



**EIGHTH JUDICIAL DISTRICT COURT
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Elizabeth A. Brown
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August 25, 2022

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: SALLY D. VILLAYERDE vs. BRIAN WILLIAMS, WARDEN

S.C. CASE: 85130

D.C. CASE: A-18-780041-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated August 24, 2022, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed August 23, 2022 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

FFCO
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DISTRICT COURT
CLARK COUNTY, NEVADA

SALLY VILLAVERDE,
#1433466

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent

CASE NO: A-18-780041-W
(C-03-191012-2)
DEPT NO: X

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: JULY 13, 2022
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable TIERRA JONES, District Judge, on the 13th day of July 2022, Petitioner not being present and in pro per, Respondent being represented by STEVEN WOLFSON, Clark County District Attorney, by and through CHARLES THOMAN, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following findings of fact and conclusions of law:

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1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On March 23, 2003, Sally Villaverde (“Petitioner”) and Co-Defendants Rene Gato and
4 Robert Castro were charged by way of Amended Criminal Complaint with Burglary (Felony
5 - NRS 205.060), Murder With Use of a Deadly Weapon (Open Murder) (Felony - NRS
6 200.010, 200.030, 193.165) and Robbery With Use of a Deadly Weapon (Felony - NRS
7 200.380, 193.165). On March 21, 2003, a preliminary hearing was held, after which the district
8 court held all three (3) defendants to answer to the charges in district court.

9 On March 25, 2003, Petitioner and the Co-Defendants were charged by way of
10 Information with Burglary (Felony - NRS 205.060), Murder With Use of a Deadly Weapon
11 (Open Murder) (Felony - NRS 200.010, 200.030, 193.165), and Robbery With Use of a Deadly
12 Weapon (Felony - NRS 200.380, 193.165). An Amended Information, charging only
13 Petitioner, was filed on March 29, 2004, following the district court's granting of Petitioner's
14 Motion to Sever Trials filed on January 27, 2004.

15 On March 31, 2004, a jury trial commenced. On April 8, 2004, the jury found Petitioner
16 guilty on all counts, including First Degree Murder With Use of a Deadly Weapon.

17 On June 3, 2004, the District Court sentenced Petitioner as follows: Count 1 - to a
18 maximum of ninety-six (96) months with a minimum of twenty-two (22) months in the Nevada
19 Department of Corrections (“NDC”); Count 2 - to a term of Life imprisonment without the
20 possibility of parole in the NDC, plus an equal and consecutive term for the Use of a Deadly
21 Weapon; Count 3 - to a maximum on one hundred fifty-six (156) months and a minimum of
22 thirty-five (35) months in the NDC, plus an equal and consecutive term for the Use of a Deadly
23 Weapon, Count 3 consecutive to Count 2. Credit for time served does not appear to have been
24 awarded according to the Court Minutes. On June 10, 2004, the District Court fielded The
25 Judgment of Conviction.

26 On June 10, 2004, Petitioner filed a direct appeal. On February 15, 2006, The Nevada
27 Supreme Court affirmed Petitioner’s convictions. On March 14, 2006, the Nevada Supreme
28 Court issued Remittitur.

1 On April 3, 2006, Petitioner filed his first Petition for Writ of Habeas Corpus (Post-
2 Conviction) ("First Petition"). On April 20, 2006, Petitioner filed a Motion to Withdraw his
3 Petition Without Prejudice. On April 25, 2006, the State filed its Response. On May 3, 2006,
4 Petitioner filed a Reply. On May 31, 2006, Petitioner filed a Supplemental Petition for Writ of
5 Habeas Corpus, Memorandum of Points and Authorities in Support of the Petition, and
6 Appendix of Exhibits.

7 On April 12, 2007, the District Court appointed counsel. On August 27, 2007, appointed
8 counsel filed a Supplement to Petitioner's Petition for Writ of Habeas Corpus. On November
9 6, 2007, the State filed its Response to the Supplemental Petition. On January 10, 2008, the
10 District Court held an evidentiary hearing on Petitioner's ineffective assistance of counsel
11 claims. Following the evidentiary hearing, the Court denied the petition on the merits. On
12 February 26, 2008, the District Court filed The Findings of Facts, Conclusions of Law, and
13 Order.

14 On January 28, 2008, Petitioner filed a Notice of Appeal. On May 10, 2010, The Nevada
15 Supreme Court affirmed the District Court's denial of Petitioner's Petition. On June 4, 2010,
16 Nevada Supreme court issued Remittitur.

17 On August 28, 2018, Petitioner filed a second Petition for Writ of Habeas Corpus (Post-
18 Conviction) ("Second Petition") and Motion for Appointment of Counsel. On October 29,
19 2018, The State filed its Response. On November 1, 2018, the District Court held a hearing
20 and denied the Petition and the Motion. On December 5, 2018, the District Court filed its
21 Findings of Fact, Conclusions of Law, and Order was filed.

22 On November 26, 2018, Petitioner filed a Notice of Appeal. On October 30, 2019, the
23 Nevada Court of Appeals entered an Order of Affirmance. On November 20, 2019, Petitioner
24 submitted a Petition for Rehearing. On January 22, 2020, the Nevada Court of Appeals granted
25 rehearing and affirmed the district court's judgment. On May 18, 2020, the Court issued
26 Remittitur.

27 On March 26, 2019, Petitioner filed a Motion for Modification of Sentence. The State
28 filed an Opposition on April 17, 2019. On April 23, 2019, the District Court denied the motion.

1 On May 7, 2019, The Order Denying Petitioner's Motion for Modification of Sentence was
2 filed. On May 1, 2019, Petitioner filed a Notice of Appeal. On March 12, 2020, the Nevada
3 Court of Appeals affirmed the judgment of the District Court. On June 1, 2020, the Court
4 issued Remittitur. On June 14, 2021, the District Court filed an Amended Judgment of
5 Conviction, granting Petitioner four hundred sixty-nine (469) days credit for time served.

6 On October 4, 2021, Petitioner filed a third Petition for Writ of Habeas Corpus (Post-
7 Conviction) ("Third Petition"), a Motion to Appoint Counsel and Request for Evidentiary
8 Hearing. The State's Response was filed on November 18, 2021. On December 6, 2021, the
9 Court denied the Third Petition, Motion to Appoint Counsel and Request for Evidentiary
10 Hearing. The Findings of Fact, Conclusions of Law and Order was filed on December 21,
11 2021. On December 27, 2021, Petitioner filed a Notice of Appeal under Nevada Supreme
12 Court Case No. 84026. On June 13, 2022, the Nevada Court of Appeals affirmed the denial of
13 the Third Petition and Remittitur issued on July 8, 2022.

14 On May 26, 2022, Petitioner filed a Motion to Correct Illegal Sentence. On June 10,
15 2022, the State filed an Opposition. On June 20, 2022, the District Court denied the Motion.

16 On May 12, 2022, Petitioner filed a fourth Petition for Writ of Habeas Corpus (Post-
17 Conviction) ("Fourth Petition"), Motion to Appoint Counsel and Request for Evidentiary
18 Hearing. On June 24, 2022, the State filed its Response. On July 13, 2022, the District Court
19 denied Petitioner's Fourth Petition, Motion to Appoint Counsel and Request for Evidentiary
20 Hearing. The District Court granted the State's Motion to Dismiss Pursuant to Laches.

21 **FACTUAL BACKGROUND**

22 In 1998, Leonel Garcia ("Garcia") met the Petitioner and Enrique Caminero
23 ("Caminero"). Mr. Garcia indicated that he was good friends with Caminero. Garcia knew that
24 Caminero was a very successful drug dealer.

25 In February of 2002, just weeks before the murder of Caminero, Rene Gato ("Gato"),
26 Roberto Castro ("Castro"), and Francisco Terrazon (Fanciquito) approached Garcia requesting
27 his assistance in kidnapping Caminero. They asked Garcia to assist in setting up a meeting
28 with Caminero in a hotel room. Once Caminero arrived at the hotel, the plan was to kidnap

1 him, tie him up and torture him until he revealed where his money was and who supplied him
2 with the drugs he sold.

3 Garica was to approach Caminero because he knew Caminero trusted him. However,
4 Garcia warned Caminero. Garcia then contacted Caminero's mother and the police after
5 hearing of Caminero's death.

6 Teresa Gamboa ("Gamboa") was the Petitioner's girlfriend. She testified at a
7 preliminary hearing regarding her involvement in the death of Caminero. Gamboa testified
8 that she was living with the Petitioner in March of 2002. She was also acquainted with Gato,
9 Castro. Petitioner asked Gamboa to rent a room for him on March 5, 2002, using a false ID.
10 In return, she and Petitioner were to receive money.

11 On March 5, 2002, using Gato's car, they drove to the Capri Motel. While traveling,
12 Gato asked the Petitioner how much Gamboa knew. Petitioner replied that she knew some
13 things but not everything. Gamboa testified that Gato had a large chrome gun. Upon arrival,
14 Gamboa rented a room in the back, as instructed, and returned to Gato's car. Then Gamboa,
15 Petitioner, and his two Co-Defendants entered the room. Gamboa stayed for about five
16 minutes, and they returned her home around 5:30 PM.

17 After, Petitioner took a taser gun, and all three left Gamboa. Petitioner returned home
18 around 10:30 PM. Gamboa described Petitioner as being "freaked out" and pacing the room.
19 She also noticed that Petitioner had blood on his pants and shirt. Petitioner was saying, "he's
20 dead," "No, no, I gave him mouth-to-mouth resuscitation," and "He was still – he was still
21 breathing."

22 On March 6, 2002, Petitioner and Gamboa drove to California and stayed at a Motel 6,
23 along with Gato and Castro. At the motel, Gamboa overheard Petitioner admit to using a belt
24 to strangle the victim, as well as using the taser gun.

25 Moreover, law enforcement recovered a palm print at the crime scene during the
26 investigation, preserved in diluted blood. The palm print was recovered near the area where
27 Caminero's body was found. The palm print matched with Petitioner. Two other fingerprints
28 from the bathroom also matched with Petitioner.

1 On February 18, 2003, a warrant was issued for Petitioner's arrest. Las Vegas
2 Metropolitan Police Department officers arrested Petitioner shortly after at Alfredo Martinez's
3 place of residence. While in custody and after being Mirandized, Petitioner admitted being in
4 the hotel room when Caminero arrived there. Once Caminero arrived, a struggle ensued. They
5 tried to gag Caminero and bind his legs and hands. However, Gato ended up shooting
6 Caminero. Castro then strangled Caminero causing a gurgling sound.

7 Gato then instructed Petitioner and Castro to clean the room for fingerprints. Petitioner
8 tried wiping down most of the room. Also, Petitioner took Caminero's SUV and other
9 belongings. Gamboa noticed Petitioner had 400 dollars in cash as well as several small gold
10 chains or bracelets. Gamboa indicated that Petitioner took the jewelry to a Super Pawn.

11 Also, Degna Ortega ("Ortega"), Caminero's mother, testified that Caminero always
12 wore or had on his person the pawned jewelry. Abdirazaq Mohamed, a manager at a pawn
13 store, testified that Petitioner pawned several items of jewelry, described as gold chains,
14 shortly after the murder.

15 ANALYSIS

16 **I. PETITIONER'S FOURTH PETITION IS PROCEDURALLY BARRED**

17 Petitioner's Fourth Petition is procedurally barred for various reasons, as argued *infra*.
18 The Nevada Supreme Court has held that the district court has a *duty* to consider whether a
19 defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial
20 Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found
21 that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions
22 is mandatory," noting:

23
24 Habeas corpus petitions that are filed many years after conviction
25 are an unreasonable burden on the criminal justice system. The
26 necessity for a workable system dictates that there must exist a
time when a criminal conviction is final.

27 Id. Additionally, procedural bars "cannot be ignored [by the district court] when properly
28 raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no

1 discretion to the district courts regarding whether to apply the statutory procedural bars; the
2 rules *must* be applied. Id.

3 This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013).
4 There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of
5 the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307
6 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's
7 petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The
8 procedural bars are so fundamental to the post-conviction process that they must be applied
9 by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

10 **A. THE INSTANT PETITION IS TIME-BARRED**

11 Petitioner's Fourth Petition is time-barred. NRS 34.726(1) states:

12 Unless there is good cause shown for delay, a petition that
13 challenges the validity of a judgment or sentence must be filed
14 within 1 year of the entry of the judgment of conviction or, if an
15 appeal has been taken from the judgment, within 1 year after the
16 Supreme Court issues its remittitur. For the purposes of this
subsection, good cause for delay exists if the petitioner
demonstrates to the satisfaction of the court:

- 17 (a) That the delay is not the fault of the petitioner; and
18 (b) That dismissal of the petition as untimely will unduly
19 prejudice the petitioner.

20 The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain
21 meaning. See Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the
22 statute's language, the one-year time bar proscribed by NRS 34.726 begins to run from the date
23 the judgment of conviction is filed, or a remittitur from a timely direct appeal is filed. See
24 Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

25 The one-year time limit for preparing petitions for post-conviction relief under NRS
26 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002),
27 the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite
28 evidence presented by the defendant that he purchased postage through the prison and mailed
the petition within the one-year time limit.

1 This is not a case wherein the Judgment of Conviction was, for example, not final. See,
2 e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant’s
3 judgment of conviction was not final until the district court entered a new judgment of
4 conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259,
5 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an
6 unspecified amount is not final and therefore does not trigger the one-year period for filing a
7 habeas petition). Nor is there any other legal basis for running the one-year time limit from the
8 filing of the Amended Judgment of Conviction.

9 Here, the District Court filed the *original* Judgment of Conviction on June 10, 2004.
10 On March 14, 2006, the Nevada Supreme Court issued Remittitur. On June 14, 2021, the
11 District Court filed an Amended Judgment of Conviction, granting Petitioner four hundred
12 sixty-nine (469) days credit for time served. Petitioner claims his Fourth Petition is timely filed
13 because it was filed within one (1) year from the filing of his Amended Judgment of
14 Conviction. While “an amended judgment of conviction is substantively appealable under
15 NRS 177.015(3),” the appeal is limited only “to issues arising from the amendment.” Witter
16 v. State, 135 Nev. 412, 416-17, 452 P.3d 406, 410 (2019). Hence, Petitioner can only raise
17 issues regarding credit for time served. Petitioner fails to cite any issues arising as a result of
18 the Amended Judgment of Conviction. Therefore, the instant Fourth Petition remains time-
19 barred and is denied.

20 **B. THE INSTANT PETITION IS BARRED AS SUCCESSIVE**

21 Petitioner's Fourth Petition is barred because it is successive. NRS 34.810(2) states:

22 A second or successive petition *must be dismissed* if the judge or
23 justice determines that it fails to allege new or different grounds
24 for relief and that the prior determination was on the merits or, if
25 new and different grounds are alleged, the judge or justice finds
26 that the failure of the petitioner to assert those grounds in a prior
petition constituted an abuse of the writ.

27 (emphasis added). Application of NRS 34.810(2) is mandatory. See State v. Eight Judicial
28 Dist. Ct. ex el. County of Clark (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074-75 (2005).

1 Successive petitions are petitions that either fails to allege new or different grounds for
2 relief of which the grounds have already been decided on the merits or petitions that allege
3 new or different grounds, but a judge or justice finds that the petitioner's failure to assert those
4 grounds in a prior petition would constitute an abuse of the writ. See Lozada v. State, 110 Nev.
5 349, 352-53, 871 P.2d 944, 950 (1994) (overruled on other grounds by Rippo v. State, 134
6 Nev. 411, 423 P.3d 1084 (2018); Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000)
7 (overruled on other grounds by Harris v. State, 130 Nev. 435, 329 P.3d 619 (2014) (holding
8 that “where a defendant previously has sought relief from the judgment, the defendant’s failure
9 to identify all grounds for relief in the first instance should weigh against consideration of the
10 successive motion.”). Successive petitions will only be decided on the merits if the petitioner
11 can show good cause and prejudice. See NRS 34.810(3).

12 The Nevada Supreme Court has stated: “Without such limitations on the availability of
13 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-
14 conviction remedies. In addition, meritless, successive and untimely petitions clog the court
15 system and undermine the finality of convictions.” Lozada, 110 Nev. at 358, 871 P.2d at 950.
16 The Nevada Supreme Court recognizes that “[u]nlike initial petitions which certainly require
17 a careful review of the record, successive petitions may be dismissed based solely on the face
18 of the petition.” Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,
19 if the claim or allegation was previously available with reasonable diligence, it is an abuse of
20 the writ to wait to assert it in a later petition. See McClesky v. Zant, 499 U.S. 467, 497–98
21 (1991).

22 Here, Petitioner’s First Petition – through appointed counsel – was considered on the
23 merits. An evidentiary hearing was held on the First Petition. Ultimately the Court denied the
24 Petition on the merits, which consisted of ineffective assistance of counsel claims. The Nevada
25 Supreme Court affirmed this Court's denial. Petitioner subsequently filed a Second Petition on
26 August 28, 2018, wherein he raised more ineffective assistance of counsel claims based on
27 challenges to jury instructions and prosecutorial misconduct and that he is not guilty of First
28 Degree Murder. See generally Second Petition. The Second Petition was also denied on

1 November 1, 2018. Then, on October 4, 2021, Petitioner filed a Third Petition, in which
2 Petitioner's allegations were no different from his prior Petitions. Now, Petitioner filed his
3 Fourth Petition alleging the same claim – he is innocent of First Degree Murder – and alleging
4 new claims. Raising the same claims again makes his Fourth Petition successive. The new
5 claims raised in the Fourth Petition were available to Petitioner since 2004. As such, any new
6 claims Petitioner does assert is an abuse of writ because Petitioner fails to show good cause as
7 to why he is now asserting these claims more than a decade after his conviction when such
8 claims were always available to Petitioner. As discussed above, his Fourth Petition is time
9 barred as the Amended Judgment of Conviction limits him to raising claims regarding credit
10 for time served. Therefore, the Fourth Petition is successive and an abuse of the writ and is
11 denied.

12 **C. PETITIONER'S SUBSTANTIVE CLAIMS ARE WAIVED FOR FAILURE TO RAISE ON**
13 **DIRECT APPEAL**

14 NRS 34.810(1) reads:

15 The court shall dismiss a petition if the court determines that:

16 (a) The petitioner's conviction was upon a plea of guilty or guilty but
17 mentally ill and the petition is not based upon an allegation that the plea was
18 involuntarily or unknowingly or that the plea was entered without effective
19 assistance of counsel.

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

20 ...

21 (2) Raised in a direct appeal or a prior petition for a writ of habeas
22 corpus or postconviction relief.

23 ...

22 Unless the court finds both cause for the failure to present the grounds and actual
23 prejudice to the petitioner.

24 The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and
25 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
26 conviction proceedings [A]ll other claims that are appropriate for a direct appeal must be
27 pursued on direct appeal, or they will be *considered waived in subsequent proceedings.*"
28 Franklin v. State, 110 Nev. 750. 752. 877 P.2d 1058. 1059 (1994) (emphasis added)

(disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Here, Petitioner raises two (2) substantive claims with subclaims. In Ground One, Petitioner claims the Court erred by dismissing the jury during the penalty phase and by sentencing Petitioner absent a stipulation by the parties as required by NRS 175.552. Petition at 7-7d. Related to this claim, Petitioner also claims the Court's "abuse of discretion were vindictive and unconstitutional" when Petitioner refused to testify against his co-defendants. Petition at 7d. In Ground Two, Petitioner claims his sentence should be modified because NRS 200.030 is ambiguous. Additionally, he claims that because the State filed an Amended Information for Voluntary Manslaughter in his co-defendant Robert Castro's (hereinafter "Castro") plea, this requires Petitioner's conviction for First Degree Murder be vacated. Petition at 8. All of the claims except for the last one are waived because Petitioner failed to raise these substantive claims on direct appeal. His claim regarding the Amended Information is barred by case of the law and res judicata doctrines, as discussed *supra*. Thus, this Petition is denied.

D. PETITIONER'S CLAIMS ARE BARRED BY THE LAW OF THE CASE AND RES JUDICATA DOCTRINES

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

1 overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d
2 869, 875 (Ark. 2005) (recognizing the doctrine’s applicability in the criminal context); see also
3 York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing
4 to file motions with the same arguments, his motion is barred by the doctrines of the law of
5 the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

6 Petitioner claims that his sentence for First Degree Murder should be “vacated,
7 modified, or reversed.” Petition 8c. Essentially, Petitioner is claiming, again, that he is not
8 guilty of First Degree Murder. This claim is barred. On March 26, 2019, Petitioner filed a
9 Motion for Modification of Sentence claiming that the State used “inconsistent theories”
10 against him and his co-defendant, Castro, who pled to a lesser crime. Motion at 3-13. This
11 Court denied Petitioner’s Motion, which the Nevada Court of Appeals affirmed:

12
13 Sally Dorian Villaverde appeals from an order of the district court denying a
14 motion to modify sentence filed on March 26, 2019. Eighth Judicial District
Court, Clark County; Douglas W. Herndon, Judge.

15 In his motion, Villaverde claimed that his sentence should be modified because
16 the State used different theories of the case between different codefendants, his
17 codefendant did not plead guilty to using a deadly weapon, and the district court
18 made inappropriate comments at sentencing and overlooked important
19 mitigating factors. Villaverde's claims fell outside the narrow scope of claims
20 permissible in a motion to modify-sentence. See Edwards v. State, 112 Nev. 704,
21 708, 918 P.2d 321, 324 (1996). Therefore, without considering the merits of any
of the claims raised in the motion; we conclude the district court did not err by
denying the motion. Accordingly, we ORDER the judgment of the district court
AFFIRMED.

22 Villaverde v. State, No. 78725-COA March 12, 2020.

23 Subsequently, Petitioner claimed in his Second Petition that he was innocent of First
24 Degree Murder based upon Castro’s Guilty Plea Agreement. See Second Petition at 27-29.
25 Specifically, Petitioner argued:

26 [B]ecause Roberto Castro pleaded Guilty of Voluntary
27 Manslaughter and served 4 [] to 10 [years] [in] high desert state
28 prison. Show[s] once again that the [S]tates THEORY OF FIRST

1 DEGREE MURDER WAS UNRELIABLE beyond a reasonable
2 doubt.

3 See Second Petition at 28.

4 In the Third Petition, Petitioner again argued he is innocent of First Degree Murder
5 based upon Castro's Guilty Plea Agreement. See Third Petition at 11-13. Specifically,
6 Petitioner argued that:

7 The Prejudice involved in the case is that[] the Jury found
8 [Petitioner] Guilty and convicted [Petitioner] on theories [that are]
9 inconsistent with the theories alleged by the State [regarding]
10 Castro's charging document or information.

11 ...

12 [I]f the State conceded in open court, that [Castro's] name
13 thereto on the above amended information committed voluntary
14 manslaughter while "in the heat of passion." Then by operation of
15 State and Federal law, [Petitioner's] conviction for first-degree
16 murder must be vacated.

17 Third Petition at 13.

18 In his instant Fourth Petition, Petitioner raises the same claim. Specifically, Petitioner
19 argued that:

20 it is Villaverde legal position and argument that since the record established
21 codefendant Roberto Castro's actions lacked any malice aforethought and
22 deliberation at the time he committed the killing "while in the heat of passion,"
23 his current conviction and sentencing as aider and abettor of a first degree
24 murder shall be vacated or modified whereas the record also reflected the
25 Prosecution's own concession that Villaverde "aided and abetted" Roberto
26 Castro to commit voluntary manslaughter. See Factual basis at Amened
27 Information at page 7b

28 Fourth Petition at 8b.

29 As shown above, Petitioner is raising the same issue he raised in his previous Petitions.
30 Despite wording his argument differently, the issue remains the same. Petitioner relies on the
31 Amended Information filed in Castro's Guilty Plea Agreement, wherein Castro pled to
32 Voluntary Manslaughter, to vacate Petitioner's First Degree Murder conviction. This claim
33 has repeatedly been denied, by the District Court and the Nevada Court of Appeals.

1 The Nevada Court of Appeals has already ruled on the merits of this issue. See Sally
2 Villaverde v. State, Docket No. 77563 (Order of Affirmance, May 21, 2020). The Nevada
3 Court of Appeals held that:

4 Villaverde claim[s] his co-defendant's guilty plea was new
5 evidence, not presented at trial, that showed that he could not have
6 committed first-degree murder with the use of a deadly weapon,
robbery with the use of a deadly weapon, and burglary.

7 . . .

8 [However,] Villaverde fail[s] to demonstrate he was
9 actually innocent. Villaverde's co-defendant's *Alford* plea to lesser
10 charges did not demonstrate Villaverde was factually innocent of
the charges he was convicted of. Accordingly, because Villaverde
11 failed to demonstrate it was more likely than not that no reasonable
jury would find him guilty beyond a reasonable doubt based on his
12 co-defendant's plea, we conclude the district court did not err by
denying this claim without first holding an evidentiary hearing.

13 Sally Villaverde v. State, Docket No. 77563-COA (Order of Affirmance, May 21, 2020) p. 2-
14 3. As shown above, Petitioner's claim is precluded for rehearing as the Nevada Court of
15 Appeals has already made a final ruling on the merits regarding the instant issue. Therefore,
16 Petitioner's claim is barred under the law of the case and res judicata doctrines.

17 **E. THIS PETITION IS BARRED DUE TO LACHES**

18 Certain limitations exist on how long a defendant may wait to assert a post-conviction
19 request for relief. Consideration of the equitable doctrine of laches is necessary in determining
20 whether a defendant has shown 'manifest injustice' that would permit a modification of a
21 sentence. Hart, 116 Nev. at 563–64, 1 P.3d at 972. In Hart, the Nevada Supreme Court stated:
22 "Application of the doctrine to an individual case may require consideration of several factors,
23 including: (1) whether there was an inexcusable delay in seeking relief; (2) whether an implied
24 waiver has arisen from the defendant's knowing acquiescence in existing conditions; and (3)
25 whether circumstances exist that prejudice the State. See Buckholt v. District Court, 94 Nev.
26 631, 633, 584 P.2d 672, 673–74 (1978)." Id.

27 NRS 34.800 creates a rebuttable presumption of prejudice to the State if "[a] period
28 exceeding five years [elapses] between the filing of a judgment of conviction, an order

1 imposing a sentence of imprisonment or a decision on direct appeal of a judgment of
2 conviction and the filing of a petition challenging the validity of a judgment of conviction...”
3 The Nevada Supreme Court has observed, “[P]etitions that are filed many years after
4 conviction are an unreasonable burden on the criminal justice system. The necessity for a
5 workable system dictates that there must exist a time when a criminal conviction is final.”
6 Groesbeck v. Warden, 100 Nev. 259, 679 P.2d 1268 (1984). To invoke the presumption, the
7 statute requires the State plead laches. NRS 34.800(2). The State affirmatively pled laches.

8 Here, there is inexcusable delay for seeking relief – especially because Petitioner’s
9 claims are meritless, which will be fully discussed below. A rebuttable presumption of
10 prejudice for the State arises because Petitioner brings this Petition more than a decade after
11 Remittitur was issued on March 14, 2006, which is more than twice the amount of time
12 specified in NRS 34.800. Because Petitioner failed to overcome the presumptive prejudice to
13 the State, Petitioner's Fourth Petition is also dismissed pursuant to laches.

14 **II. PETITIONER FAILS TO DEMONSTRATE GOOD CAUSE AND PREJUDICE** 15 **TO OVERCOME THE PROCEDURAL BARS**

16 **A. PETITIONER FAILS TO SHOW GOOD CAUSE**

17 To avoid procedural default under NRS 34.726 and NRS 34.810, the petitioner has the
18 burden of pleading and proving specific facts that demonstrate good cause for his failure to
19 present his claim in an earlier proceeding or to otherwise comply with the statutory
20 requirements, and that the petitioner will be unduly prejudiced if the petition is dismissed. *See*
21 Hogan v. Warden, 109 Nev. 952, 959-60, 860 P.2d 710, 715-16 (1993); Phelps v. Nevada
22 Dep’t of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). “A court *must* dismiss a
23 habeas petition if it presents claims that either were or could have been presented in an earlier
24 proceeding, unless the court finds both cause for failing to present the claims earlier or for
25 raising them again and actual prejudice to the petitioner.” Evans, 117 Nev. at 646-47, 29 P.3d
26 at 523 (2001) (emphasis added).

27 Moreover, “to establish good cause, [petitioners] must show that an impediment
28 external to the defense prevented their compliance with the applicable procedural rule.” Clem

1 v. State, 119 Nev. 615,621, 81 P.3d 521,525 (2003) (emphasis added); See also Hathaway v.
2 State, 119 Nev. 248, 25 I, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537.
3 “A qualifying impediment might be shown where the factual or legal basis for a claim was not
4 reasonably available at the time of default.” Clem, 119 Nev. at 621, 81 P.3d at 525. The Court
5 continued, petitioners “cannot attempt to manufacture good cause.” Id. at 621, 81 P.3d at 526.
6 Examples of good cause include interference by State officials and the previous unavailability
7 of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).
8 Any delay in the filing of the petition must not be the fault of the petitioner. See NRS
9 34.726(1)(a).

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

18 As previously discussed, the Amended Judgment of Conviction does not excuse
19 Petitioner’s untimely filing of his instant Petition. Moreover, Petitioner does not allege an
20 impediment external to the defense prevented Petitioner from raising these claims in an earlier
21 proceeding and offers no excuse for his failure to raise said issues at the appropriate time.
22 Thus, Petitioner fails to show good cause to overcome the procedural bars.

23 **B. PETITIONER FAILS TO SHOW PREJUDICE**

24 To establish prejudice, a Petitioner must show “‘not merely that the errors of [the
25 proceedings] created [the] possibility of prejudice, but that they worked to his actual and
26 substantial disadvantage, in affecting the State’s proceedings with [an] error of constitutional
27 dimensions.’” Hogan, 109 Nev. at 960, 860 P.2d at 716 (quoting United States v. Frady. 456
28 U.S. 152, 170, 102 S. Ct. I 584, I 596 (1982)). Bare and naked allegations are insufficient 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).

Additionally, for a petitioner to demonstrate prejudice, he or she must show “not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.” Hogan v Warden, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). To the extent Petitioner argues that his claims raised herein show prejudice, his claim fails because they are without merit.

i. The District Court did not Err in Dismissing the Jury During the Penalty Phase

Petitioner alleges the District Court erred in dismissing the jury during the penalty phase and by sentencing Petitioner in violation of NRS 175.552 because the parties did not stipulate to waive the separate penalty hearing. Petition at 7-7d. Petitioner further alleges that the District Court’s “abuse of discretion was vindictive and inappropriate” because Petitioner repeatedly refused to testify against his co-defendants. Petition at 7d.

NRS 175.552 in part reads:

- I. Except as otherwise provided in subsection 2, in every case in which there is a finding that a defendant is guilty or guilty but mentally ill of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing.
- ...
- II. In a case in which the death penalty is not sought ... the parties may by stipulation waive the separate penalty hearing required in subsection 1. When stipulating to such a waiver, the parties may also include an agreement to have the sentence, if any, imposed by the trial judge. Any stipulation pursuant to this subsection must be in writing and signed by the defendant, the defendant's attorney, if any, and the prosecuting attorney.

1 Here, Petitioner's claim is belied by the record. On the first day of the jury trial, defense
2 counsel placed on the record that the parties stipulated to waiving the penalty hearing and that
3 sentencing would be up to the Court. See Jury Trial Day 1, March 29, 2004, at 3. The Court
4 then confirmed with Petitioner, if he was in agreement and understood the consequences of
5 the stipulation. Id. Therefore, Petitioner's claim is meritless and is denied.

6 Likewise, Petitioner's claim regarding the Court's actions as "vindictive and
7 inappropriate" is also belied by the record. In support of this claim, Petitioner argues that "the
8 State forcibly transported Villaverde from the maximum security at Ely State Prison, Nevada,
9 in an attempt to coerce Villaverde to testify against codefendants." Petition at 7d. Petitioner
10 further alleges that "trial Judge imposed harshly, severe maximum sentences as a tactical
11 maneuver, and/or fear factor to compel Villaverde to turn evidence[] on behalf of the State
12 against Codefendants." Petition at 7d. Petitioner cites to the February 7, 2005 Court Minutes,
13 which relate to his previous co-defendant, Rene Gato's (hereinafter "Gato") jury trial, in
14 support of his frivolous claim. A review of the February 7, 2005 Court Minutes demonstrates
15 Petitioner's claim is simply not correct as the Minutes state, "Deft. was transported ... with
16 the knowledge and consent of counsel."

17 It is noteworthy that Petitioner had already been convicted and sentenced by February
18 7, 2005, at which point his appeal was pending. Accordingly, the District Court had already
19 sentenced Petitioner within the statutory constraints. Moreover, the Court Minutes indicate
20 that the State extended an offer to Petitioner who was transported from Ely State Prison to
21 Court to appear at Gato's trial - with the knowledge and consent of Petitioner's counsel. See
22 Jury Trial Transcript, Feb. 7, 2005, p. 76-77 in Case No. C191012-1. As such, Petitioner was
23 not forcibly brought to court. After Petitioner reiterated that he did not want to accept the
24 State's post-trial negotiations to testify even with immunity at Gato's trial, Petitioner was
25 transferred back to prison. No one forced Petitioner to testify nor did the District Court impose
26 a sentence as strategy to coerce Petitioner to testify. Thus, this claim is denied.

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1 **ii. Petitioner’s Sentence for First Degree Murder Should Not be Modified**

2 Petitioner claims his sentence for First Degree Murder should be modified for two (2)
3 reasons. First, NRS 200.030 is ambiguous. Petition at 8. Second, the State dismissed several
4 charges in co-defendant’s case. Petition at 8b. According to Petitioner, NRS 200.030 is
5 ambiguous because it details different degrees of murder, and despite acknowledging that the
6 “theories are clear,” Petitioner claims the statute “lends itself to two or more reasonable
7 interpretations.” Petition at 8a. According to Petitioner, “all types of murder require the
8 presence of malice aforethought. However, the record reflects the State’s concession after
9 Villaverde’s trial/sentencing that his codefendant Roberto Castro committed the homicide
10 without malice and deliberation.” Petition at 8a. Essentially, Petitioner argues that because his
11 co-defendant, Castro, entered a guilty plea agreement for voluntary manslaughter, Petitioner’s
12 first degree murder conviction cannot stand as the State “admi[tte]d] Roberto Castro was the
13 one whom committed the homicide.” Petition 8b.

14 In general, a district court lacks jurisdiction to modify or vacate a sentence once the
15 defendant has started serving it. Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373
16 (1992), overruled on other grounds, Harris v. State, 130 Nev. 435, 446, 329 P.3d 619, 627
17 (2014). A motion to correct or modify an illegal sentence may only challenge the facial legality
18 of the sentence: either the district court was without jurisdiction to impose a sentence or the
19 sentence was imposed in excess of the statutory maximum. Edwards v. State, 112 Nev. 704,
20 708, 918 P.2d 321, 324 (1996).

21 A district court does have inherent authority to correct, vacate, or modify a sentence
22 where the defendant can demonstrate the sentence violates due process because it is based on
23 a materially untrue assumption or mistake of fact that has worked to the defendant’s extreme
24 detriment. Edwards, 112 Nev. at 707, 918 P.2d at 324. However, not every mistake or error
25 during sentencing gives rise to a due process violation. State v. Dist. Ct. (Husney), 100 Nev.
26 90, 97, 677 P.2d 1044, 1048 (1984). The Nevada Supreme Court has emphasized that a
27 “motion to modify a sentence is limited in scope to sentences based on mistaken assumptions

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1 about a defendant's criminal record which work to the extreme detriment of the defendant."
2 Edwards, 112 Nev. at 708, 918 P.2d at 324.

3 NRS 200.030 is not ambiguous. A statute is ambiguous if "it is subject to more than
4 one reasonable interpretation." Hobbs v. State, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011).
5 The statute is clear as it defines the degree of murders and only offers one reasonable
6 interpretation per definition. Petitioner's claim is predicated on his misunderstanding that his
7 co-defendant's proceeding has an effect on his case, which it does not. Both defendants were
8 originally charged with Murder with Use of a Deadly Weapon as the direct perpetrator and
9 under the same criminal theories of liability: directly committing the crime, aiding and
10 abetting, and conspiracy. Information filed March 25, 2003, at 2. Together, they were bound
11 up to District Court on all charges. Id. The only difference is that Petitioner chose to go to trial
12 on the charges in the Information, while Castro chose to enter into a plea agreement where the
13 theories of liability were the same. See Guilty Plea Agreement ("GPA"), Case C191012C.
14 Additionally, as discussed above, this Court and the Nevada Court of Appeals have already
15 adjudicated that "Villaverde's co-defendant's *Alford* plea to lesser charges did not demonstrate
16 Villaverde was factually innocent of the charges he was convicted of." Sally Villaverde v.
17 State, Docket No. 77563-COA (Order of Affirmance, May 21, 2020).

18 Petitioner's second reason for sentence modification is that State dismissed the Robbery
19 and Burglary charges in Castro's case, which violated Petitioner's due process rights. Petition
20 at 8b. Again, Petitioner mistakenly relies on his co-defendant's decision to accept a plea deal
21 as justification to invalidate Petitioner's conviction. This is not a reason to modify Petitioner's
22 sentence because Petitioner voluntarily rejected the State's offer and went to trial on the
23 original Information whereas Castro accepted the offer. Therefore, Petitioner's sentence will
24 not be modified and Petitioner has failed to show prejudice to overcome the procedural bars.

25 **III. PETITIONER IS NOT ENTITLED TO APPOINTMENT OF COUNSEL**

26 Petitioner requests the appointment of counsel because of complex issues and
27 Petitioner's "first language Spanish may represent a language barrier." See Motion, at 3.
28 Petitioner's Motion is denied as moot, Petitioner is not entitled to appointment of counsel.

1 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-
2 conviction proceedings. See Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566
3 (1991). The Nevada Supreme Court similarly observed that “[t]he Nevada Constitution...does
4 not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada
5 Constitution’s right to counsel provision as being coextensive with the Sixth Amendment to
6 the United States Constitution.” McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258
7 (1996). McKague specifically held that with the exception of NRS 34.820(1)(a) (entitling
8 appointed counsel when petitioner is under a sentence of death), one does not have “any
9 constitutional or statutory right to counsel at all” in post-conviction proceedings. Id. at 164,
10 912 P.2d at 258.

11 The Nevada Legislature has, however, given courts the discretion to appoint post-
12 conviction counsel so long as “the court is satisfied that the allegation of indigency is true, and
13 the petition is not dismissed summarily.” NRS 34.750. NRS 34.750 reads:

14
15 A petition may allege that the petitioner is unable to pay the costs
16 of the proceedings or to employ counsel. If the court is satisfied
17 that the allegation of indigency is true and the petition *is not*
18 *dismissed summarily*, the court may appoint counsel to represent
19 the petitioner. In making its determination, the court may consider,
among other things, the severity of the consequences facing the
petitioner and whether:

- 18 (a) The issues presented are difficult;
19 (b) The petitioner is unable to comprehend the proceedings; or
(c) Counsel is necessary to proceed with discovery.

20 (emphasis added). Accordingly, under NRS 34.750, it is clear that the Court has discretion in
21 determining whether to appoint counsel.

22 More recently, the Nevada Supreme Court examined whether a district court
23 appropriately denied a defendant’s request for appointment of counsel based upon the factors
24 listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-
25 Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75,
26 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant
27 filed a pro se postconviction petition for writ of habeas corpus and requested counsel be
28 appointed. Id. The district court ultimately denied the petitioner’s petition and his appointment

1 of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court
2 examined the statutory factors listed under NRS 34.750 and concluded that the district court's
3 decision should be reversed and remanded. Id. The Court explained that the petitioner was
4 indigent, his petition could not be summarily dismissed, and he had in fact satisfied the
5 statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that
6 because petitioner had represented he had issues with understanding the English language
7 which was corroborated by his use of an interpreter at his trial, that was enough to indicate that
8 the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had
9 demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—
10 were severe and his petition may have been the only vehicle for which he could raise his
11 claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims
12 may have required additional discovery and investigation beyond the record. Id.

13 Pursuant to NRS 34.750, Petitioner has not demonstrated that counsel should be
14 appointed. Unlike in Renteria-Novoa, Petitioner's Fourth Petition is summarily denied for
15 several reasons, including, but not limited to, his Petition being time-barred, successive, barred
16 by laches, and his claims being waived as well as meritless.

17 Notwithstanding summary denial, Petitioner's request is denied as he has failed to meet
18 any of the additional statutory factors under NRS 34.750. While the severity of the
19 consequences may be significant, the issues Petitioner presents are not complex. His first
20 claim, that neither he nor the parties stipulated to waiving the penalty phase, is belied by the
21 record. The Court even addressed the matter with Petitioner. As to his claim of sentence
22 modification based on Castro's subsequent plea, that claim is also meritless. Petitioner has
23 previously raised this claim and this Court denied it on the merits on April 23, 2019. The
24 Nevada Court of Appeals affirmed the District Court's judgment. Sally Villaverde v. State,
25 No. 78725-COA March 12, 2020. Notably, this is Petitioner's Fourth Petition. The issues he
26 presents are not complex; rather, Petitioner fails to accept responsibility for his actions and the
27 fact that the law can hold him responsible under multiple theories of culpability. Therefore,
28 the issues presented are not difficult.

1 Additionally, there has been no indication that Petitioner is unable to comprehend the
2 proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the
3 English language, here Petitioner has failed to demonstrate any inability to understand these
4 proceedings. Although Petitioner sometimes used a Spanish interpreter, Petitioner has
5 demonstrated that he can comprehend the proceedings. Post-trial, Petitioner has filed several
6 Petitions for Writ of Habeas Corpus, citing to the proper authority for the issues he claims.
7 Further, Odyssey does not indicate that he had an interpreter at the Evidentiary Hearing held
8 regarding his First Petition. Therefore, Petitioner does not have a language barrier and is able
9 to comprehend the proceedings.

10 Finally, counsel is not necessary to proceed with further discovery in this case. The
11 claims Petitioner raises are without merit and are easily negated with the record, such as his
12 first claim regarding an alleged failure to stipulate to waive the penalty phase. Petitioner's
13 second claim regarding sentence modification also does not need additional discovery as the
14 law does not offer any reason to modify his sentence. Due to habeas relief not being warranted,
15 there is no need for additional discovery, let alone counsel's assistance to conduct such
16 investigation. Therefore, Petitioner's Motion is denied as moot.

17 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

18 Petitioner requests an evidentiary hearing. Motion at 1. Petitioner, however, fails to
19 show that an evidentiary hearing is warranted. NRS 34.770 determines when a defendant is
20 entitled to an evidentiary hearing. It reads:

- 21 1. The judge or justice, upon review of the return, answer and
22 all supporting documents which are filed, shall determine
23 whether an evidentiary hearing is required. A petitioner must
24 not be discharged or committed to the custody of a person other
25 than the respondent *unless an evidentiary hearing is held*.
- 26 2. If the judge or justice determines that the petitioner is not
27 entitled to relief and an evidentiary hearing is not required, he
28 shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing
 is required, he shall grant the writ and shall set a date for the
 hearing.

(emphasis added). The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

Here, Petitioner is not entitled to an evidentiary hearing because his Petition is procedurally barred, not supported by specific factual allegations that entitle him to relief as his claims are belied by the record and are barred by the law of the case doctrine. Because Petitioner’s claims are meritless, holding an evidentiary hearing would only expand an already thorough record, which is an incorrect basis for holding an evidentiary hearing.

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Dated this 23rd day of August, 2022

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Sally Villaverde, Plaintiff(s)

CASE NO: A-18-780041-W

7 vs.

DEPT. NO. Department 10

8 Brian Williams Warden,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the
14 court's electronic eFile system to all recipients registered for e-Service on the above entitled
case as listed below:

15 Service Date: 8/23/2022

16 Dept Law Clerk

dept10lc@clarkcountycourts.us