IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAN KITTREDGE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83943

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Habeas Relief
Eighth Judicial District Court, Clark County

TERRENCE M. JACKSON, ESQ.
Nevada Bar #000854
Law Office of Terrence M. Jackson
624 South 9th Street
Las Vegas, Nevada 89101
(702) 386-0001

Counsel for Appellant

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500
State of Nevada

AARON D. FORD
Nevada Attorney General
Nevada Bar #007704
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHAN KITTREDGE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83943

RESPONDENT'S ANSWERING BRIEF
Appeal from Denial of Habeas Relief
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals as it pertains to an appeal from a judgment of conviction based on a guilty plea. NRAP 17(b)(1).

STATEMENT OF THE ISSUES

Issues Identified in the Petition for Writ of Habeas Corpus

1. Whether counsel was not ineffective for failing to have Appellant's competency evaluated before he accepted a plea deal. Appellant's Appendix ("AA") at 221.

Issues Identified on Appeal But Not Raised Below

1. Whether counsel was not ineffective for inadequately investigating and preparing before Appellant pled guilty

2. Whether counsel was not ineffective for not filing a pretrial motion to suppress
3. Whether the district court did not err when it found Appellant competent
4. Whether Appellant's sentence was not cruel and unusual
5. Whether Appellant was not entitled to an evidentiary hearing
6. Whether the district court did not err when it found no cumulative errors warranting reversal

STATEMENT OF THE CASE

On August 1, 2018, the State filed a Superseding Indictment charging Shan Jonathon Kittredge ("Appellant") with forty-eight counts of Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Attempt Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165); Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060); Assault With a Deadly Weapon (Category B Felony – NRS 200.471); Grand Larceny Auto (Category B Felony – NRS 205.228.3); Possession of a Stolen Vehicle (Category B Felony – NRS 205.273.4); Assault on a Protected Person With Use of a Deadly Weapon (Category B Felony – NRS 200.471); Resisting Public Officer With Use of a Firearm (Category C Felony – NRS 199.280); and Ownership or Possession of Firearm By Prohibited Person (Category B Felony – NRS 202.360). 1 AA 1-18.

On March 11, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. 1 AA 199.

Appellant's jury trial began on March 18, 2019, at 10:30 AM. 1 AA 80-197. The State placed on the record its offer of a stipulated term of 20-50 years. 1 AA 81-82. Appellant confirmed he rejected the offer. 1 AA 82. Jury selection began. 1 AA 88-160. At 12:20 PM, the court sent the jury to lunch. 1 AA 160. Before the attorneys left, defense counsel informed the court the parties were close to a negotiation. 1 AA 173. When court reconvened at 2:03 PM, defense counsel announced a plea agreement. 1 AA 174.

That day in open court, Appellant accepted a plea agreement in which he pled guilty to five counts: Count One Conspiracy to Commit Robbery; Counts Two, Three, and Four Robbery With Use of a Deadly Weapon; and Count Five Resisting Public Officer With Use of a Firearm. 1 AA 27-33. The State filed an Amended Superseding Indictment on March 18, 2019, in open court. 1 AA 23-26.

Appellant was sentenced on May 14, 2019, as follows: **Count One** – 28-72 months imprisonment; **Count Two** – 48-120 months plus a consecutive 48-120 months for the deadly weapon, concurrent to Count One; **Count Three** – 48-120 months plus a consecutive 48-120 months for the deadly weapon, consecutive to Count Two; **Count Four** – 48-120 months plus a consecutive 48-120 months for the deadly weapon, concurrent to Count Three; and **Count Five** – 24-60 months,

consecutive to Count Three. 1 AA 56. He received 156 days credit for time served. 1 AA 56. The aggregate sentence was 18 to 45 years as stipulated. 1 AA 57. The Judgment of Conviction was filed May 16, 2019. 1 AA 58-60. He did not appeal his conviction.

On May 22, 2020, Appellant filed a pro per Petition for Writ of Habeas Corpus. 1 AA 63-79. The State responded. 1 AA 198-211. Appointed habeas counsel filed a Supplemental Petition on July 14, 2021. 1 AA 219-257. The State responded. 1 AA 258-73. Appellant replied. 1 AA 274-80. After a hearing on October 21, 2021, the district court denied the writ. 1 AA 281-86. The Findings of Fact, Conclusions of Law and Order was filed December 1, 2021. Appellant filed a Notice of Appeal December 13, 2021. 1 AA 305-06.

STATEMENT OF THE FACTS

The Presentence Investigation Report, prepared April 15, 2019 ("PSI"), summarized the offenses as follows:

> From May 21, 2018 to June 8, 2018, a series of armed robberies occurred in Clark County, Nevada. Investigation revealed, Shan Jonathon Kittredge committed the robberies and Deanna Page, aka, Deanna Lee Page, was the driver for four robberies. Mr. Kittredge would enter the businesses, go behind the counter, and rob the clerks for the money in the registers. Mr. Kittredge would grab the money, dump the cash drawer on the ground, and look for money underneath the cash drawer. He would often take money from multiple registers.
>
> On May 21, 2018, Mr. Kittredge entered a local Roberto's Taco Shop. He placed his handgun into the side of Victim #1 and demanded money from the register. The register was open and Victim #1 backed away.

Mr. Kittredge took the money from the register, and moved to another register. He pointed his handgun at Victim #2, and asked him how to open the register. Victim #2 showed Mr. Kittredge how to open the register and he took the money. He fled out the front doors.

On May 26, 2018, Mr. Kittredge entered a local Panda Express and when Victim #3 opened the register, he went behind the counter. He pointed a handgun at Victim #3 and took approximately $400.00 from the register. Victim #4 tried to grab the money back from Mr. Kittredge. Mr. Kittredge pushed Victim #4 away and pointed the handgun at her saying, "I will shoot you, you fucking bitch!" Mr. Kittredge ran out of the store with the money.

On May 27, 2018, Mr. Kittredge entered a local Dunkin Donuts and walked through an employee side door. He walked to the drive thru and demanded the manager. He yelled, "No one leave the store," while holding a handgun. Victim #5 was told to open the registers, and Victim #6 opened the drive thru register. Mr. Kittredge grabbed the money from the register and lifted the drawer and threw it on the ground. He did the same to the front register. He fled with about $300.00.

On May 31, 2018, Mr. Kittredge entered a local Roberto's Taco Shop. Mr. Kittredge ordered a drink from Victim #7. Victim #8 rang up the purchase. When she opened the register, Mr. Kittredge jumped the counter and pulled out a handgun from his waistband. He stated, "Don't do anything," and began taking money from the register. He took $331.00 from the register. Mr. Kittredge also took the employees' tip jar. He ran out of the store and got into a vehicle. A voice in the vehicle asked, "Did you get it?"

Later on May 31, 2018, Mr. Kittredge entered another Roberto's Taco Shop through an unlocked back door. He produced a handgun and told the employees, "Better be careful," and racked the slide to the handgun. He approached Victim #9 and told her to give him all the 100 dollar bills from the register. She took him to a second register, and he took all the money from that register. He then exited the store with the money. During the course of this robbery, Ms. Page assisted Mr. Kittredge with clothing.

On June 1, 2018, Mr. Kittredge entered a local Khoury's Mediterranean Restaurant. He sat down and acted as if he were a customer. Victim #10 told the waitress he was upset because no one took his order. When the waitress approached, Mr. Kittredge pulled out a firearm and said, "Handle the situation, there are kids here!" He told Victim #11 to open the register. She replied that they didn't have one. Victim #11 retrieved $100.00 from her apron and gave it to Mr. Kittredge. He exited the restaurant.

On June 2, 2018, Mr. Kittredge entered a local Albertson's and went behind the counter at the customer service desk. He pointed a handgun at Victim #12 and stated, "Step back. I'm taking your money." Mr. Kittredge took $2,071.00 from the cash register. Victim #13 walked behind the counter and Mr. Kittredge pointed the handgun at him saying, "Get back! Get back!" Mr. Kittredge fled the store.

On June 7, 2018, Mr. Kittredge entered another local Albertson's. He feigned being a customer and asked for a pack of cigarettes. When the cashier opened the register, he jumped behind the counter and pulled out a handgun. Victim #14 slammed the register shut. Mr. Kittredge began using profanity and pointed the handgun at Victim #14's leg. She was forced to put the code into the register and open it. Mr. Kittredge took between $800.00 and $1,000.00 from the register and fled the store.

On June 8, 2018, officers conducted surveillance on Mr. Kittredge. When he exited a store, the officers attempted to take him into custody. The officers told him to get on the ground, and he initially complied. As officers gave commands, Mr. Kittredge suddenly got up and ran towards his vehicle. An officer deployed a Taser which was unsuccessful. Mr. Kittredge entered the vehicle. He reversed the vehicle, striking a victim officer's vehicle, and nearly striking another victim officer. As Mr. Kittredge drove forward, an officer observed a handgun pointing at the victim officers. The officer discharged his firearm at Mr. Kittredge. Mr. Kittredge struck another officer's vehicle before coming to a stop. Mr. Kittredge again pointed the handgun at the victim officers, and the officer again discharged his firearm. Mr. Kittredge was extricated from the vehicle and transported to the hospital.

> On June 11, 2018, Mr. Kittredge was booked accordingly into the Clark County Detention Center.

PSI at 7-8.[1]

SUMMARY OF THE ARGUMENT

Appellant must challenge the same issues on appeal that the district court considered in the habeas petition. He may not add a laundry list of new complaints never considered by the court below. The sole complaint from the original petition asserts Appellant was not competent to accept a guilty plea. Because there is no showing of incompetence in the record, the district court would not have remanded for a competency hearing. Since a challenge to competency would have been unsuccessful, counsel cannot have been ineffective for failing to pursue it.

ARGUMENT

Standard of Review

This Court reviews the district court's application of the law *de novo*, and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to independent review. However, a district court's factual findings will be given deference by this Court on appeal, so long as they are

[1] As Appellant's Appendix includes no information about the violent crimes committed in this case, the State has filed a motion to transmit the PSI.

supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

Law on Ineffective Assistance of Counsel

Appellant contends his attorney was ineffective during the plea process. 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. Strickland, 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).

"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). Likewise, the decision not to call witnesses is within the discretion of trial counsel and will not be questioned unless it was a plainly unreasonable decision. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); Dawson, 108 Nev. 112, 825 P.2d 593.

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. 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.

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).

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).

Claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. 'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record." Id. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means, 120 Nev. at 1011, 103 P.3d at 32. The burden rests on Petitioner to "allege specific facts supporting the claims in the petition." NRS 34.735(6).

A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions. Edwards v. Emperor's Garden

Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant's failure to present legal authority resulted in no reason for the district court to consider defendant's claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; "issues not so presented need not be addressed"); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

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, 118 Nev. at 8, 38 P.3d at 167.

Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best

strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011).

The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations." Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 467 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

"The rule is well established that it is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 438-39 (1975).

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." Harrington, 131 S. Ct. at 788. Although courts may not indulge *post hoc* rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id.

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).

When considering ineffective-assistance-of-counsel claims where the Petitioner pleaded guilty, the Nevada Supreme Court has held that:

> A defendant who pleads guilty upon the advice of counsel may attack the validity of the guilty plea by showing that he received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. However, guilty pleas are presumptively valid, especially when entered on advice of counsel, and a defendant has a heavy burden to show the district court that he did not enter his plea knowingly, intelligently, or voluntarily. To establish prejudice in the context of a challenge to a guilty plea based upon an assertion of ineffective assistance of counsel, *a defendant must demonstrate a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.*

Molina, 120 Nev. 185, 190-91, 87 P.3d 533, 537 (emphasis added) (internal quotations and citations omitted).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. It is counsel's duty to candidly advise a defendant regarding whether or not they believe it would be beneficial for a defendant to accept a plea offer, but the ultimate decision of whether or not to accept a plea offer is the defendant's. Rhyne, 118 Nev. at 8, 38 P.3d at 163.

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).

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.").

Law on Proper Investigation

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533,

538 (2004). To satisfy the Strickland standard and establish ineffectiveness for failure to investigate, a defendant must allege *in the pleadings* what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina, 120 Nev. at 192, 87 P.3d at 538; State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003).

It must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. A defendant must also show how a better investigation probably would have rendered a more favorable outcome. Id. "[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up." Rompilla v. Beard, 545 U.S. 374, 383, 125 S.Ct. 2456 (2005)

In considering whether counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman,

112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Law on Raising New Issues on Appeal

Issues not raised in the district court are waived on appeal. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). They may only be reviewed, if at all, for plain error. Martinorellan v. State, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record. In addition, the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at 49, 343 P.3d at 594 (internal citations omitted).

Law on Issues Not Raised on Direct Appeal

Substantive issues alleging errors on the part of the district court committed during trial, the plea process, or sentencing, are waived if not raised on direct appeal.

NRS 34.724(2)(a); NRS 34.810(1)(b); Evans v. State, 117 Nev. 609, 646-47, 29 P .3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P .2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

Here, Appellant has failed to show ineffective assistance of counsel in either of his habeas petitions or in his appellate brief.

I. IN THE ABSENCE OF EVIDENCE INDICATING APPELLANT WAS INCOMPETENT, TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST A COMPETENCY HEARING

In his original pro per petition and his attorney-submitted supplemental petition, Appellant alleges his trial attorney was ineffective for failing to establish he was incompetent to accept a plea agreement. 1 AA 69, 220. He asserts that because he was shot in the head when he aimed a firearm at police officers, he was unable to understand when his attorney explained the agreement months later. 1 AA 69. He accuses his former attorney of "nomothetic indifference," though it is Appellant himself who would like a generalized rule stating all persons who have sustained gunshot wounds in the head are incompetent forever after. 1 AA 225.

Appellant contends his attorney should have demanded more time to consider the deal. 1 AA 70. He states he should not have been required to make a serious decision after the trauma he had suffered. 1 AA 70. "Petitioner should never have been advised to accept a guilty plea agreement at that point, due to possible inability

to make sound judgments and life decisions due to traumatic brain injury." 1 AA 224.

Though nothing in the record indicates Appellant suffered cognitive defects after his shootout with the police, he points to this very absence of evidence as proof that his attorney was ineffective. 1 AA 220. "Said documentation evidencing degree of cognitive impairment has been strangely unexplored and sadly unavailable for examination at this point in order to definitively determine cause and deleterious effect of said gunshot wounds to Petitioner's head." 1 AA 220. The possibility that documentation is absent because cognitive impairment is absent has apparently not been considered.

On appeal, Appellant complains his attorney did not seek expert opinions regarding competency. AOB at 17-18. He laments counsel did not have Appellant examined to mitigate his stipulated sentence. AOB at 18. He asserts he did not meet the Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960), standard for competency. AOB at 19.

As an initial matter, Appellant makes no showing the State or the district court would have allowed his attorney to insist on more time to contemplate a deal. The parties were actually sitting in trial. 1 AA 80-197. A jury had been summoned and the voir dire process had begun. 1 AA 80-197. Appellant asserts no basis for a belief the State would have agreed to dismiss all the jurors who had taken off time from

their daily lives to adjudicate Appellant's case on a mere possibility that Appellant would eventually decide to accept a deal. Appellant had, that same day, already rejected a deal, so his desire to dismiss the jury and ponder the matter further would have been interpreted as a mere delay tactic. 1 AA 82. Appellant claims a person who has been shot in the head "should never be signing not only a plea agreement but any agreement for that matter." 1 AA 70. Appellant does not allude to how much time his attorney was allegedly obliged to demand the State wait to allow him to contemplate another plea deal in light of the previous deal he had flatly rejected.

Secondly, Appellant fails to address the proper standard for raising an issue of competency. He asserts "overwhelming" evidence existed to show the presence of "substantial doubts" as to his competency, but he fails to mention *any* evidence other than his gunshot wounds. AOB at 14. He states he was "likely still affected" by his injuries without showing evidence he was affected. AOB at 14. He cites no authority to hold a gunshot wound *per se* renders a person incompetent under Nevada law.

Appellant attaches no medical records to suggest he was incompetent. His allegations about his lack of competency are nothing more than naked assertions suitable only for summary denial. Hargrove, 100 Nev. at 503, 686 P.2d at 225. A defendant who is competent to stand trial is competent to accept a plea agreement. Godinez v. Moran, 509 U.S. 389, 398, 113 S. Ct. 2680, 2686 (1993). Appellant was

actively in the process of standing trial at the time he chose to accept a plea agreement.

Only competent people can stand trial or be sentenced to criminal sanctions. Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896 (1975). "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." Id. at 171, 95 S. Ct. at 903. Nevada uses the Dusky standard to determine competency. See Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788 (1960). Dusky held the test to be used is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." Id. at 402, 80 S. Ct. at 789.

The Dusky standard is codified into Nevada law at NRS 178.400, which states:

> 1. A person may not be tried or adjudged to punishment for a public offense while incompetent.
> 2. For the purposes of this section, "incompetent" means that the person does not have the present ability to:
>   (a) Understand the nature of the criminal charges against the person;
>   (b) Understand the nature and purpose of the court proceedings; or
>   (c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

Calvin v. State, 122 Nev. 1178, 1180, 147 P.3d 1097, 1098 (2006).

A formal competency hearing is constitutionally compelled any time there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. Olivares v. State, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008) (citing Melchor–Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983)). In this context, evidence is "substantial" if it "raises a reasonable doubt about the defendant's competency to stand trial." Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972)). So, to trigger a formal competency hearing, there must be substantial evidence that raises a reasonable doubt as to the defendant's competency.

"In the absence of reasonable doubt regarding an accused's competence, the district judge need not invoke the statutory procedure to determine competency." Martin v. State, 96 Nev. 324, 325, 608 P.2d 502, 503 (1980); Jones v. State, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991). A district court has broad discretion in making this determination. See Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000) ("The record contains no evidence that Morales was unable to remember the events relating to his drug arrest, communicate with his attorney or otherwise assist in his own defense."); Williams v. State, 85 Nev. 169, 174, 451 P.2d 848, 852 (1969) ("This issue may be suggested to the court or it may be inquired into by the court of its own motion. If the court determines a doubt to exist, it must suspend the trial and inquire into the sanity of the accused."); Langley v. State, 84 Nev. 295, 297, 439

P.2d 986, 988 (1968) ("The appellant seeks to fault the trial court for declining his request for a psychiatric examination before taking his plea to the indictment … Nothing was presented to the Court at that time to raise doubt as to Defendant's sanity or competency to stand trial. NRS 178.405.") (internal citation omitted).

Such a reasonable doubt is not raised by bare allegations of a defendant or a history of mental illness alone. Calambro v. Second Judicial Dist. Ct., 114 Nev. 961, 971-72, 964 P.2d 794, 801 (1998) (finding defendant competent although he was diagnosed schizophrenic and reported hearing voices); Riker v. State, 111 Nev. 1316, 1325, 905 P.2d 706, 711-12 (1995) (finding defendant competent although he suffered from mental disorders). A district court will consider the interactions with a defendant and his attorney as well as the interactions between the court and the defendant in determining whether a reasonable doubt as to competency exists. Hill v. State, 114 Nev. 169, 176-77, 953 P.2d 1077, 1082-83 (1998); Melchor-Gloria v. State, 99 Nev. 174, 180-81, 660 P.2d 109, 113 (1983).

As in Morales, there is no evidence Appellant was unable to remember the events relating to his crimes or arrest, communicate with his attorney or otherwise assist in his own defense. 116 Nev. at 22, 992 P.2d at 254. He does not allege he lacked sufficient ability to consult with his lawyer with a reasonable degree of understanding during the trial, or that he lacked a rational or factual understanding

of the proceedings against him. Thus, he wholly fails to even allege that he was incompetent under the Dusky standard.

Instead, Appellant alleges—without any evidentiary support—that his injuries somehow rendered him incompetent. However, this bare allegation would not raise a reasonable doubt of competency pursuant to Martin, 96 Nev. at 325, 608 P.2d at 503. Thus, even taking Appellant's unsupported, self-serving argument at face value, he still cannot establish that he was incompetent to stand trial pursuant to Dusky and Martin.

The district court engaged Appellant in a lengthy dialogue. 1 AA 174-95. Appellant demonstrated his competency during his canvass. The court acted within its discretion when it determined Appellant was competent to stand trial, and therefore, to accept a guilty plea. "Through face-to-face interaction in the courtroom, the trial judges are much more competent to judge a defendant's understanding than this court. The cold record is a poor substitute for demeanor observation." Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996).

Appellant points to no evidence in the record of his alleged incompetence at the time he entered into his guilty plea. In his sentencing memorandum, Appellant said he understood his actions and took responsibility for his choices. 1 AA 45. He acknowledged his history of drug abuse and asked for drug treatment, not mental health treatment. 1 AA 43.

Appellant first raised this claim long after his plea, which is more indicative of buyer's remorse than incompetence. At the time of his plea, he did not raise any competency issues or inform the court he was unable to understand the agreement. Given his oral and written representations to the court, his plea was voluntary and he was competent to make it. Appellant does not show his injuries made him unable to consult with his lawyer with a reasonable degree of understanding or have a rational or factual understanding of the proceedings against him. Dusky, 362 U.S. at 402, 80 S. Ct. at 788.

In his written guilty plea agreement, Appellant stated he signed the agreement because he believed a trial would be contrary to his best interest. 1 AA 31. He affirmed he was not under the influence of anything that would impair his ability to comprehend or understand the agreement. 1 AA 32. He said his attorney had answered all his questions. 1 AA 32.

Appellant spoke lucidly during the plea canvass and did not complain he did not understand. 1 AA 174-95. The court offered him an opportunity to speak with counsel if he needed clarification. 1 AA 176.

> THE COURT: Okay. Now, before accepting your guilty plea, there are a number of questions I'm going to have to ask you to ensure myself that you're entering a valid plea. If you do not understand any of the questions, would you please let me know so I can rephrase the a question?
>
> THE DEFENDANT: Yes.

> THE COURT: Okay. If at any time you wish to take a break in the proceedings so you can discuss matters in private with your attorney, will you let me know that so I can give you the opportunity and chance to do so?
>
> THE DEFENDANT: Yes.

1 AA 176.

The court inquired as to any mental illnesses Appellant had, and when informed of previous treatments, asked if Appellant's mental health needed any consideration at the time of his plea. 1 AA 177. Appellant said he was stabilized. 1 AA 177.

> THE DEFENDANT: After committing these offenses, I'm trying to stay off drugs, even mental drugs, you know.
>
> THE COURT: Okay.
>
> THE DEFENDANT: So I'm maintaining.
>
> THE COURT: All right, you've mentioned some serious mental health issues. Do you feel that any of those issues is impacting on your ability to understand what's going on here today?
>
> THE DEFENDANT: No, sir. No, sir.
>
> THE COURT: Do you feel they are impacting on your ability at all to understand what you are charged with and the nature of those charges?
>
> THE DEFENDANT: No, *not at all.*
>
> THE COURT: All right. Do you feel they impact upon your ability at all to understand the plea agreement you're entering into with the State?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: And they don't affect your ability to read and understand, for instance: the amended superseding indictment or the plea agreement?
>
> THE DEFENDANT: No, *not in any way*.

> THE COURT: Okay. Do you feel you understand what's happening here today?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Tell me in your own words what's happening here today?
>
> THE DEFENDANT: *We resolved a plea and went over my plea agreement; you're just making sure that I understand*.

1 AA 177-78 (emphasis added). Appellant was as clear as he could be that he felt he was competent to plead guilty at that time. He did not tell the court he was confused or that he needed more time to discuss the agreement's meaning with his attorney.

The district court then specifically made a finding that Appellant was competent at the entry of his plea. 1 AA 178. The State and defense counsel each had an opportunity and an obligation to speak up if they had concerns about his competency.

> THE COURT: Okay. All right, does either Counsel have any—does any Counsel from either side have any doubts as to the defendant's competence to plead at this time?
>
> MS. MERCER: No, Your Honor.
>
> MR. YAMPOLSKY: No, Your Honor.
>
> THE COURT: All right. Based on Counsel's representations, the Court's own observations of the defendant, I find the defendant is competent to plead in this matter.

1 AA 178. The court specifically based its findings on its own observations of the defendant, as well as counsel's representations.

Appellant points to no evidence, much less substantial evidence raising a reasonable doubt, that he was unable to understand the nature of the criminal charges against him, understand the nature and purpose of the court proceedings, or assist his counsel with his defense. Because Appellant's interactions with the court did not create a reasonable doubt in the court's mind as to Appellant's competency, a request for a competency hearing and competency restoration would have been futile. Martin, 96 Nev. at 325, 608 P.2d at 503. "It's the finding of the Court, the defendant is fully competent and capable of entering an informed plea, and that his plea of guilty is knowing and voluntary supported by an independent basis and fact containing the essential elements of the offenses charged." 1 AA 194. A "fully competent" defendant is not entitled to a competency hearing. Counsel is not required to undertake futile actions. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Without substantial evidence, the district court would not have held a formal competency hearing or sent Appellant to competency restoration classes. An evidentiary hearing is not necessary to explore counsel's subjective view of whether in hindsight he thinks Appellant might have been incompetent, as the objective evidence is sufficient to deny this claim. No set of facts has been pled, which if true, could demonstrate his attorney was deficient and Appellant was prejudiced by this deficiency. The denial of this claim should be affirmed.

II. APPELLANT DOES NOT ALLEGE WHAT A MORE THOROUGH INVESTIGATION OR PREPARATION WOULD HAVE SHOWN

On appeal, Appellant contends his attorney allowed him to enter an "unusual" agreement "before defense counsel had done an adequate pretrial determination of his competency and before counsel had done an adequate pretrial investigation of the case." AOB at 7-8. He asserts counsel "did not prepare or investigate adequately." AOB at 9. "Counsel did not spend more than a minimal amount of time with the Defendant." AOB at 9. He implies his attorney did not investigate enough to determine if the State had enough evidence against him to prove his guilt at trial. AOB at 12.

This claim was not raised in the petition or supplemental petition below. Therefore, defense counsel's alleged lack of investigation may only be reviewed, if at all, for plain error. Martinorellan, 131 Nev. at 48, 343 P.3d at 593.

Not only is this claim waived because it was not raised in the petition before the district court, it is devoid of specific allegations, which if true, would entitle Appellant to relief. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Appellant offers no specifics on what a better investigation would have shown. Molina, 120 Nev. at 192, 87 P.3d at 538. He does not mention any flaw in the State's case that defense counsel failed to identify. Counsel was in trial, ready to challenge the State's case. That Appellant got cold feet and backed out at the last minute does not mean his attorney was unprepared. Appellant does not name a single witness or a single defense a better

investigation could have uncovered. Appellant also makes no showing that counsel spent an inadequate amount of time with him, other than by baldly asserting it. He is not entitled to a particular relationship with his attorney. Slappy, 461 U.S. at 14, 103 S. Ct. at 1617.

There is no way to evaluate this claim for plain error, as Appellant does not assert what a more thorough investigation could have shown. This claim must be denied for the first time on appeal.

III. APPELLANT DOES NOT ALLEGE WHAT SHOULD HAVE BEEN SUPPRESSED OR ON WHAT BASIS IT COULD HAVE BEEN SUPPRESSED

Appellant argues his attorney should have made a "meritorious motion to suppress." AOB at 13. He does not state what evidence should have been suppressed. He alludes to "inculpatory admissions," but does not include these admissions in the record or describe how they occurred.

He complains his attorney should have filed a motion for an evidentiary hearing before he accepted a plea. AOB at 13. He does not state what an evidentiary hearing, as opposed to a jury trial, should have resolved.

He claims this motion "would have tested the State's case." AOB at 13. The parties were in the courthouse, ready to proceed in a trial that would have tested the State's case. Appellant does not show how these motions would have been more effective at fact-finding than a trial in front of his peers.

Appellant claims defense counsel "urged the defendant to plead guilty at the first opportunity to an unfavorable plea." AOB at 13. The lack of these motions "destroyed any chance of the defendant achieving a reasonably favorable plea negotiation." AOB at 13. This claim is belied by the record. Hargrove, 100 Nev. at 503, 686 P.2d at 225. Appellant turned down a less favorable offer on the record before his trial began. 1 AA 82. Accepting a plea of guilty to five counts is objectively better than being adjudicated guilty of forty-eight felonies as a habitual offender. 1 AA 1-18, 199.

This claim was not raised in the petition or supplemental petition below. Therefore, defense counsel's alleged lack of investigation may only be reviewed, if at all, for plain error. Martinorellan, 131 Nev. at 48, 343 P.3d at 593. There is no way to evaluate this claim for plain error, as Appellant does not assert how these motions could have been successful. This claim must be denied for the first time on appeal.

IV. THE DISTRICT COURT DID NOT ERR WHEN IT FOUND APPELLANT COMPETENT

Appellant claims the district court erred when it found him competent. AOB at 14. He asserts the "simple leading questions in the plea canvass was not a sufficient test of his competency or a showing that he could fully and with rationality, fully understand the process of entering a knowing, voluntary and intelligent plea." AOB at 19.

A plea canvass is not intended to substitute for a competency hearing. As discussed above, a competency hearing is only required where substantial evidence raising a reasonable doubt as to the defendant's competency is brought to the court's attention. Since no substantial evidence arose that created a reasonable doubt as to Appellant's competency, this claim would have had no merit on direct appeal.

Further, such a complaint is a substantive challenge to his Judgment of Conviction. Accordingly, it must have been raised on direct appeal. Appellant's decision not to file a direct appeal is a waiver of the alleged error by the district court. NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). While a waiver may be overcome by demonstrating good cause and prejudice, Appellant's brief is silent on the issue. Moreover, Appellant cannot demonstrate good cause or prejudice for failing to raise this on appeal, as all the facts and law necessary to raise this claim were available for a timely direct appeal. His cited Third Circuit case on diminished capacity does not hold that counsel must investigate every defendant's mental health in the absence of substantial evidence raising reasonable doubts as to his competency.

Not only was this issue meritless and waived as it was not raised on direct appeal, it was also not included in the petition or supplemental petition before the

district court and is waived for that reason. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357. This claim must be denied for the first time on appeal.

V. APPELLANT'S SENTENCE FOR HIS CRIME SPREE WAS NOT CRUEL OR UNUSUAL

Appellant contends his sentence amounts to cruel and unusual punishment because it does not provide a "meaningful possibility of rehabilitation." AOB at 21. He contends he is the "rare case" in which a sentence within statutory guidelines exceeds the limits of the Constitution. AOB at 22. He asserts the punishment he stipulated to "far exceeded a reasonable sentence." AOB at 23.

He cites Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455 (2012), to hold a juvenile may not be sentenced to life without parole. AOB at 21. He also cites Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2019), which holds juveniles may not be sentenced to death. AOB at 23. He asserts a sentence of up to forty-five years is a functional life without parole sentence. AOB at 23.

Appellant complains his attorney was ineffective for not using the injuries he received when aiming a weapon at the police as mitigating circumstances. AOB at 24. He also claims counsel should have obtained a Probation and Parole report detailing his extensive criminal history before stipulating to a sentence. AOB at 24.

The Eighth Amendment to the United States Constitution and Article 1, Section 6 of the Nevada Constitution prohibit the imposition of cruel and unusual punishment. "A sentence within the statutory limits is not 'cruel and unusual

punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Allred v. State, 120 Nev. 410, 420, 92 P.2d 1246, 1253 (2004) (quoting Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979).

Additionally, district courts have "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the Legislature, it will normally not be considered disproportionate. Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

Appellant was more than twice the age of a juvenile at the time of his recent crime spree, and he was not sentenced to life without parole or sentenced to death. He fails to explain why a mandate affording a juvenile to demonstrate rehabilitation at some point in his life applies to a forty-two-year-old career criminal. Appellant's

allegation that his defense attorney did not consider the potentially available aggravating and mitigating circumstances before Appellant chose to accept the guilty plea agreement is not supported by anything in the record.

Appellant's sentence was a stipulated one, so any challenge to it is waived. Woods v. State, 114 Nev. 468, 477, 958 P.2d 91, 97 (1998); Reuben C. v. State, 99 Nev. 845, 845-46, 673 P.2d 493, 493 (1983); Powell v. Sheriff, 85 Nev. 684, 687, 462 P.2d 756, 758 (1969). He agreed to this sentence rather than run the risk of being sentenced to life without the possibility of parole as a habitual criminal. He does not argue his sentence fell outside the statutory range or that the statutes fixing the punishment were unconstitutional.

Not only was this issue meritless and waived as it was not raised on direct appeal, it was also not included in the petition or supplemental petition before the district court and is waived for that reason. Dermody, 113 Nev. at 210-11, 931 P.2d at 1357. This claim must be denied for the first time on appeal.

VI. APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Appellant complains the district court denied his petition without conducting an evidentiary hearing with expert testimony as to his competency. AOB at 8. He asserts a hearing could have shown inadequate investigation and preparation, as well as established that the claims of the State's experts were vastly overstated. AOB at 26. He does not mention which State expert made any claim, or how that claim was

overstated. As Appellant chose not to go to trial, no experts were called. He alludes to "many cases" where the failure to hire an expert to counter a State's expert could be ineffective, but he does not apply this notion to the facts of his own case. AOB at 26.

In the habeas context, the Nevada Supreme has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002); Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief—unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Hargrove, 100 Nev. at 503, 686 P.2d at 225 (holding that "[an] Appellant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

Under Byford v. State, the Nevada Supreme Court held that "a post-conviction habeas petitioner is entitled to an evidentiary hearing on any claims that if true would warrant relief as long as the claims are supported by specific factual allegations

which the record does not belie or repel." 123 Nev. 67, 68-69, 156 P.3d 691, 692 (2007).

There was no need for an evidentiary hearing, as there was no need to expand the record. The district court interacted with Appellant during the trial and plea canvass and did not see substantial evidence raising reasonable doubt as to Appellant's competency.

Habeas counsel did not ask for an evidentiary hearing in his supplemental petition or during the hearing on the petition. 1 AA 219-27, 2 AA 282-86. This claim is raised for the first time before this Court. Since the district court did not have an opportunity to consider the matter, this Court should decline to do so here.

VII. NO ERRORS CUMULATE TO WARRANT REVERSAL

Finally, Appellant complains cumulative errors require reversal. AOB at 26. He relies on this Court's analysis of cumulative errors occurring at trial to assert cumulative errors of counsel should be treated the same. AOB at 27.

The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner

cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.")

Nevertheless, even where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)).

Since the supplemental petition actually considered by the district court only contained one alleged error, that of Appellant's competency, the issue of cumulative errors was not raised below. Since the district court did not have an opportunity to consider the matter, this Court should decline to do so here.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the denial of Appellant's Petition for Writ of Habeas Corpus.

/ / /

Dated this 23rd day of June, 2022.

Respectfully submitted,

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 9,483 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of June, 2022.

Respectfully submitted

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

BY */s/ Jonathan E. VanBoskerck*
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
Office of the Clark County District Attorney
Regional Justice Center
200 Lewis Avenue
Post Office Box 552212
Las Vegas, Nevada 89155-2212
(702) 671-2500

CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 23rd day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

TERRENCE M. JACKSON, ESQ.
Counsel for Appellant

JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney

/s/ J. Hall
Employee, Clark County
District Attorney's Office

JEV/Suzanne Rorhus/jh