IN THE SUPREME COURT OF THE STATE OF NEVADA

DUJUAN LOOPER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85513

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

DIANE C. LOWE, ESQ.
Nevada Bar #014573
Lowe Law, LLC
7350 West Centennial Pkwy #3085
Las Vegas, Nevada 89113
(725) 212-2451

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

DUJUAN LOOPER, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85513

RESPONDENT'S ANSWERING BRIEF

Appeal from Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals under NRAP 17(b)(3) because it is an appeal from a postconviction petition that does not involve a Category A felony.

STATEMENT OF THE ISSUES

1. The district court correctly found that Appellant's second petition is time barred.
2. The district court correctly found that Appellant could not overcome his procedural bars.

STATEMENT OF THE CASE

On February 15, 2013, pursuant to consolidation of cases C-12-279379 and C-12-279418, the State filed a Second Amended Information in case C-12-279379, charging Defendant Dujuan Don Looper ("Appellant") as follows – Count 1 –

Second Degree Kidnapping (Category B Felony- NRS 200.310); Count 2 – Coercion (Category B Felony – NRS 207.190); Counts 3-4 – Child Abuse and Neglect (Category B Felony – NRS 200.508); Count 5 – Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018); Count 6 – Sexual Assault with a Minor Under Fourteen Years of Age (Category A Felony – NRS 200.364, 200.366); Count 7 – Lewdness with a Child Under the Age of 14 (Category A Felony – NRS 201.230); Count 8 – Use of Minor in Producing Pornography (Category A Felony – NRS 200.700, 200.710, 200.750); Count 9 – Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). I Appellant's Appendix (hereinafter "AA") 7-10.

On January 8, 2014, Appellant entered into a Guilty Plea Agreement with the aid of his counsel Margery Barbeu, whereby he agreed to plead guilty to the following charges as contained in a Third Amended Information: Count 1 – Attempt Sexual Assault with a Minor Under Fourteen Years of Age (Category B Felony – NRS 193.330, 200.364, 200.366); Count 2 – Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018); Count 3 – Possession of Visual Presentation Depicting Sexual Conduct of a Child (Category B Felony – NRS 200.700, 200.730). I AA 14-24. The district court also canvassed Appellant at the time he entered his plea and questioned him on whether he understood that he would be subject to sex offender registration, lifetime

supervision, and a psychosexual evaluation as the consequences of the plea. 1 AA 25-36. The Appellant entered his plea of guilty to all counts affirming his understanding of this knowledge. 1 AA 14-24.

On April 28, 2014, Appellant appeared for sentencing and was sentenced to the Nevada Department of Corrections as follows: Count 1 – 96 to 240 months; Count 2 – 19 to 60 months, to run consecutive to Count 1; Count 3 – 19 to 72 months, to run consecutive to Counts 1 and 2, with 809 days credit for time served. 1 AA 89-92. The Court also imposed a special sentence of lifetime supervision and ordered Defendant to register as a sex offender. I AA 89-92. The Judgment of Conviction was filed on May 23, 2014. I AA 91-92.

Appellant filed a direct appeal from his judgment of conviction pursuant to his guilty plea. 1 AA 93. The Nevada Supreme Court affirmed the conviction on December 11, 2014, after Appellant filed a direct appeal. I AA 93-95. Remittitur issued to the district court on January 9, 2015.

On January 16, 2015, Appellant filed a Post-Conviction Petition for Writ of Habeas Corpus. I AA 96-119. Appellant also requested for an appointment of an attorney to aid with his Petition, and his motion was granted. On April 18, 2016, Appellant, through his counsel William H. Gamage, filed a Supplement to Petition for Writ of Habeas Corpus. I AA 121-32. Appellant alleged two additional grounds in his supplement asserting arguments for ineffective assistance of counsel and the

lifetime supervision statutes in conjunction with each other as being unconstitutionally vague. I AA 121-32. On June 13, 2016, the State filed its Response. I AA 136-47.

An evidentiary hearing was granted for Appellant's first petition and heard on July 6, 2017. I AA 148-49. The Appellant, Gamage, and two of Appellant's trial counsel, Melinda Weaver and Marjorie Kratsas, appeared at the hearing. I AA 148-49. The district court denied all relief by way of its Findings of Fact Conclusions of Law and Order issued April 22, 2017. II AA 277.

On May 11, 2018, Appellant filed a Pro Se Motion to Withdraw Counsel. On June 4, 2018, the motion was granted. II AA 290-92.

On October 25, 2018, Appellant filed a Pro Se Motion to Modify Sentence. II AA 294-303. On November 1, 2018, Appellant filed a Pro Se Motion to Correct Illegal Sentence. II AA 294. On November 20, 2018, the State filed its Opposition to Defendant's Motion for Modification of Sentence and Motion to Correct Illegal Sentence. II AA 304-08. On November 26, 2018, the court denied the motions. II AA 309-10. The court's written order was filed on January 9, 2019. II AA 309-10.

Appellant did not file anything related to his case until 2022. Appellant asserts that Gamage assured him if they lost the action at the 2017 evidentiary hearing that Gamage would file an appeal. II AA 412-14. Appellant alleges that after his attempts to contact Gamage regarding his appeal fell through, that he filed his second notice

of appeal on his own on May 26, 2022. II AA 316-18. This Court dismissed the initial appeal as untimely on June 16, 2022, as it was entered over five years after time to file a notice of appeal had expired. II AA 333-34. A remittitur was then filed on August 1, 2022. II AA 335-36.

Once obtaining the remittitur from his second appeal, district court appointed counsel to assist Appellant with a second petition for writ of habeas corpus that was later filed on August 2, 2022. II AA 386-410. The court denied all relief and on October 12, 2022, issued its Findings of Fact, Conclusions of Law and Order finding the petition as untimely as it was filed over eight years past the statutory expiration date. II AA 435-448. In its Order denying the petition, the court reiterated that Appellant was properly canvassed on the circumstances surrounding his plea. II AA 446. The court also highlighted how Appellant's plea agreement contained specific provisions informing him of the psychosexual evaluation and sex offender registration requirements. II AA 446.

After the denial of his second habeas petition, Appellant filed the instant third appeal to argue ineffective assistance of post-conviction counsel to allow him to argue the matters in his second late filed appeal.

The Appellant later filed his opening brief on February 28, 2023. Opening Brief. The State responds as follows.

/ / /

SUMMARY OF THE ARGUMENT

The district court correctly denied Appellant's Second Petition. Appellant fails to overcome the procedural bars. Appellant's Second Petition is time barred as it was filed eight years past the date for filing habeas petitions had elapsed. In addition, Appellant is not entitled to reargue matters previously decided by the Nevada Supreme Court and the district court to establish good cause to hear his late filing. Appellant attempts to overcome the procedural bars through alternate good cause by asserting an improper ineffective assistance of counsel argument for his post-trial proceedings. Appellant also argues that he will be prejudiced by not being allowed to argue his appeal, but the claims in his appeal lack merit and are belied by the record.

The Nevada Supreme Court has held that an Appellant is not entitled to effective assistance of counsel in post-conviction proceedings if they are not appointed by mandate. In addition, Appellant argues that his prior counsel failed to file a timely appeal on his initial petition for habeas corpus which allowed for time to lapse by the time he filed his appeal. Despite being time barred, Appellant attempts to assert that this Court should overturn its prior rulings that prevent post-conviction ineffective assistance of counsel arguments in noncapital cases. Appellant advocates for the use of ineffective assistance of counsel arguments for collateral initial review proceedings to assert cause for a procedural default through

federal case law. Yet, Appellant does not argue that any procedural default occurred at his proceeding, only that his Counsel did not file a direct appeal following the proceeding. Thus, Appellant does not even meet the standard that he advocates for this Court to adopt.

Appellant also argues that allowing for his petition to move forward would not frustrate the time requirement for habeas petitions in NRS 34.726(1) as he has not filed successive petitions in abuse of the statute. However, Appellant has already filed three appeals and two petitions in this case over the span of the nearly nine years since his conviction, and over eight years since the time to file petitions expired. Appellant's successive and delayed requests for constant review of this case have been in line with exactly what the statute sought to prevent.

Finally, Appellant attempts to argue that he will suffer prejudice if he is unable to appeal the district court's decision because he was not fully informed by his plea counsel regarding its consequences and the strength of his case. However, Appellant's argument is belied by the record. The record demonstrates how Appellant was thoroughly canvassed by the district court and how counsel spoke with him at length regarding his plea and the evidence in their possession. Accordingly, as Appellant was time barred from asserting his petition and cannot demonstrate good cause or sufficient prejudice to overcome the procedural bars, this Court should affirm the district court's ruling.

ARGUMENT

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 supported by substantial evidence and are not clearly wrong. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). While this Court gives deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, this Court reviews the district court's application of the law to those facts de novo. Id.

I. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT'S SECOND PETITION IS TIME BARRED.

Appellant's Second Petition is time-barred and lacks good cause or prejudice to explain the delay. Under 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). 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 filed. 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 applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two 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. Further, the district courts have a duty to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has 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., at 231, 112 P.3d at 1074.

In addition, the Court held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars. 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 Id., 121 Nev. at 231, 112 P.3d at 1074.

Here, Appellant had until January 9, 2016, to file any habeas petitions in compliance with NRS 34.726(1). II AA 439. Initially, the Appellant filed a petition on January 16, 2015. I AA 96-119. The petition was argued by evidentiary hearing on July 6, 2017, where the appellant and his previous counsel, William H. Gamage, were both present with the Court denying all relief. II AA 277-89. Appellant alleges how Gamage assured him if relief was denied at the hearing, Gamage would file an appeal. II AA 412-14. For over four years, Appellant and his Counsel neither filed an appeal nor any additional habeas petitions. Appellant then filed his second appeal pro per on May 26, 2022. II AA 316-18. The Nevada Supreme Court later dismissed the action on June 16, 2022, with an August 1, 2022, remittitur later issued. II AA 333-36. Appellant filed a second habeas petition on August 2, 2022, that was denied by the District Court on October 12, 2022, with the instant appeal filed on October 12, 2022. II AA 435-53. Thus, Appellant's petition is eight years past the one-year deadline and was properly time barred.

II. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANT COULD NOT OVERCOME HIS PROCEDURAL BARS.

A. Appellant cannot demonstrate good cause sufficient to overcome his procedural bars.

Appellant's failure to prove good cause or prejudice requires the dismissal of his Petition. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. See Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003).

"A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem, 119 Nev. 615, 621, 81 P.3d 521, 525, rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default,

whereas a finding by Supreme Court that a defendant was suffering from Multiple Personality Disorder was). 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." Id. (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)).

The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture good cause[.]" 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. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at 197, 275 P.3d at 95, footnote 2). 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. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

i. Appellant cannot assert "good cause" through his appeal to re-argue his first petition.

Appellant files the instant appeal rearguing several of the claims made in his first petition for habeas corpus. Opening Brief. However, these claims lack merit and do not support a finding of good cause to hear Appellant's late filed petition. Appellant argues multiple ineffective assistance of counsel claims. Opening Brief, at 30-33. First, Appellant argues that his initial counsel failed to provide him proper knowledge on the consequences of his plea and the strength of the evidence of his case. Opening Brief, at 30-33. However, the Nevada Supreme Court has held that even when a post-conviction matter is timely appealed, good cause is not found if the claims of said case have been shown to lack merit. McKague v. Whitley, 112 Nev. 159, 165, 912 P.2d 255, 259 (1996), (Instance where the Nevada Supreme Court held that it would not have mattered if the appellant's post-conviction counsel had timely appealed, as the appellant's claim lacked merit).

In the decision denying Appellant's first petition, the district court concluded that Appellant's substantive claims were not meritorious. I AA 278-289. And the district court has twice held in its findings of fact that the record reflects Appellant was properly canvassed by the district court regarding his plea. I AA 278-289; II AA 435-449. The district court has also held that Appellant's attorney discussed Appellant's plea and the evidence of his case at length with him. I AA 278-289; II AA 435-449. In addition, the Nevada Supreme Court properly affirmed the Appellant's conviction regarding these matters on December 11, 2014. I AA 93-95.

Thus, the district court did not err in dismissing the second successive petition as it failed to allege new or different grounds for relief. And, as a result, does not support good cause.

Second, Appellant asserts that after having attempted to argue his first ineffective assistance claim, that counsel for his first petition was ineffective by failing to file a subsequent appeal. Opening Brief, at 30-33. However, as evidenced by the record, the district court had already held twice and the Nevada Supreme Court having already affirmed once that Looper's initial claims were not meritorious. I AA 278-289; I AA 93-95; II AA 435-449. Appellant also does not argue where the district court erred in making their decision, only that the district court should reverse existing case law to better his position to assert good cause. Opening Brief, at 16. Therefore, the district court's ruling should thus be upheld as Appellant's duplicitous and meritless claims do not warrant good cause to overcome the procedural bars.

ii. Appellant cannot assert ineffective assistance of counsel to argue good cause for his delay in filing.

Appellant alleges that Gamage, who represented him for his first Petition for Writ of Habeas Corpus failed to file an appeal of the court's denial of the Petition as they had discussed. Opening Brief, at 9. However, an ineffective assistance of

counsel argument is not proper at this stage of the proceedings. And Appellant had no right to effective counsel as it was not mandated.

Appellant was not entitled to effective assistance of counsel in his post-conviction proceedings. The Nevada Supreme Court has "consistently held that the ineffective assistance of post-conviction counsel in a noncapital case may not constitute 'good cause' to excuse procedural defaults." Brown v. McDaniel, 130 Nev. 565, 569, 331 P.3d 867, 870 (2014) (citing McKague v. Warden, 112 Nev. 159, 163–65, 912 P.2d 255, 258 (1996)); (Crump v. Warden, 113 Nev. 293, 303 & n. 5, 934 P.2d 247, 253 & n. 5 (1997)). "This is because there is no constitutional or statutory right to the assistance of counsel in noncapital post-conviction proceedings, and '[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel.'" Id. at 569, 331 P.3d at 870 (quoting McKague, 112 Nev. at 163–65, 912 P.2d at 258. Moreover, Appellant was not entitled to an appeal from the denial of his post-conviction petition. "Trial counsel is ineffective if he or she fails to file a direct appeal" after a defendant has requested or expressed a desire for one—not an appeal from a Petition for Writ of Habeas Corpus. See Hathaway, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003). Further, the "right to effective assistance of counsel arises only if that counsel was appointed pursuant to a statutory mandate. Crump, 113 Nev. 293, 934 P.2d 247 (1997). This right does not arise if the counsel was appointed pursuant to the court's discretion." Id.

Here, Appellant filed a direct appeal on May 6, 2014, and the Supreme Court affirmed his Judgment of Conviction on December 11, 2014. I AA 93-95. In addition, Appellant's counsel was not appointed by statute, but instead by the discretion of the Court. II AA 366-67. Thus, Appellant was neither entitled to an appeal, nor effective assistance of counsel after his Petition was denied. As such, his ineffective assistance of counsel claim for failing to file an appeal cannot be used to establish good cause.

iii. This Court should reject Appellant's argument for the Court to overturn its previous rulings so he may establish good cause.

Appellant argues that this Court should overturn its previous rulings so that he may assert an ineffective assistance of counsel claim to support good cause for filing his untimely petition. Opening Brief, at 16. Not only would allowing counsel to proceed with his argument overturn long standing precedent, but Appellant also lacks the standing necessary to meet the standard he suggests that this Court adopt. See Brown, 130 Nev. 565, 569, 331 P.3d 867, 870; see also Burns v. State, 523 P.3d 1101 (2023) (Instance where this Court upheld the precedent of Appellants not being entitled to effective counsel in noncapital post-conviction matters); Pitrello v. State, 508 P.3d 885 (2022) (Case where this Court upheld the standard set in Brown and affirmed the district's court's ruling of a petition filed as untimely after an appellant filed a petition one year after the date of expiration); Slaughter v. State, 504 P.3d

523 (2022) (Where this Court upheld and failed to reconsider Brown as it had been "correctly decided.").

Appellant asserts how this Court's precedent in Brown, 130 Nev. 565, 569, 331 P.3d 867, 870, for not accepting ineffective assistance of counsel arguments in post-conviction noncapital cases to constitute good cause, should be overturned to better reflect the holding in Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012). Martinez, 566 U.S. 1, 5, 132 S. Ct. 1309, 1313 182 L. Ed. 2d 272, permits a petitioner to assert a claim for ineffective assistance of counsel in a federal post-conviction collateral initial review proceeding to establish "cause" to excuse a procedural default. However, this Court has interpreted Martinez's procedural carve out exception to not apply to Nevada State Courts and only holds an exception in instances for capital cases where counsel is mandated by statute. Brown, 130 Nev. 565, 572, 331 P.3d 867, 872.

Assuming arguendo that Appellant's Martinez, 566 U.S. 1, 5, 132 S. Ct. 1309, 1313 182 L. Ed. 2d 272, argument is entertained, Appellant does not assert that any procedural defect occurred at his collateral review proceeding. Unlike in Martinez, where the petitioner's postconviction counsel did not raise an ineffective assistance of counsel claim in the first collateral proceeding, Applicant's counsel presented these arguments in the supplement for the initial habeas petition. I AA 121-32. And Applicant's counsel continued to defend Applicant's position at an evidentiary

hearing on this matter. I AA 148. At no point in the record does it indicate that Appellant's counsel caused a procedural defect in respect to Appellant's first habeas petition, nor does the Appellant argue this position in his Opening Brief. Thus, this Court should reject Appellant's argument based on its previous precedent and for not meeting the standard that Appellant suggests.

iv. This Court should reject Appellant's argument that allowing his untimely petition to proceed would not violate the spirit of NRS 34.736(1).

Appellant also argues how the habeas petition time limit in NRS 34.736(1) was created to evade perpetual filings for petitions of relief, and how the record demonstrates that he has not made perpetual filings that violate the spirit of the statute. Opening Brief, at 20-24. Yet, Appellant has already filed three appeals and two petitions for writs of habeas corpus for this matter. I AA 93-95; I AA 96-119; II AA 316-18; II AA 389-411; II AA 451-53. And this Court has continuously held "habeas corpus petitions that are filed many years after [a] conviction a[s] an unreasonable burden on the criminal justice system," and a "workable system dictates that there must exist a time when a criminal conviction is final." Riker, 121 Nev. 225, 234, 112 P.3d 1070, 1076; see also Rippo v. State, 134 Nev. 411, 420, 423 P.3d 1084, 1096, amended on denial of reh'g, 432 P.3d 167 (2018) (where this Court reiterated the importance of obtaining a time when a conviction is final); Homick v. State, 127 Nev. 1142, 373 P.3d 923 (2011) (Where this Court upheld a district court

decision to find a petition untimely after it had been filed three years after the date of expiration). The district court entered Appellant's conviction nearly nine years prior and it has been eight years since the time limit for requesting a habeas petition expired. I AA 91-95. With this Court reviewing its third appeal stemming from a duplicative habeas petition, and the length of time since the initial conviction was entered, this Court should not entertain Appellant's argument.

B. Appellant cannot demonstrate prejudice sufficient to overcome procedural bars.

Appellant fails to demonstrate that he was prejudiced by being unable to appeal the denial of his Petition because his claims lack merit. "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 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. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

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). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "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. The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). "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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

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, 1011-1012, 103 P.3d 25, 32-33 (2004). Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)). This analysis does not indicate 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." Donovan, 94 Nev. at 675, 584 P.2d at 711. The role of a court in considering alleged 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." Id. 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.

The Strickland analysis does not "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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). 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). "Counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments." Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "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). 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 Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means, 120 Nev. 1001, 1012, 103 P.3d 25, 33. Further, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] **must** allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing 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.

Here, Appellant cannot demonstrate prejudice in being unable to appeal the district court's decision because the district court properly denied his Petition. Appellant claims that his plea counsel, Marjorie E. Barbeau, Esq., rendered ineffective assistance because she failed to fully inform him of (1) the nature and requirements of sex offender registration; (2) the consequences and procedural aspects of lifetime supervision; (3) the requirement that he undergo a medical and mental health assessment in order to be eligible for parole; and (4) the strength of the evidence in his case. Opening Brief, at 30-31.

In its Order denying the Appellant's first Petition, the district court explained that Appellant was canvassed on whether he understood that he would be subject to sex offender registration, lifetime supervision, and a psychosexual evaluation. II AA 283. Further, Appellant's plea agreement contained specific provisions informing him of the psychosexual evaluation and sex offender registration requirements. II AA 284. Moreover, Ms. Barbeau testified at the evidentiary hearing that she went to the Clark County Detention Center and met with Appellant to go through not just his file at length, but all the evidence and the Guilty Plea Agreement. II AA 284. Finally, Ms. Barbeau also testified that she recalls speaking with Appellant about sex offender registration and lifetime supervision. II AA 284. Thus, the district court

properly denied Appellant's claims as they were belied by the record. Accordingly, Appellant cannot show that he was prejudiced by his inability to appeal the denial of his habeas petition because his claims lack merit. As Appellant has failed to show good cause or prejudice sufficient to overcome his procedural bar, this Court should uphold the district court's holding.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the district court's denial of Appellant's Second Petition.

Dated this 24th day of March, 2023.

Respectfully submitted,

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
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 5,863 words and 25 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 24th day of March, 2023.

Respectfully submitted

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

BY */s/ Alexander Chen*
ALEXANDER CHEN
Chief Deputy District Attorney
Nevada Bar #010539
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 24th day of March, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

DIANE C. LOWE, ESQ.
Counsel for Appellant

ALEXANDER CHEN
Chief Deputy District Attorney

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

AC/Tanner Castro/jh