IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Mar 14 2022 10:56 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

ERIN DESHAUN WARE,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-21-842235-W
Related Case C-15-310099-1
Docket No: 84262

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
ERIN WARE #1017483,
PROPER PERSON
P.O. BOX 7000
CARSON CITY, NV 89702

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

A-21-842235-W Erin Ware, Plaintiff(s) vs. State of Nevada, Defendant(s)

I N D E X

A-21-842235-W Erin Ware, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

I N D E X

Erin Ware
(Name)
#1017483
(I.D. Number)
Northern Nevada Correctional Center
Post Office Box 7000
Carson City, NV 89702

FILED
OCT 06 2021
CLERK OF COURT

Petitioner, In Proper Person

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

IN AND FOR THE COUNTY OF Clark

Erin Ware
Petitioner,

vs.

State Of Nevada,
Respondent.

Case No.: A-21-842235-W
Dept. No. Dept. 21

PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)
(Non Death Penalty)

INSTRUCTIONS:

1. This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
2. Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
3. If you want an attorney appointed, you must complete the Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
4. You must name as Respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the

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institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of you liberty: Northern Nevada Correctional Center Carson County

2. Name and location of court which entered the judgment of conviction under attack: Clark County Court house Las Vegas Nv

3. Date of judgment of conviction: 4-19-2018

4. Case Number: C-15-310099-1

5. (a) Length of sentence: 17-50 years

Count 1 - 6-15 years & Enhancement 1-10 years

Count II - 6-15 years & Enhancement 4-10 years

Aggregated = 17-50 years

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No ✓

If "yes", list crime, case number and sentence being served at this time:

_____

7. Nature of offense involved in conviction being challenged: Attempted murder w/use of deadly weapon. Robbery w/use of a deadly weapon, Solicitation to comitt murder

8. What was your plea? (check one)

(a) Not guilty _____ (c) Guilty but mentally ill _____

(b) Guilty ✓ (d) Nolo contender _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment of information, or if a plea of guilty was negotiated, give details: _____

_____

_____

_____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury _____

(b) Judge without a jury ✓

11. Did you testify at the trial? Yes _____ No ✓

12. Did you appeal from the judgment of conviction?

Yes _____ No ✓

13. If you did appeal, answer the following:

(a) Name of court: _____

(b) Case number or citation: _____

(c) Result: _____

(d) Date of result: _____

(Attach copy of order or decision, if available)

14. If you did not appeal, explain briefly why you did not:

I didn't Know that I could appeal the courts decision. My counsel never informed me that I could appeal.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ✓ No _____

16. If you answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: Carson City Court house

(2) Name of proceeding: motion for credits AB 5-10

(3) Grounds raised: Work credits off of the front of the sentence.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No ✓

(5) Result: denied

(6) Date of result: April, 2020

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes _____ No _____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion?

Yes _____ No _____

(2) Second petition, application or motion?

Yes _____ No _____

(3) Third or subsequent petitions, applications or motions?

Yes _____ No _____

Citation or date of decision.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length)

I was told that I did the wrong motion and that I needed to complete a Habeaus Corpus

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a, (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Yes, I had no Knowledge that I had a time limit to do any appeals

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes _____ No ✓

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: _____

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes _____ No ✓

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground One:

Ineffective assistance of Counsel

Supporting Facts:

Intially Amanda Gregory was my lawyer and I was offered 8-20 years. I turned down the deal and within weeks due to conflict of interest, Amanda was thrown off of my case and I was appointed Josh Tomsheck. He never hired an private investigator nor any expert witnesses to help my defense. I was tricked and cohearsed into accepting this deal by Josh Tomsheck. He talked my family and my girlfriend into begging me to take the deal. Josh made promises to me and my family that were not held up to. He promised me that he had a great report with Judge Tagliotti and I would get nowhere near 17-50 years because I was taking responsibility and wouldnt put victems on the stand to memorize the tramatic event. At sentencing I was maxxed out and none of them promises ever benifited me. I would of never accepted the deal if Josh Tomsheck

Supporting facts

wouldnt of persuaded me and my family in to taking this deal. I would of never pled guilty hoping for leniency and hopeful promises from my lawyer. He even called my family while court was going and had my mom crying to me on the phone in court, telling me to trust Josh and listen to what he is saying because he is the lawyer. If I had it my way I would of Kept Amanda Gregory as my lawyer and went to trial or accepted the 8-20 year deal. I would of not allowed Josh Tomsheck to cohearse me nor trick me into taking a deal.

(b) Ground Two:

Ineffective assistance of counsel

Supporting Facts:

In the case United States V. Sanchez, the inmate was pressured to plea guilty by his defense lawyer In the case Key v. united states alledged terms of promises made and figuretively no promises held up. In the case woodard v. collins, lawyer advises the victem to take the plea deal In the case Eldridge v. atkins, the attorney fails to interview witnesses and failed to present misidentification defense. All these grounds herein should in fact give me a new trial. Im a pro litigat and I do not Know law.

(c) Ground Three:

Supporting Facts:

(e) Ground Five:

Supporting Facts:

11

(d) Ground Four:

Supporting Facts:

WHEREFORE, petitioner prays that the court grant petitioner Relief to which he may be entitled in this proceeding.

EXECUTED at Carson City, Nevada on the 21st Day of September, 2021.

Erin Ware #1017483
PO Box 7000 Carson City NV
89702

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

Erin Ware #1017483
Petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 21 day of September 2021, by placing the same into the hands or prison law library staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

Steve B Wolfson

_____

_____

_____

_____, Nevada 89 155

Erin Ware
Signature of Petitioner In Pro Se

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document.

Habeaus Corpus
(Title of Document)

filed in case number: C-15-310099-1

☑ Document does not contain the social security number of any person

-OR-

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

☐ A specific state or federal law, to wit:

Nevada
(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS125B.055)

Date: 9-21-21

Erin Ware
(Signature)

Erin Ware
(Print Name)

Pro-se
(Attorney for)

ERIN WARE #1017483
N.N.C.C.
PO Box 7000
Carson City Nv 89702

3717
$ 0.98

Clerk of the Court
200 Lewis Avenue 3rd Floor
Las Vegas Nv 89155

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DISTRICT COURT
CLARK COUNTY, NEVADA

Erin Ware,

Petitioner,

vs.

State of Nevada,

Respondent,

Case No: A-21-842235-W
Department 21

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on October 06, 2021. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's

Calendar on the 21st day of DECEMBER, 20 21, at the hour of

1:30 o'clock for further proceedings.

Dated this 6th day of October, 2021

District Court Judge

CAA 21D DAC7 65FB
Tara Clark Newberry
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Erin Ware, Plaintiff(s)	CASE NO: A-21-842235-W
vs.	DEPT. NO. Department 21
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 10/7/2021

Erin Ware	#1017483 NNCC P.O. Box 7000 Carson City, NV, 89702

RESP
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

ERIN DESHAUN WARE,
#2652033

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-842235-W
C-15-310099-1

DEPT NO: XXI

STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

DATE OF HEARING: December 21, 2021
TIME OF HEARING: 1:30 PM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JOHN NIMAN, Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) and Petitioner's Motion for the Appointment of Counsel and Request for Evidentiary Hearing. This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On October 16, 2015, Erin Deshaun Ware ("Petitioner") was charged via Information with Count One: BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON (Category B Felony – NRS 205.060); Count Two: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Three: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Four: BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony – NRS 200.400.2); Count Five: BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481); Count Six: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count Seven: ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count Eight: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Nine: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Ten: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); and Count Eleven: OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360).

This Information was amended on October 20, 2015, and again on October 27, 2015. On July 6, 2016, the Information was again amended, this time adding Count Twelve: SOLICITATION TO COMMIT MURDER (Category B Felony – NRS 199.500.2).

Petitioner's jury trial began February 7, 2018. After voir dire, he pled guilty to Count One: Attempt Murder with Use of a Deadly Weapon; Count Two: Robbery with Use of a Deadly Weapon; and Count Three: Solicitation to Commit Murder. The Guilty Plea Agreement ("GPA") described the deal as follows:

> As to the charge of Robbery with Use of a Deadly Weapon, the parties stipulate to a term of imprisonment of ten (10) to twenty-five (25) years in the Nevada Department of corrections. As to the charge of Attempt Murder

> with Use of a Deadly Weapon, the parties stipulate that the sentence on that count will run consecutively to the Robbery with Use of a Deadly Weapon Count. The parties retain the right to argue for between three (3) and seven (7) years on the bottom end. The parties stipulate to a total of twenty-five (25) years on the back end of the Attempt Murder with Use of a Deadly Weapon count. As to the charge of Solicitation to Commit Murder, the State agrees to make no recommendation and agrees to run the sentence on that count concurrently. Additionally, the State agrees to dismiss Case No. C317264 after sentencing in this case.

GPA at 1-2. In Case No. C317264, Petitioner faced five counts, including robbery, battery, and burglary.

Petitioner was sentenced on April 10, 2018. For Count One, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections plus a consecutive term of twelve (12) to one hundred twenty (120) months for the Use of a Deadly Weapon. For Count Two, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty months (180) in the Nevada Department of Corrections plus a consecutive term of forty-eight (48) to one hundred twenty (120) months for the Use of a Deadly Weapon, to run consecutive to Count One. For Count Three, he was sentenced to a minimum of forty-eight (48) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections, to run concurrent with Counts One and Two. He received an aggregate total sentence of seventeen (17) to fifty (50) years, with 971 days credit for time served.

The Judgment of Conviction was filed April 19, 2018. This Petition for Writ of Habeas Corpus was filed October 6, 2021.

STATEMENT OF FACTS

The Court relied on the following when sentencing Petitioner:

> On June 10, 2015, officers responded to victim business Subway in reference to a robbery. Upon arrival, officers were advised that a male, later identified as the defendant, Erin Deshaun Ware, entered the business, purchased a cup of water from victim #2, and then left. Moments later, Mr. Ware returned asking to use the restroom. Soon after, pointing a gun, he approached victim #3 and demanded money. Victim #3 retrieved a revolver from her purse and pointed it at Mr. Ware. Mr. Ware then punched her and shot her four times. He ordered victim #2 to the ground and had her crawl to the safe. Mr. Ware then fled the business with $400

and victim #3's revolver. Victim #3 was transported to a local hospital for treatment as she was shot in the left check, left forearm, and twice in the chest.

Based on the above facts an arrest warrant was issued. On August 14, 2015, Mr. Ware was arrested, transported to the Clark County Detention Center and booked accordingly.

On November 30, 2015, a detective received information regarding a male inmate, later identified as the defendant, Erin Deshaun Ware, soliciting to commit the murder of victim #2. Further investigation revealed that Mr. Ware met with an individual, wherein Mr. Ware discussed the individual's payment amount as well as detailed information about victim #2. The second meeting held between Mr. Ware and the individual was to confirm that Mr. Ware still wanted victim #2 killed.

Based on the above facts, Mr. Ware was remanded into custody on December 21, 2015.

PSI at 6-7.

ARGUMENT

I. THE PETITION IS PROCEDURALLY BARRED

A. The Petition is time-barred.

The Petition is time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
>
> (a) That the delay is not the fault of the petitioner; and
>
> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

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

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas

petition filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

This is not a case in which the Judgment of Conviction was not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's conviction was not final until the district court entered a new Judgment of Conviction on counts the district court had vacated; Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction imposing restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition).

Here, Petitioner's Judgment of Conviction was filed on April 19, 2018. He had until April 19, 2019, to file a timely petition. Petitioner did not file this Petition until October 6, 2021, more than two years too late. Absent a showing of good cause to excuse this delay, Defendant's Petition and Supplement must be denied.

B. Application of the procedural bars is mandatory.

The Nevada Supreme Court has held that courts have a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural

bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

C. Only good cause and actual prejudice can overcome the procedural bars

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

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available

to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

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

Petitioner asserts no good cause to delay his filing of this Petition. When asked if he were filing outside the procedural time frame, Petitioner said, "Yes. I had no knowledge that I had a time limit to do any appeals."[1] Petition at 6. He then asserts, "I didn't know that I could appeal the court's decision. My counsel never informed me that I could appeal." Petition at 4.

[1] Petitioner appears to conflate direct appeals and habeas.

Counsel has no constitutional obligation to inform or consult with a defendant regarding his right to a direct appeal when the defendant is convicted pursuant to a guilty plea. Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011). Rather, the duty arises "only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, 'such as the existence of a direct appeal claim that has reasonable likelihood of success.'" Id. (quoting Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)). When a defendant who pled guilty claims he was deprived of the right to appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

Here, Petitioner expressly waived his appeal rights and his counsel was fully aware of this waiver. GPA at 4-5, 7. He affirmed:

> By entering my plea of guilty, I understand that I am waving and forever giving up the following rights and privileges:
>
> . . .
>
> The right to appeal the conviction with the assistance of an attorney either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means *I am unconditionally waiving my right to a direct appeal of this conviction*, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

GPA at 5 (emphasis added).

Petitioner has provided no evidence he requested his attorney to file an appeal. Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("The burden of production lies with the petitioner in petitions for writ of habeas corpus") (citing NRS 34.370(4)). As such, his claim is a bare allegation suitable only for summary dismissal. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioner also received the benefit he bargained for. Because Petitioner has sat on his appellate rights for years, this Court should dismiss his Petition as untimely.

D. Petitioner fails to meet his burden to overcome the procedural bars

To demonstrate prejudice to overcome the procedural bars, a defendant 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.

Petitioner's claim that his attorney coerced him into pleading guilty was available during the statutory time period for the filing of a habeas petition, so it cannot constitute good cause for failing to file an appeal on time. See Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. Because his claims have no merit, they cannot demonstrate constitutional errors working to his actual disadvantage. This Petition is procedurally barred.

II. PETITIONER DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL

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

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

inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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.

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).

Ineffective assistance of counsel does not exist where a defense attorney makes "a reasoned plea recommendation which hindsight reveals to be unwise" or where an attorney relies "on an ultimately unsuccessful defense tactic." Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988).

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

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).

Further, 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.").

To establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne, 118 Nev. at 8, 38 P.3d at 163.

A. Coercion to accept plea bargain

Petitioner alleges his attorney coerced him into pleading guilty. He cites four cases as proof that this Court should give him a new trial. Petition at 8.

It should first be noted that Petitioner actually *had* a trial. The State was ready to present its case, its witnesses were under subpoena, and the jury had endured voir dire. Then, at the very precipice of trial, Petitioner decided to plead guilty. He had the option of facing trial on

his original twelve felony charges and chose *not* to proceed. He chose instead to plead guilty to three felonies, thereby reducing his sentence exposure significantly. It is disingenuous for Petitioner to now lament the lack of trial in his case, when all preparations for trial had already occurred.

At his trial before voir dire, while the prospective jurors were outside the room, the State made an offer to Petitioner on the record. This offer called for a stipulated 20-50 year sentence for the three felonies, as well as dismissal of the other five felonies and Case No. C240973. Petitioner rejected this offer in open court. Petitioner's counsel pointed out to him that he faced habitual criminal treatment, which carried a possible sentence of life without the possibility of parole. After voir dire, Petitioner accepted the State's offer.

Petitioner's cases are to no avail. In the first, United States v. Sanchez, 2013 WL 8291618, (C.D. Cal. Nov. 7, 2013), Petitioner states the inmate was pressured to plead guilty by his lawyer. Petition at 8. However, the court did *not* find the defense lawyer applied undue pressure on the defendant to plead guilty and the court did not grant him relief. Id. "If the Court credited this declaration, it would tend to show, at most, that Sanchez felt harried, anxious, frightened, upset, and perceived that his lawyer was pressuring him too much to take the plea, not that his lawyer acted incompetently in persistently urging Sanchez to do so." Id. at *7. The defendant, like Petitioner here, benefited from a reduced sentence based on reduced charges. "In light of this substantial sentence 'savings' which the plea achieved relative to potential convictions at trial, and the colorable evidence against Sanchez, the Court cannot say it was irrational for counsel to recommend and Sanchez to take the plea." Id. at *16.

The second cited case, Key v. United States, 2017 WL 6884120, (E.D. Tex. Nov. 20, 2017), is included as one showing promises made but not kept. Petition at 8. There, the defendant alleged his attorney failed to keep his promises, but the court found no merit to this claim. Id. "Movant has failed to meet his burden of proving that his guilty plea was based on an unkept promise, or that counsel provided ineffective assistance by failing to raise this issue." Id. at *2.

The third case is included as an example of a "lawyer [who] advises the victim to take the plea deal."[2] Petition at 8. Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990), explores an attorney's failure to investigate before advising his client to plead guilty. The attorney investigated one crime but allowed his client to plead to another, so the court remanded the case. Id. "On remand, the district court must make findings to determine whether Woodard suffered prejudice." Id. at 1029.

Petitioner's final case is Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. 1981). There, Eldridge's attorney did not interview alibi witnesses or subpoena them for trial, and the court found this to be ineffective. Id. "Trial counsel did none of these things and petitioner was materially prejudiced by counsel's failure." Id.

These cases are not directly relevant to Petitioner's situation. The Sanchez defendant was not in fact pressured to plead guilty. The Key defendant failed to show he pled based on any unfulfilled promises. The Woodard attorney failed to investigate the evidence before advising his client to plead. The Eldridge attorney did not interview alibi witnesses before trial. Petitioner here also fails to show he was pressured to plead guilty or that his plea was based on any unfulfilled promises. He does not show what a better investigation would have revealed or what any witnesses may have testified to if he went to trial.

Petitioner admits he turned down a more favorable deal from the State long before his case proceeded to trial. Petition at 7. He then states that "[i]f I had it my way I would of kept Amanda Gregory as my lawyer and went to trial or accepted the 8-20 year deal." Petition at 7.5.[3] Petitioner makes no showing that if he had turned down the State's offer on the day of trial, the State would have renewed the offer he had rejected before. There is no reason to suspect he could "have it his way." By spending the resources to prepare its case for trial, the State had the opportunity to evaluate the strength of its case and choose what, if any, offer it was willing to make once the jury venire had gathered. Further, Attorney Gregory was not an option, as she had recused herself due to a conflict of interest.

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[2] Petitioner may have intended to say the lawyer in the cited case advised the "defendant," not the victim. There is no assertion here that an attorney advised any of the victims Petitioner held at gunpoint or shot.

[3] This page occurs between pages 7 and 8.

Petitioner claims he "would of never accepted the deal if Josh Tomsheck wouldn't of persuaded me and my family in to taking this deal." Petition at 7-7.5. It is not ineffective for an attorney to recommend a favorable plea deal, particularly when the State is ready to present its case to the jury that day. Petitioner, rather than having succumbed to the wily persuasions of his attorney, may have accepted the deal because pleading to three felonies is categorically better than being found guilty of twelve felonies as a habitual offender.

B. Failure to investigate

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

Moreover, 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). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. Id.

Petitioner states his attorney "never hired an private investigator nor any expert witnesses to help my defense." Petition at 7. He does not, however, allege what circumstances an investigator could have discovered that would have aided his defense, or what expert witnesses could have contributed. See Love, 109 Nev. at 1138, 865 P.2d at 323. Since this case did not go to trial, Petitioner's claim that his attorney was not ready for trial is a bare and naked

allegation, suitable for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6).

C. Broken promises

Next, Petitioner asserts his attorney made promises that were not adhered to. Petition at 7. He does not name any promise made but broken. A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). The closest Petitioner comes to his burden is to state his attorney claimed to have a good rapport with the judge and predicted that his sentence would be less than 17-50 years. Petition at 7. A prediction is not a promise.

As proof this "promise" was broken, Petitioner says he was "maxxed out and none of them promises ever benefited me." Petition at 7. He was not, in fact, sentenced to the maximum he could receive for the three Category "B" felonies he pled guilty to. Each had a potential sentence of 1-20 years, and each could have run consecutively. NRS 193.130. Additionally, the deadly weapons enhancement for two of his crimes entailed an additional 1-20 year penalty each, consecutive to the underlying offense. NRS 193.165. Any of these could be consecutive to the others, so that he faced a potential 100 years for these crimes. Petitioner only received an aggregate sentence of 17-50 years, significantly better than he could have done, and better than his plea deal contemplated.

Petitioner cannot "have it his way." His preferred attorney was removed in the interest of justice. The State's previous offer was off the table. He is not entitled to a trial because he had a trial available to him. Petitioner pled guilty because he was convinced doing so was in his best interests. He may not now exhibit buyer's remorse after having received the benefit of his bargain. This Petition is time-barred, with no good cause or prejudice shown to permit it to evade the procedural bars.

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CONCLUSION

For the foregoing reasons, the State respectfully requests that the instant Petition for Writ of Habeas Corpus be DENIED.

DATED this 2nd day of November, 2021.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565

BY ***/s/ John Niman***
JOHN NIMAN
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 2nd day of November, 2021, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

ERIN WARE, #1017483
N.N.C.C.
PO BOX 7000
CARSON CITY, NV 89702

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

ERIN DESHAUN WARE,
#2652033,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-842235-W
C-15-310099-1

DEPT NO: XXI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: December 21, 2021
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 21st day of December, 2021, the Petitioner being not present, not represented by counsel, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through WILLIAM J. MERBACK, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On October 16, 2015, Erin Deshaun Ware ("Petitioner") was charged via Information with Count One: BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(Category B Felony – NRS 205.060); Count Two: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Three: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Four: BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony – NRS 200.400.2); Count Five: BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481); Count Six: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count Seven: ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count Eight: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Nine: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Ten: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); and Count Eleven: OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360).

This Information was amended on October 20, 2015, and again on October 27, 2015. On July 6, 2016, the Information was again amended, this time adding Count Twelve: SOLICITATION TO COMMIT MURDER (Category B Felony – NRS 199.500.2).

Petitioner's jury trial began February 7, 2018. After voir dire, he pled guilty to Count One: Attempt Murder with Use of a Deadly Weapon; Count Two: Robbery with Use of a Deadly Weapon; and Count Three: Solicitation to Commit Murder. The Guilty Plea Agreement ("GPA") described the deal as follows:

> As to the charge of Robbery with Use of a Deadly Weapon, the parties stipulate to a term of imprisonment of ten (10) to twenty-five (25) years in the Nevada Department of corrections. As to the charge of Attempt Murder with Use of a Deadly Weapon, the parties stipulate that the sentence on that count will run consecutively to the Robbery with Use of a Deadly Weapon Count. The parties retain the right to argue for between three (3) and seven (7) years on the bottom end. The parties stipulate to a total of twenty-five (25) years on the back end of the Attempt Murder with Use of a Deadly

> Weapon count. As to the charge of Solicitation to Commit Murder, the State agrees to make no recommendation and agrees to run the sentence on that count concurrently. Additionally, the State agrees to dismiss Case No. C317264 after sentencing in this case.

GPA at 1-2. In Case No. C317264, Petitioner faced five counts, including robbery, battery, and burglary.

Petitioner was sentenced on April 10, 2018. For Count One, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections plus a consecutive term of twelve (12) to one hundred twenty (120) months for the Use of a Deadly Weapon. For Count Two, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty months (180) in the Nevada Department of Corrections plus a consecutive term of forty-eight (48) to one hundred twenty (120) months for the Use of a Deadly Weapon, to run consecutive to Count One. For Count Three, he was sentenced to a minimum of forty-eight (48) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections, to run concurrent with Counts One and Two. He received an aggregate total sentence of seventeen (17) to fifty (50) years, with 971 days credit for time served.

The Judgment of Conviction was filed April 19, 2018. This Petition for Writ of Habeas Corpus was filed October 6, 2021. The State filed its response on November 02, 2021. Following a hearing on December 21, 2021, this Court finds and concludes as follows:

ANALYSIS

I. THIS PETITION IS PROCEDURALLY-BARRED

A. The Petition is time-barred.

The Petition is time-barred pursuant to NRS 34.726(1):

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

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

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

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

This is not a case in which the Judgment of Conviction was not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's conviction was not final until the district court entered a new Judgment of Conviction on counts the district court had vacated; Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction imposing restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition).

Here, Petitioner's Judgment of Conviction was filed on April 19, 2018. He had until April 19, 2019, to file a timely petition. Petitioner did not file this Petition until October 6, 2021, more than two years too late. Because Petitioner has not shown good cause and actual prejudice to overcome the procedural bars under NRS 34.726(1), this Petition and Supplement must be denied.

B. Application of the procedural bars is mandatory.

The Nevada Supreme Court has held that courts have a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

C. Only good cause and actual prejudice can overcome the procedural bars

To avoid procedural default under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be

unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34

P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Petitioner asserts no good cause to delay his filing of this Petition. When asked if he were filing outside the procedural time frame, Petitioner said, "Yes. I had no knowledge that I had a time limit to do any appeals."[1] Petition at 6. He then asserts, "I didn't know that I could appeal the court's decision. My counsel never informed me that I could appeal." Petition at 4.

Counsel has no constitutional obligation to inform or consult with a defendant regarding his right to a direct appeal when the defendant is convicted pursuant to a guilty plea. Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011). Rather, the duty arises "only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, 'such as the existence of a direct appeal claim that has reasonable likelihood of success.'" Id. (quoting Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)). When a defendant who pled guilty claims he was deprived of the right to appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

Here, Petitioner expressly waived his appeal rights and his counsel was fully aware of this waiver. GPA at 4-5, 7. He affirmed:

> By entering my plea of guilty, I understand that I am waving and forever giving up the following rights and privileges:
>
> . . .
>
> The right to appeal the conviction with the assistance of an attorney either appointed or retained, unless specifically reserved in writing and agreed upon as

[1] Petitioner appears to conflate direct appeals and habeas.

> provided in NRS 174.035(3). I understand this means *I am unconditionally waiving my right to a direct appeal of this conviction*, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

GPA at 5 (emphasis added).

Petitioner has provided no evidence he requested his attorney to file an appeal. Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("The burden of production lies with the petitioner in petitions for writ of habeas corpus") (citing NRS 34.370(4)). As such, his claim is a bare allegation suitable only for summary dismissal. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioner shows no impediment external to the defense that excuses his sitting on his appellate rights for years.

D. Petitioner fails to meet his burden to overcome the procedural bars

To demonstrate prejudice to overcome the procedural bars, a defendant 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.

Petitioner's claim that his attorney coerced him into pleading guilty was available during the statutory time period for the filing of a habeas petition, so it cannot constitute good cause for failing to file an appeal on time. See Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. This Petition is procedurally barred.

II. COUNSEL WAS NOT INEFFECTIVE UNDER STRICKLAND

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,

104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

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

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

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.

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).

Ineffective assistance of counsel does not exist where a defense attorney makes "a reasoned plea recommendation which hindsight reveals to be unwise" or where an attorney relies "on an ultimately unsuccessful defense tactic." Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988).

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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).

Further, 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.").

To establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not

voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne, 118 Nev. at 8, 38 P.3d at 163.

A. Coercion to accept plea bargain

Petitioner alleges his attorney coerced him into pleading guilty. Petition at 8. It must be noted that Petitioner *had* a trial. The State was ready to present its case, its witnesses were under subpoena, and the jury had endured voir dire. Then, at the very precipice of trial, Petitioner pled guilty. He had the option of facing trial on his original twelve felony charges and chose *not* to proceed. He chose instead to plead guilty to three felonies, thereby reducing his sentence exposure significantly. It is disingenuous for Petitioner to now lament the lack of trial in his case, when all preparations for trial had already occurred.

At his trial before voir dire, while the prospective jurors were outside the room, the State made an offer to Petitioner on the record. This offer called for a stipulated 20-50 year sentence for the three felonies, as well as dismissal of the other five felonies and Case No. C240973. Petitioner rejected this offer in open court. Petitioner's counsel pointed out to him that he faced habitual criminal treatment, which carried a possible sentence of life without the possibility of parole. After voir dire, Petitioner accepted the State's offer.

Petitioner's cases are to no avail. In the first, United States v. Sanchez, 2013 WL 8291618, (C.D. Cal. Nov. 7, 2013), Petitioner states the inmate was pressured to plead guilty by his lawyer. Petition at 8. However, the court did *not* find the defense lawyer applied undue pressure on the defendant to plead guilty and the court did not grant him relief. Id. "If the Court credited this declaration, it would tend to show, at most, that Sanchez felt harried, anxious, frightened, upset, and perceived that his lawyer was pressuring him too much to take the plea, not that his lawyer acted incompetently in persistently urging Sanchez to do so." Id. at *7. The defendant, like Petitioner here, benefited from a reduced sentence based on reduced charges. "In light of this substantial sentence 'savings' which the plea achieved relative to potential

convictions at trial, and the colorable evidence against Sanchez, the Court cannot say it was irrational for counsel to recommend and Sanchez to take the plea." Id. at *16.

The second cited case, Key v. United States, 2017 WL 6884120, (E.D. Tex. Nov. 20, 2017), is included as one showing promises made but not kept. Petition at 8. There, the defendant alleged his attorney failed to keep his promises, but the court found no merit to this claim. Id. "Movant has failed to meet his burden of proving that his guilty plea was based on an unkept promise, or that counsel provided ineffective assistance by failing to raise this issue." Id. at *2.

The third case is included as an example of a "lawyer [who] advises the victim to take the plea deal."[2] Petition at 8. Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990), explores an attorney's failure to investigate before advising his client to plead guilty. The attorney investigated one crime but allowed his client to plead to another, so the court remanded the case. Id. "On remand, the district court must make findings to determine whether Woodard suffered prejudice." Id. at 1029.

Petitioner's final case is Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. 1981). There, Eldridge's attorney did not interview alibi witnesses or subpoena them for trial, and the court found this to be ineffective. Id. "Trial counsel did none of these things and petitioner was materially prejudiced by counsel's failure." Id.

These cases are not directly relevant to Petitioner's situation. The Sanchez defendant was not in fact pressured to plead guilty. The Key defendant failed to show he pled based on any unfulfilled promises. The Woodard attorney failed to investigate the evidence before advising his client to plead. The Eldridge attorney did not interview alibi witnesses before trial. Petitioner here fails to show he was pressured to plead guilty or that his plea was based on any unfulfilled promises. He does not show what a better investigation would have revealed or what any witnesses may have testified to if he went to trial.

[2] Petitioner may have intended to say the lawyer in the cited case advised the "defendant," not the victim. There is no assertion here that an attorney advised any of the victims Petitioner held at gunpoint or shot.

Petitioner admits he turned down a more favorable deal from the State long before his case proceeded to trial. Petition at 7. He then states that "[i]f I had it my way I would of kept Amanda Gregory as my lawyer and went to trial or accepted the 8-20 year deal." Petition at 7.5.[3] Petitioner makes no showing that if he had turned down the State's offer on the day of trial, the State would have renewed the offer he had rejected before. By preparing its case for trial, the State had the opportunity to evaluate the strength of its case and choose what, if any, offer it was willing to make once the jury venire had gathered. Further, Attorney Gregory was not an option, as she had recused herself due to a conflict of interest.

Petitioner claims he "would of never accepted the deal if Josh Tomsheck wouldn't of persuaded me and my family in to taking this deal." Petition at 7-7.5. It is not ineffective for an attorney to recommend a favorable plea deal, particularly when the State is ready to present its case to the jury that day. Petitioner, rather than having succumbed to the wily persuasions of his attorney, may have accepted the deal because pleading to three felonies is categorically better than being found guilty of twelve felonies as a habitual offender.

B. Failure to investigate

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

[3] This page occurs between pages 7 and 8.

Moreover, 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). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. Id.

Petitioner states his attorney "never hired an private investigator nor any expert witnesses to help my defense." Petition at 7. He does not, however, allege what circumstances an investigator could have discovered that would have aided his defense, or what expert witnesses could have contributed. See Love, 109 Nev. at 1138, 865 P.2d at 323. Since this case did not go to trial, Petitioner's claim that his attorney was not ready for trial is a bare and naked allegation, suitable for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6).

C. Broken promises

Next, Petitioner asserts his attorney made promises that were not adhered to. Petition at 7. He does not name any promise made but broken. A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). The closest Petitioner comes to his burden is to state his attorney claimed to have a good rapport with the judge and predicted that his sentence would be less than 17-50 years. Petition at 7. A prediction is not a promise.

As proof this "promise" was broken, Petitioner says he was "maxxed out and none of them promises ever benefited me." Petition at 7. He was not, in fact, sentenced to the maximum he could receive for the three Category "B" felonies he pled guilty to. Each had a potential sentence of 1-20 years, and each could have run consecutively. NRS 193.130. Additionally, the deadly weapons enhancement for two of his crimes entailed an additional 1-20 year penalty each, consecutive to the underlying offense. NRS 193.165. Any of these could be consecutive to the others, so that he faced a potential 100 years for these crimes. Petitioner only received an aggregate sentence of 17-50 years, significantly better than he could have done, and better than his plea deal contemplated.

Under the Strickland standard, Petitioner must show his attorney's representation fell below an objective standard of reasonableness and that but for counsel's errors, there was a reasonable probability that the results of the proceedings would have been different. Petitioner has failed to meet this high burden.

Petitioner pled guilty because he was convinced doing so was in his best interests. He may not now exhibit buyer's remorse after having received the benefit of his bargain. This Petition is time-barred, with no good cause or prejudice shown to permit it to evade the procedural bars.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 4th day of January, 2022

Bita Yeager

0EA 7B3 847F FC84
Bita Yeager
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF MAILING

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

ERIN WARE, 1017483
N.N.C.C.
PO BOX 7000
CARSON CITY, NV 89701

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

ed/GCU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Erin Ware, Plaintiff(s)	CASE NO: A-21-842235-W
vs.	DEPT. NO. Department 21
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

Electronically Filed
1/6/2022 9:19 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

ERIN WARE,

Petitioner,

vs.

STATE OF NEVADA,

Respondent,

Case No: A-21-842235-W

Dept No: XXI

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

PLEASE TAKE NOTICE that on January 4, 2022, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on January 6, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 6 day of January 2022, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:
Erin Ware # 1017483
P.O. Box 7000
Carson City, NV 89702

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

FCL
STEVEN B. WOLFSON
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200 Lewis Avenue
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Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

ERIN DESHAUN WARE,
#2652033,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: A-21-842235-W
C-15-310099-1

DEPT NO: XXI

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: December 21, 2021
TIME OF HEARING: 1:30 PM

THIS CAUSE having come on for hearing before the Honorable BITA YEAGER, District Judge, on the 21st day of December, 2021, the Petitioner being not present, not represented by counsel, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through WILLIAM J. MERBACK, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On October 16, 2015, Erin Deshaun Ware ("Petitioner") was charged via Information with Count One: BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(Category B Felony – NRS 205.060); Count Two: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Three: ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.380, 193.165); Count Four: BATTERY WITH INTENT TO COMMIT A CRIME (Category B Felony – NRS 200.400.2); Count Five: BATTERY WITH USE OF A DEADLY WEAPON RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481); Count Six: ATTEMPT MURDER WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Count Seven: ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); Count Eight: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Nine: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); Count Ten: DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony - NRS 202.287); and Count Eleven: OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony – NRS 202.360).

This Information was amended on October 20, 2015, and again on October 27, 2015. On July 6, 2016, the Information was again amended, this time adding Count Twelve: SOLICITATION TO COMMIT MURDER (Category B Felony – NRS 199.500.2).

Petitioner's jury trial began February 7, 2018. After voir dire, he pled guilty to Count One: Attempt Murder with Use of a Deadly Weapon; Count Two: Robbery with Use of a Deadly Weapon; and Count Three: Solicitation to Commit Murder. The Guilty Plea Agreement ("GPA") described the deal as follows:

> As to the charge of Robbery with Use of a Deadly Weapon, the parties stipulate to a term of imprisonment of ten (10) to twenty-five (25) years in the Nevada Department of corrections. As to the charge of Attempt Murder with Use of a Deadly Weapon, the parties stipulate that the sentence on that count will run consecutively to the Robbery with Use of a Deadly Weapon Count. The parties retain the right to argue for between three (3) and seven (7) years on the bottom end. The parties stipulate to a total of twenty-five (25) years on the back end of the Attempt Murder with Use of a Deadly

> Weapon count. As to the charge of Solicitation to Commit Murder, the State agrees to make no recommendation and agrees to run the sentence on that count concurrently. Additionally, the State agrees to dismiss Case No. C317264 after sentencing in this case.

GPA at 1-2. In Case No. C317264, Petitioner faced five counts, including robbery, battery, and burglary.

Petitioner was sentenced on April 10, 2018. For Count One, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections plus a consecutive term of twelve (12) to one hundred twenty (120) months for the Use of a Deadly Weapon. For Count Two, he was sentenced to a minimum of seventy-two (72) months to a maximum of one hundred eighty months (180) in the Nevada Department of Corrections plus a consecutive term of forty-eight (48) to one hundred twenty (120) months for the Use of a Deadly Weapon, to run consecutive to Count One. For Count Three, he was sentenced to a minimum of forty-eight (48) months to a maximum of one hundred eighty (180) months in the Nevada Department of Corrections, to run concurrent with Counts One and Two. He received an aggregate total sentence of seventeen (17) to fifty (50) years, with 971 days credit for time served.

The Judgment of Conviction was filed April 19, 2018. This Petition for Writ of Habeas Corpus was filed October 6, 2021. The State filed its response on November 02, 2021. Following a hearing on December 21, 2021, this Court finds and concludes as follows:

ANALYSIS

I. THIS PETITION IS PROCEDURALLY-BARRED

A. The Petition is time-barred.

The Petition is time-barred pursuant to NRS 34.726(1):

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

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

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

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly construed. In Gonzales v. State, the Nevada Supreme Court rejected a habeas petition filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit. 118 Nev. 590, 596, 53 P.3d 901, 904 (2002). In contrast with the short amount of time to file a notice of appeal, a prisoner has a full year to file a post-conviction habeas petition, so there is no injustice in a strict application of NRS 34.726(1), despite any alleged difficulties with the postal system. Id. at 595, 53 P.3d at 903.

This is not a case in which the Judgment of Conviction was not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's conviction was not final until the district court entered a new Judgment of Conviction on counts the district court had vacated; Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction imposing restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition).

Here, Petitioner's Judgment of Conviction was filed on April 19, 2018. He had until April 19, 2019, to file a timely petition. Petitioner did not file this Petition until October 6, 2021, more than two years too late. Because Petitioner has not shown good cause and actual prejudice to overcome the procedural bars under NRS 34.726(1), this Petition and Supplement must be denied.

B. Application of the procedural bars is mandatory.

The Nevada Supreme Court has held that courts have a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. Ignoring these procedural bars is an arbitrary and unreasonable exercise of discretion. Id. at 234, 112 P.3d at 1076. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules *must* be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074. Parties cannot stipulate to waive the procedural default rules. State v. Haberstroh, 119 Nev. 173, 180-81, 69 P.3d 676, 681-82 (2003).

C. Only good cause and actual prejudice can overcome the procedural bars

To avoid procedural default under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be

unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "A court *must* dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001) (emphasis added).

"To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. Such an external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Hathaway, 119 Nev. at 251, 71 P.3d at 506 (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645 (1986)); see also Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)). Any delay in filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

The Nevada Supreme Court has clarified that a defendant cannot attempt to manufacture good cause. See Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting Colley v. State, 105 Nev. at 236, 773 P.2d at 1230). Excuses such as the lack of assistance of counsel when preparing a petition, as well as the failure of trial counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. See Phelps, 104 Nev. at 660, 764 P.2d at 1306, superseded by statute on other grounds as recognized in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

A petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34

P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

Petitioner asserts no good cause to delay his filing of this Petition. When asked if he were filing outside the procedural time frame, Petitioner said, "Yes. I had no knowledge that I had a time limit to do any appeals."[1] Petition at 6. He then asserts, "I didn't know that I could appeal the court's decision. My counsel never informed me that I could appeal." Petition at 4.

Counsel has no constitutional obligation to inform or consult with a defendant regarding his right to a direct appeal when the defendant is convicted pursuant to a guilty plea. Toston v. State, 127 Nev. 971, 267 P.3d 795 (2011). Rather, the duty arises "only when the defendant inquires about the right to appeal or in circumstances where the defendant may benefit from receiving advice about the right to a direct appeal, 'such as the existence of a direct appeal claim that has reasonable likelihood of success.'" Id. (quoting Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999)). When a defendant who pled guilty claims he was deprived of the right to appeal, "the court must consider such factors as whether the defendant received the sentence bargained for as part of the plea and whether the plea expressly reserved or waived some or all appeal rights." Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000).

Here, Petitioner expressly waived his appeal rights and his counsel was fully aware of this waiver. GPA at 4-5, 7. He affirmed:

> By entering my plea of guilty, I understand that I am waving and forever giving up the following rights and privileges:
>
> . . .
>
> The right to appeal the conviction with the assistance of an attorney either appointed or retained, unless specifically reserved in writing and agreed upon as

[1] Petitioner appears to conflate direct appeals and habeas.

> provided in NRS 174.035(3). I understand this means *I am unconditionally waiving my right to a direct appeal of this conviction*, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

GPA at 5 (emphasis added).

Petitioner has provided no evidence he requested his attorney to file an appeal. Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995) ("The burden of production lies with the petitioner in petitions for writ of habeas corpus") (citing NRS 34.370(4)). As such, his claim is a bare allegation suitable only for summary dismissal. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). Petitioner shows no impediment external to the defense that excuses his sitting on his appellate rights for years.

D. Petitioner fails to meet his burden to overcome the procedural bars

To demonstrate prejudice to overcome the procedural bars, a defendant 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.

Petitioner's claim that his attorney coerced him into pleading guilty was available during the statutory time period for the filing of a habeas petition, so it cannot constitute good cause for failing to file an appeal on time. See Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07. This Petition is procedurally barred.

II. COUNSEL WAS NOT INEFFECTIVE UNDER STRICKLAND

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,

104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

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

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

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

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.

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).

Ineffective assistance of counsel does not exist where a defense attorney makes "a reasoned plea recommendation which hindsight reveals to be unwise" or where an attorney relies "on an ultimately unsuccessful defense tactic." Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988).

When a conviction is the result of a guilty plea, a defendant must show that there is a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985) (emphasis added); see also Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (2004).

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).

Further, 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.").

To establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not

voluntarily entered. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986) (citing Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne, 118 Nev. at 8, 38 P.3d at 163.

A. Coercion to accept plea bargain

Petitioner alleges his attorney coerced him into pleading guilty. Petition at 8. It must be noted that Petitioner *had* a trial. The State was ready to present its case, its witnesses were under subpoena, and the jury had endured voir dire. Then, at the very precipice of trial, Petitioner pled guilty. He had the option of facing trial on his original twelve felony charges and chose *not* to proceed. He chose instead to plead guilty to three felonies, thereby reducing his sentence exposure significantly. It is disingenuous for Petitioner to now lament the lack of trial in his case, when all preparations for trial had already occurred.

At his trial before voir dire, while the prospective jurors were outside the room, the State made an offer to Petitioner on the record. This offer called for a stipulated 20-50 year sentence for the three felonies, as well as dismissal of the other five felonies and Case No. C240973. Petitioner rejected this offer in open court. Petitioner's counsel pointed out to him that he faced habitual criminal treatment, which carried a possible sentence of life without the possibility of parole. After voir dire, Petitioner accepted the State's offer.

Petitioner's cases are to no avail. In the first, United States v. Sanchez, 2013 WL 8291618, (C.D. Cal. Nov. 7, 2013), Petitioner states the inmate was pressured to plead guilty by his lawyer. Petition at 8. However, the court did *not* find the defense lawyer applied undue pressure on the defendant to plead guilty and the court did not grant him relief. Id. "If the Court credited this declaration, it would tend to show, at most, that Sanchez felt harried, anxious, frightened, upset, and perceived that his lawyer was pressuring him too much to take the plea, not that his lawyer acted incompetently in persistently urging Sanchez to do so." Id. at *7. The defendant, like Petitioner here, benefited from a reduced sentence based on reduced charges. "In light of this substantial sentence 'savings' which the plea achieved relative to potential

convictions at trial, and the colorable evidence against Sanchez, the Court cannot say it was irrational for counsel to recommend and Sanchez to take the plea." Id. at *16.

The second cited case, Key v. United States, 2017 WL 6884120, (E.D. Tex. Nov. 20, 2017), is included as one showing promises made but not kept. Petition at 8. There, the defendant alleged his attorney failed to keep his promises, but the court found no merit to this claim. Id. "Movant has failed to meet his burden of proving that his guilty plea was based on an unkept promise, or that counsel provided ineffective assistance by failing to raise this issue." Id. at *2.

The third case is included as an example of a "lawyer [who] advises the victim to take the plea deal."[2] Petition at 8. Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990), explores an attorney's failure to investigate before advising his client to plead guilty. The attorney investigated one crime but allowed his client to plead to another, so the court remanded the case. Id. "On remand, the district court must make findings to determine whether Woodard suffered prejudice." Id. at 1029.

Petitioner's final case is Eldridge v. Atkins, 665 F.2d 228, 236 (8th Cir. 1981). There, Eldridge's attorney did not interview alibi witnesses or subpoena them for trial, and the court found this to be ineffective. Id. "Trial counsel did none of these things and petitioner was materially prejudiced by counsel's failure." Id.

These cases are not directly relevant to Petitioner's situation. The Sanchez defendant was not in fact pressured to plead guilty. The Key defendant failed to show he pled based on any unfulfilled promises. The Woodard attorney failed to investigate the evidence before advising his client to plead. The Eldridge attorney did not interview alibi witnesses before trial. Petitioner here fails to show he was pressured to plead guilty or that his plea was based on any unfulfilled promises. He does not show what a better investigation would have revealed or what any witnesses may have testified to if he went to trial.

[2] Petitioner may have intended to say the lawyer in the cited case advised the "defendant," not the victim. There is no assertion here that an attorney advised any of the victims Petitioner held at gunpoint or shot.

Petitioner admits he turned down a more favorable deal from the State long before his case proceeded to trial. Petition at 7. He then states that "[i]f I had it my way I would of kept Amanda Gregory as my lawyer and went to trial or accepted the 8-20 year deal." Petition at 7.5.[3] Petitioner makes no showing that if he had turned down the State's offer on the day of trial, the State would have renewed the offer he had rejected before. By preparing its case for trial, the State had the opportunity to evaluate the strength of its case and choose what, if any, offer it was willing to make once the jury venire had gathered. Further, Attorney Gregory was not an option, as she had recused herself due to a conflict of interest.

Petitioner claims he "would of never accepted the deal if Josh Tomsheck wouldn't of persuaded me and my family in to taking this deal." Petition at 7-7.5. It is not ineffective for an attorney to recommend a favorable plea deal, particularly when the State is ready to present its case to the jury that day. Petitioner, rather than having succumbed to the wily persuasions of his attorney, may have accepted the deal because pleading to three felonies is categorically better than being found guilty of twelve felonies as a habitual offender.

B. Failure to investigate

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328.

[3] This page occurs between pages 7 and 8.

Moreover, 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). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. Id.

Petitioner states his attorney "never hired an private investigator nor any expert witnesses to help my defense." Petition at 7. He does not, however, allege what circumstances an investigator could have discovered that would have aided his defense, or what expert witnesses could have contributed. See Love, 109 Nev. at 1138, 865 P.2d at 323. Since this case did not go to trial, Petitioner's claim that his attorney was not ready for trial is a bare and naked allegation, suitable for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.735(6).

C. Broken promises

Next, Petitioner asserts his attorney made promises that were not adhered to. Petition at 7. He does not name any promise made but broken. A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). The closest Petitioner comes to his burden is to state his attorney claimed to have a good rapport with the judge and predicted that his sentence would be less than 17-50 years. Petition at 7. A prediction is not a promise.

As proof this "promise" was broken, Petitioner says he was "maxxed out and none of them promises ever benefited me." Petition at 7. He was not, in fact, sentenced to the maximum he could receive for the three Category "B" felonies he pled guilty to. Each had a potential sentence of 1-20 years, and each could have run consecutively. NRS 193.130. Additionally, the deadly weapons enhancement for two of his crimes entailed an additional 1-20 year penalty each, consecutive to the underlying offense. NRS 193.165. Any of these could be consecutive to the others, so that he faced a potential 100 years for these crimes. Petitioner only received an aggregate sentence of 17-50 years, significantly better than he could have done, and better than his plea deal contemplated.

Under the Strickland standard, Petitioner must show his attorney's representation fell below an objective standard of reasonableness and that but for counsel's errors, there was a reasonable probability that the results of the proceedings would have been different. Petitioner has failed to meet this high burden.

Petitioner pled guilty because he was convinced doing so was in his best interests. He may not now exhibit buyer's remorse after having received the benefit of his bargain. This Petition is time-barred, with no good cause or prejudice shown to permit it to evade the procedural bars.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 4th day of January, 2022

Bita Yeager

0EA 7B3 847F FC84
Bita Yeager
District Court Judge

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

BY */s/ John Afshar*
JOHN AFSHAR
Deputy District Attorney
Nevada Bar #14408

CERTIFICATE OF MAILING

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

ERIN WARE, 1017483
N.N.C.C.
PO BOX 7000
CARSON CITY, NV 89701

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

ed/GCU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Erin Ware, Plaintiff(s)	CASE NO: A-21-842235-W
vs.	DEPT. NO. Department 21
State of Nevada, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 21, 2021**

A-21-842235-W Erin Ware, Plaintiff(s)
vs.
State of Nevada, Defendant(s)

December 21, 2021 **1:30 PM** **Petition for Writ of Habeas Corpus**

HEARD BY: Yeager, Bita **COURTROOM:** RJC Courtroom 05B

COURT CLERK: Carina Bracamontez-Munguia

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT: Merback, William J. Attorney

JOURNAL ENTRIES

- Upon Court's inquiry, Court Services Officer indicated Deft. was not on the transport list. Mr. Merback indicated they had filed a response on November 2nd and noted they were not intending on transporting the Deft. as they had hoped the Court would make a decision based on the pleadings. COURT FINDS the Deft. had not shown good cause and actual prejudice to overcome the procedural bars under NRS 34.726(1). COURT FINDS under Strickland the Deft. needed to show that counsels representation fell below an objective standard of reasonableness and that but for counsels errors there was a reasonable probability that the results of the proceedings would have been different, however, he did not demonstrate that in the Writ. Therefore, based mostly on the procedural problem with the Deft. not filing the writ in a timely manner, COURT ORDERED, petition DENIED; State DIRECTED to prepare an order consistent with its response.

NDC

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated March 3, 2022, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 73.

ERIN WARE,

Plaintiff(s),

vs.

STATE OF NEVADA,

Defendant(s),

Case No: A-21-842235-W
Related Case C-15-310099-1
Dept. No: XXI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 14 day of March 2022.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk