, naked allegations he was hurried into doing so. This suspect letter is insufficient to warrant relief. See Hargrove v. State, 100 Nev. 502, 686 P.2d 222, 225 (1984) ("bare" and "naked," and are insufficient to warrant relief, as are those claims belied and repelled by the record).

Decision, 2 PCR 285. Thus, the court correctly found that the letter was an insufficient, self-serving document that did not show counsel's deficient performance or prejudice.

Indeed, the record reflects that Appellant's plea was freely and voluntarily entered, as supported by the court's canvass of Appellant, Appellant's execution of the GPA, and his counsel's testimony during the evidentiary hearing. Therefore, any motion to withdraw guilty plea would have been meritless, and counsel is not deemed ineffective for failing to file the requested motion. Ennis, 122 Nev. at 706, 137 P.3d at 1103 (it is not ineffective for counsel to decline to make futile arguments). Accordingly, the district court did not abuse its discretion in denying Appellant's ineffective assistance of counsel claim for failure to file a motion to withdraw guilty plea.

CONCLUSION

Based on the foregoing, the State respectfully requests Appellant's denial of Petition for Writ of Habeas Corpus be affirmed.

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Dated this 7th day of June, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 6,757 words and 29 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 7th day of June, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 7th day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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