IN THE SUPREME COURT OF THE STATE OF NEVADA

DAINE CRAWLEY,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 85884

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is appropriately retained by the Nevada Court of Appeals pursuant to NRAP 17(b)(3) and (7), because it is a postconviction appeal that challenges a category C felony.

STATEMENT OF THE ISSUE(S)

1. Whether the Petition for Writ of Habeas Corpus was procedurally barred.
2. Whether Appellant entered into the plea agreement knowingly and voluntarily based on the totality of circumstances.
3. Whether Appellant received effective assistance of counsel at sentencing.
4. Whether Appellant was entitled to an evidentiary hearing.

STATEMENT OF THE CASE

On July 12, 2019, DAINE ANTON CRAWLEY (hereinafter "Appellant"), was charged by way of Information with Count 1 – Carrying Concealed Firearm or Other Deadly Weapon (Category C Felony – NRS 202.350(1)(d)(3) – NOC 51459) in District Court case C-19-341735-1. 3 Appellant's Appendix (AA) 679. On July 15, 2019, Appellant entered into a Guilty Plea Agreement ("GPA") and was released on his own recognizance. Id. 679 – 80. Pursuant to the GPA, Appellant agreed to plead guilty to one count of Carrying Concealed Firearm or Other Deadly Weapon, and the State would retain the right to argue at sentencing. Appellant was then released on his own recognizance.

Appellant was then arrested on August 9, 2019, and charged by way of Information on August 28, 2019, with Count 1 – Grand Larceny (Category C Felony – NRS 205.220(1), NRS 205.222(2) – NOC 56004) in C-19-342881-1. Id. 680. Then Appellant filed a Motion to Dismiss Counsel, Erika Ballou, on October 28, 2019, in the instant case. Id. On November 13, 2019, Ms. Ballou moved for the withdrawal of the GPA and advised there was incorrect information in the Presentence Investigation Report ("PSI") and that another evaluation has to be done. Id. The Court ordered Carl Arnold to be appointed as counsel for the limited basis of the Motion to Withdraw Plea. Id. On November 19, 2019, the State filed a Notice of Intent to Seek Punishment as a Habitual Criminal. Id.

On January 31, 2020, Appellant filed a Motion to Withdraw Plea. Id. The State filed its Opposition on February 14, 2020. Id. On February 19, 2020, the District Court heard oral arguments on the motion. Id. The Court concluded that there was an insufficient basis to withdraw the plea and denied the motion. Id.

On March 4, 2020, Appellant's sentencing hearing took place. Id. At the hearing, the State argued in support of Habitual Treatment since he violated his agreement. Id. Defense counsel provided that there were errors within Appellant's PSI. Id. The Court ordered that the sentencing proceedings be continued to correct the PSI. Id.

A Supplemental Presentence Investigation Report ("SPSI") was filed March 24, 2020, indicating that the Division found no errors in the original PSI. Id. Appellant was sentenced on April 1, 2020, under the small habitual criminal statute to the Nevada Department of Corrections for a maximum of two hundred forty (240) months with a minimum parole eligibility of eighty-four (84) months. Id. Appellant then filed a pro per Notice of Appeal on April 6, 2020, prior to the Judgement of Conviction being entered into on April 7, 2020. Id.

On May 11, 2020, Carl Arnold was appointed as appellate counsel. Id. Appellant's Opening Brief was filed in case 81011 on October 12, 2020. Id. The Respondent's Answering Brief was filed on November 12, 2020. Id. Appellant then filed a Motion to Dismiss Counsel on December 28, 2020. Id. The motion was denied

on January 8, 2021, by the Nevada Supreme Court. Id. 680 – 81. On April 14, 2021, the Court of Appeals of the State of Nevada affirmed the judgement of conviction and issued remittitur. Id. 681.

Amidst the pending direct appeal, Appellant filed his first pro per Petition for Writ of Habeas Corpus ("First Petition") on June 4, 2020, commencing case A-20-816041-W. Id. Appellant then filed his second pro per Petition for Writ of Habeas Corpus ("Second Petition") on June 12, 2020. Id. The State responded to the two petitions on July 21, 2020. Id. On August 19, 2020, the District Court granted Appellant's request to have counsel appointed.

After counsel was already appointed pursuant to his request, Appellant then filed yet another a pro per Supplemental Petition for Writ of Habeas Corpus ("Third Petition") on March 18, 2021. Id. The State filed its response on May 6, 2021. Id. The District Court denied this petition due to it being procedurally barred and a fugitive document on May 25, 2021, and the Findings of Fact, Conclusions of Law, and Order was filed July 22, 2021. Id.

Appellant then filed his second pro per Notice of Appeal on June 24, 2021, commencing case 83136. Id. On July 8, 2021, Appellant filed a pro per Motion to Withdraw of Counsel. Id. On August 12, 2021, Appellant filed his Proper Person Informal Brief, and the Nevada Supreme Court transferred the case to the Court of Appeals. Id. The State filed its Respondent's Answering Brief in 83136-COA on

January 13, 2022. Id. The Court of Appeals issued an Order of Reversal and Remand on February 3, 2022. Id. The Court of Appeals found that the District Court erred in denying relief on the grounds that Appellant did not challenge the validity of his guilty plea or raise claims of ineffective assistance of counsel because Appellant did have allegations that trial-level counsel was ineffective and complaints about counsel's performance. Id. In addition, the District Court erred in denying relief on the grounds that the final pleading was a fugitive document because the record conflicts in appointing Roger Bailey or Carl Arnold. Id. The Court of Appeals ordered that Appellant be appointed replacement postconviction counsel. Id.

On March 29, 2022, Diane Lowe was appointed. Id. Appellant through his counsel filed the instant Defendant's Supplemental Brief in Support of Petition for Writ Of Habeas Corpus ("Supplemental Petition") on August 26, 2022. Id. In addition, Appellant filed the Declaration of Daine Crawley on September 7, 2022, with his original signature. Id. The State filed its response on October 10, 2022. Id. 681 – 82. Appellant then filed a Motion for Leave to File Motion for Additional Sentence Credit on November 23, 2022. Id. 682.

On November 28, 2022, the Court held a hearing and denied Appellant's First, Second, Third, and Supplemental Petitions for Writ of Habeas Corpus. Id. On December 6, 2022, the Court filed a Finding of Facts, Conclusions of Law and Order

denying Appellant's Petitions. 2 AA 350 – 56. The Court filed an Amended Findings of Fact, Conclusion of Law and Order on December 21, 2022. 3 AA 679 – 98.

On January 9, 2023, Appellant filed a Motion for Leave to Add Verified Nevada Behavior Health Records to Record and a Motion for Leave to File Motion for Additional Sentence Credit. Id. 721. On the same day both motions were granted by the Court. Id. On February 13, 2023, Appellant filed a Motion to Amend the Judgement of Conviction by Adding 199 Day of Additional Sentence Credit. 3 AA 700 -01.

On December 21, 2022, Appellant filed a Notice of Appeal, and on April 26, 2023, Appellant filed the instant Opening Brief.

STATEMENT OF FACTS

On June 12, 2019, officers were dispatched to a location between the Excalibur and the Luxor in reference to a person threatening pedestrians with a knife. 3 AA 682. Upon arrival, contact was made with a witness who stated he was walking with his friend through the hotel parking lot when they were approached by a male, later identified as Appellant, who got in his face and made unintelligible comments while retrieving a knife from his backpack. Id. The witness felt threatened by the Appellant who held the knife in his hand with the blade exposed. Id. He stepped away from the Appellant who then approached a vehicle with three occupants and

attempted to open the door before the car drove away. Id. As the Appellant walked to another vehicle and hit the window, the witness notified police and security. Id.

Officers also spoke to the witness' friend who relayed the same events as described by the witness. Id. While the Appellant was being detained, he stated that he did not have a knife; however, officers located a knife in his pocket. Id.

Based on the above facts, Appellant was arrested, transported to the Clark County Detention Center, and booked accordingly. Id.

SUMMARY OF THE ARGUMENT

The District Court did not err in denying Appellant's petition for writ of habeas corpus, post-conviction. Appellant's petition was procedurally barred without evidence of good cause because it raised issues that would have appropriately been decided in a direct appeal.

Appointed counsel was also not ineffective in attempting to have Appellant's plea withdrawn. Pursuant to State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000), Appellant knowingly and voluntarily entered into the plea agreement. Furthermore, Appellant received effective assistance of counsel at sentencing. Finally, Appellant should not have been granted an evidentiary hearing.

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ARGUMENT

I. STANDARD OF REVIEW

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

II. THE DISTRICT COURT PROPERLY FOUND THAT THE ISSUES RAISED IN APPELLANT'S PETITIONS FOR WRIT OF HABEAS CORPUS WERE PROCEDURALLY BARRED.

Initially, Appellant has failed to address the procedurally barred nature of his habeas petitions in his Appellant's Opening Brief (AOB). The District Court here ruled that the issues that Appellant raised were barred pursuant to NRS 34.810 because he wished to raise issues that would have been appropriately raised in a direct appeal. 3 AA 683. His failure to do so amounts to an admission that the decision below was correct. See, Polk v. State, 126 Nev. 180, 184-86, 233 P.3d 357, 360-61 (2010) (finding confessed error by failing to address a material issue);

Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is Appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Further, Appellant should be barred from addressing good cause in any reply since to do so would allow him to short circuit the adversarial process by denying Respondent any opportunity to respond. This Court should not tolerate such litigation practices. See, Righetti v. Eighth Judicial District Court, 133 Nev. 42, 47, 388 P.3d 643, 648 (2017) (declining to adopt a rule in a capital case that "rewards and thus incentivizes less than forthright advocacy").

A. Application of procedural bars is mandatory.

The Nevada Supreme Court has held that courts have a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. Id. The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

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

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

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

B. The petitions were beyond the scope of habeas.

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .

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

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Further, substantive claims are beyond the scope of habeas and waived. 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).

A defendant may only escape these procedural bars if they meet the burden of establishing good cause and prejudice:

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of error upon direct appeal, the district court is not obliged to consider them in post-conviction proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

The District Court held that the grounds Appellant brought in his previous petitions were proper only for a direct appeal, and thereby, waived. 3 AA 693. In his second petition, Appellant presented three (3) grounds to the Court: (1) violation of his due process rights; (2) errors in his SPSI; and (3) violation of a court administrative order[1]. Id. In addition, Appellant presented four (4) grounds to the Court in his Third Petition: (1) violation of his due process rights; (2) errors in his SPSI; (3) violation of a court administrative order; and (4) error in adjudication as a habitual criminal. Id. Appellant does not challenge the validity of a guilty plea and/or raise claims of ineffective assistance of counsel. Id. Thus, the issues Appellant raised in his prior petitions were improperly brought before the Court. As such, these

[1] Appellant's claims brought in his First Petition are not mentioned in AOB.

substantive claims are proper only on direct appeal and are procedurally barred, and the district court properly held that these claims should be denied.

C. Appellant failed to demonstrate both good cause and prejudice to overcome the procedural bars.

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

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added); see Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003); Pellegrini, 117 Nev. at 887, 34 P.3d at 537. "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

v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003). The Court continued, "petitioners cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by state officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. 192, 198 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Additionally, "bare" and "naked" allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A 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. Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

The District Court found Appellant was unable to demonstrate prejudice sufficient to ignore his procedural defaults. 3 AA 697. Further, all facts and law necessary were available for Appellant to bring these claims in a direct appeal. Therefore, the district court did not err in finding that Appellant had failed to show good cause to overcome the procedural bars.

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III. APPELLANT ENTERED INTO HIS PLEA KNOWINGLY AND VOLUNTARILY.

A. Totality of the circumstances – habitual agreement

To the District Court, Appellant argued that his counsel failed to fully advise him of his plea, and that his second counsel did not effectively argue his motion to withdraw his plea. Appellant now argues that the District Court erred in finding Appellant knowingly and voluntarily entered into the plea agreement because it did not account for the totality of the circumstances. AOB 29.

Guilty pleas are valid if both 'voluntary' and 'intelligent. Brady v. United States, 397 U.S. 742, 747, 90 S. Ct. 1463, 1468, 25 L. Ed. 2d 747 (1970). A guilty plea must be both knowing and voluntary, because it waives constitutional right to jury trial, right to confront one's accusers, and privilege against self-incrimination. Parke v. Raley, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992). The guidelines for voluntariness of guilty pleas require only that the record affirmatively show that the defendant entered his plea understandingly and voluntarily. Crawford v. State, 117 Nev. 718, 722, 30 P.3d 1123, 1126 (2001) (overruled on other grounds). A guilty plea is knowing and voluntary if the defendant "has a full understanding of both the nature of the charges and the direct consequences arising from a plea of guilty." Rubio v. State, 124 Nev. 1032, 1038, 194 P.3d 1224, 1228 (2008). To determine the validity of the guilty plea, we require the district court to look beyond the plea canvass to the entire record and the totality of the circumstances. Id. The appellate

court will not invalidate a plea as long as the totality of the circumstances, as shown by the record, demonstrates that the plea was knowingly and voluntarily made and that the defendant understood the nature of the offense and the consequences of the plea. Freese, 116 Nev. at 1105, 13 P.3d at 448; Molina v. State, 120 Nev. 185, 191, 87 P.3d 533, 537-38 (2004) ("A thorough plea canvass coupled with a detailed, consistent, written plea agreement supports a finding that the defendant entered the plea voluntarily, knowingly, and intelligently." Freese, 116 Nev. at 1105, 13 P.3d at 448.

The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. Brady, 397 U.S. at 744, 90 S. Ct. at 1467, 25 L. Ed. 2d 747.

Appellant's plea agreement, combined with the plea canvass conducted by the District Court, establishes by totality of the circumstances that Appellant's guilty plea was the result of a voluntary and informed choice. Prior to accepting the guilty plea, the District Court, in addition to reviewing the guilty plea agreement, conducted the following canvas of Appellant:

> THE COURT: I have a guilty plea agreement which indicates that Mr. Crawley will plead guilty to carrying concealed firearm or other deadly weapon, a C felony.

THE DEFENDANT: Yes, ma'am.

THE COURT: Thank you. The State retains the right to argue at sentencing and the State will not oppose an O.R. release after entry of plea. Counsels, is that accurate?

[DEFENSE COUNSEL]: Yes, Your Honor.

[THE STATE]: Yes, Your Honor.

THE COURT: And, Mr. Crawley, is that your understanding of the negotiations?

THE DEFENDANT: Yes, ma'am.

THE COURT: What is your true full name please?

THE DEENDANT: Daine Anton Crawley.

THE COURT: And how old are you?

THE DEFENDANT: Thirty-three.

THE COURT: How far have you've gone in school?

THE DEFENDANT: Graduate.

THE COURT: From high school?

THE DEFENDANT: High school, I'm sorry, yes.

THE COURT: That's okay. Do you read, write and understand the English language?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you taking any medications or suffering any medical conditions that would interfere with your ability to understand the proceedings or the terms of your agreement?

THE DEFENDANT: No, ma'am.

THE COURT: Do you understand you're being charged with carrying concealed firearm or other deadly weapon, a C felony?

THE DEFENDANT: Yes, ma'am.

THE COURT: How do you plea to that charge, guilty or not guilty?

THE DEFENDANT: Guilty, ma'am.

THE COURT: Is anybody forcing you to plead guilty?

THE DEFENDANT: No, ma'am.

THE COURT: Are you pleading guilty of your own free will?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand as a consequence of your plea, the Court may sentence you to minimum of one year and maximum of five years in the Nevada Department of Corrections and may fine you up to ten thousand dollars?

THE DEFENDANT: Yes, ma'am.

THE COURT: And do you understand that you'll be required to pay administrative assessment fees?

THE DEFENDANT: Yes, ma'am.

THE COURT: I have the original Guilty Plea Agreement, did you read through it?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you understand it?

THE DEFENDANT: Yes, ma'am.

THE COURT: And was your attorney available to answer any questions you had regarding the agreement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Are you satisfied with the services of your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you sign the agreement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Is this your signature on page 5?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you sign it freely and voluntarily?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that by entering your guilty plea, you're giving up the constitutional rights listed in the Agreement?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you understand that if you're not a U.S. citizen you may be deported based on your guilty plea?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you discuss the case and your rights with your attorney?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you have any questions?

> THE DEFENDANT: No, ma'am.
>
> THE COURT: Are you pleading guilty because in truth and in fact on or about June 12th, 2019 in Clark County Nevada, you willfully, unlawfully and feloniously carry concealed upon your person, a firearm or other deadly weapon, that being a knife?
>
> THE DEFENDANT: Yes, ma'am.
>
> THE COURT: I will accept your plea as being freely and voluntarily entered…

1 AA 31 – 34. With respect to Appellant's GPA it states in relevant part:

> "The State retains the right to argue at sentencing" … "I understand and agree that, if I fail to interview with the Department of Parole and Probation, fail to appear at any subsequent hearings in this case, or an independent magistrate, by affidavit review, confirms probable cause against me for new criminal charges including reckless driving or DUI, but excluding minor traffic violations, the State will have the unqualified right to argue for any legal sentence and term of confinement allowable for the crime(s) to which I am pleading guilty, including the use of any prior convictions I may have to increase my sentence as an habitual criminal to five (5) to twenty (20) years, . . ."

1 AA 22-23.

Appellant argues that "though a habitual potential is stated in the plea agreement [4:1-2] he thought it was to be read in combination with the agreement that the State would not seek the habitual if he made good faith efforts to get treatment." 2 AA 426. Additionally, Appellant claims that "had he known about his proposed sentence structure and been advised fully about the plea, there is a reasonable probability he would have rejected the plea offer and requested a trial instead." Id.

Based upon the written plea agreement and Appellant's responses to the oral canvass, the District Court determined that Appellant understood the nature of his offense, the consequences of his plea, and that his plea was freely, voluntarily and knowingly made.

When Appellant entered the plea, Appellant was questioned about whether he had read and understood the agreement and he answered affirmatively to both questions. As shown above, Appellant's plea agreement provides that the State effectively reserved the right to increase his sentence as a habitual criminal. The small habitual statute states:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this State of:
> (a) Any felony, who has previously been two times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years.

NRS 207.010(1)(a) [Effective through June 30, 2020]. Appellant was eligible for such treatment because he had been convicted of seven (7) prior felonies. 1 AA 23-24, 83-85. Appellant violated habitual criminal section of his GPA when he was arrested on August 9, 2019, and charged by way of Information on August 28, 2019, with Count 1 – Grand Larceny (Category C Felony – NRS 205.220(1), NRS 205.222(2) – NOC 56004) in C-19-342881-1, less than a month after being released.

3 AA 680. Appellant's subsequent arrest gave the State the unqualified right to argue and seek habitual punishment pursuant to the plea agreement. Appellant was aware of this right as indicated when he affirmatively stated that he read and understood his plea agreement.

When Appellant was asked whether his attorney was available to answer any questions he had regarding the agreement, Appellant replied "yes ma'am." When asked whether he had any questions about the agreement Appellant stated, "no ma'am." Appellant did not assert that he was incapable of reading or understanding the agreement. The District Court accepted Appellant's guilty plea agreement after a thorough plea canvass coupled with a detailed, consistent, written plea agreement which supported a finding that the defendant entered the plea voluntarily, knowingly, and intelligently. Molina, 120 Nev. at 191, 87 P.3d at 537-38. Thus, under the totality of the circumstances Appellant entered his guilty plea knowingly and voluntarily.

Moreover, Appellant argues that, he did not know out of state convictions would count towards habitual treatment as well as gross misdemeanors qualifying as felonies. 2 AA 426. This doubt would have not made any difference to his willingness to enter the plea unless he entered the plea intending to violate the plea agreement. Had Appellant abided by the plea agreement and not been arrested, he would not have been eligible to be sentenced as a habitual criminal.

B. Totality of the circumstances – Appellant had effective counsel when entering his guilty plea agreement.

Appellant argues that "had he known about his proposed sentence structure, been advised fully about the plea, and that the State would not honor the spirit of their agreement on the habitual, he would not have taken the plea deal and instead would have instead on a jury trial." AOB 36.

A defendant is entitled to effective assistance of counsel in the plea-bargaining process, and in determining whether to accept or reject a plea offer. Lafler v. Cooper, 566 U.S. 156, 162, 132 S. Ct. 1376, 1384 (2012); see also McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970) (Constitution guarantees effective counsel when accepting guilty plea). Similarly, a "defendant has the right to make a reasonably informed decision whether to accept a plea offer." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002) (quoting United States v. Day, 969 F.2d 39, 43 (3rd Cir. 1992)). Importantly, the question is not whether "counsel's advice [was] right or wrong, but . . . whether that advice was within the range of competence demanded of attorneys in criminal cases." Id., quoting McMann, 397 U.S. at 771, 90 S. Ct. at 1449.

Further, the Nevada Supreme Court has held that a reasonable plea recommendation which hindsight reveals to be unwise is not ineffective assistance. Larson v. State, 104 Nev. 691, 694, 766 P.2d 261, 263 (1988). Similarly, the fact that a defense tactic is ultimately unsuccessful does not make it unreasonable. Id.

Lastly, while 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, the ultimate decision of whether or not to accept a plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163 (2002).

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).

Appellant was fully advised of his guilty plea agreement. Appellant claims that he was prejudiced because counsel misinformed him about the habitual treatment. AOB 36. As discussed above, Appellant affirmed at his plea canvass that he read and understood his plea agreement. The plea agreement provides that the State has the right to increase [his] sentence as a habitual criminal to five (5) to twenty (20) years. 1 AA 22-23. In addition, Appellant's GPA states, "I understand as a consequence of my plea of guilty the Court must sentence me to imprisonment in the Nevada Department of Corrections for a minimum term of not less than ONE (1) year and a maximum term of not more than FIVE (5) years." 1 AA 23. In which

Appellant signed on July 15, 2019. Id. at 5. Thus, Appellant was properly informed of the habitual treatment.

In addition, the Appellant was fully canvassed on his GPA and was asked if he understood his potential sentence. 1 AA 32-33. The District Court asked Appellant if he was satisfied with the services of his attorney, to which he answered "Yes, ma'am." Id. at 4. Thus, Appellant was properly informed about his plea agreement, knew about his proposed sentence structure, and had been advised fully about the plea.

Moreover, Appellant's claim "that the State would not honor the spirit of their agreement on the habitual," is belied by the record. "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). As discussed above, Appellant was very aware as to the terms of his guilty plea agreement. He read, understood, had an opportunity to ask his attorney questions about it, did not have any questions about the plea agreement, and signed it. Therefore, Appellant had effective assistance of counsel during his plea deal and entered into it knowingly and voluntarily. If he did enter the agreement with that understanding, it is certainly not a manifest injustice, or even a fair and just reason, to allow Appellant to withdraw his plea now, as indicated in the denial of the Motion to Withdraw Plea. 3 AA 687.

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IV. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Appellant argues that his counsel at sentencing was ineffective for failing to outline Appellant's mitigating circumstances. AOB 36-41.

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

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

the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

"There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland, 466 U.S. at 689, 104 S. Ct. at 689. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). In essence, the court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

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

and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

Appellant has not demonstrated by a preponderance of the evidence that sentencing counsel was ineffective. Appellant takes issue with the following statement the State made at sentencing which was not addressed by his counsel: "here's a fellow whose criminal felony history has spanned almost twenty years." AOB 37. It can be perceived that sentencing counsel did not correct this statement because Appellant's adult criminal history does begin in 2004. 3 AA 691. While his arrest on September 18, 2004, was for a misdemeanor DUI, his suspended sentence was revoked December 5, 2004, showing his inability to be on probation early on. Id. At the time of sentencing, Appellant's first arrest was sixteen (16) years ago, *almost* twenty (20) years.

Appellant claims that he was prejudicially affected because his counsel at sentencing did not provide mitigating documentation in support of him. AOB 37-38. Certificates of completion for all of Appellant's substance abuse programs and self-help packages were submitted to the District Court judge prior to sentencing. 1 AA 116. In addition, Appellant spoke and read a letter to the judge at length about his

situation and circumstances. 1 AA 116-120. The State rebutted by emphasizing the seven (7) previous times Appellant has received counseling. Id. at 120–21. Sentencing counsel then argued that habitual treatment was unnecessary and suggested Drug Court. Id. at 122–23. Appellant also argues that his Probation and Parole sentence recommendations would have been much lower if they had his Nevada Behavioral Health Records, and that neither the physical nor mental disability check box is marked on his supplemental PSI. AOB 39. However, Appellant was granted disability in 2016, not recently, and is convicted of grand larceny, this current offense, and another grand larceny since. 3 AA 691. His wrist was broken during an altercation while in custody in 2018 and instead of getting it fixed, he committed the instant offense, leading to his arrest, and then committed a subsequent crime between entering his plea in this case and sentencing. Id. Moreover, the Court had enough evidence regarding Appellant's behavioral health based on the records submitted to the Court by his counsel. Therefore, sentencing counsel did provide the Court with all mitigating circumstances and they were rebutted.

Appellant makes several other arguments attempting to "support" his claim of sentencing counsel's failure to mitigate. First, Appellant claims that his attorney's colleague, who knew little about his case made a "fifteen-sentence lackluster statement on his behalf" which was devastating. AOB 40. However, this claim is

vague, and Appellant does not specifically point to what statement he is referring to. Second, Appellant complains that trial counsel neglected him, asserting that the State admitted that first counsel was ineffective. Appellant does not cite anything on the record supporting this claim. Third, Appellant complains that his trial counsel failed to file a supplemental at the postconviction level and that the pro per supplemental was dismissed by the Court as a fugitive document. AOB 41. However, Appellant fails to recognize that the Court also dismissed his Petition because the Court found that Appellant should have brought the grounds in his Petition on direct appeal and therefore, they were waived. 3 AA 717. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson, 108 Nev. at, 825 P.2d at 596. 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). Thus, sentencing counsel made a strategic decision in Appellant's case that it would be futile to file such a petition. Lastly, Appellant complains that counsel did not provide transcripts for the plea and sentencing hearing in an effort to establish error at his appeal. However, there are no notable errors in Appellant's plea nor sentencing hearing transcripts. Thus, this point is irrelevant. Accordingly, Appellant did have effective assistance of counsel at sentencing.

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V. THE DISTRICT COURT DID NOT ERR IN DENYING APPELLANT AN EVIDENTIARY HEARING.

Appellant complains the District Court erred by denying his request for an evidentiary hearing. AOB 42. This claim also fails.

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

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

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A

claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002).

It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.")**.** Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). 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. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (*citing* Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

Appellant complains that he is entitled to an evidentiary hearing because he

has presented significant evidence that if true would entitle him to relief. However, Appellant is not entitled to an evidentiary hearing. Appellant's GPA shows that counsel advised him of the potential sentences he could receive. 1 AA 25-26. Furthermore, Appellant was fully informed of her sentence structure during her plea canvas. 1 AA 31-34. Although fully aware of the consequences of his plea Appellant chose to commit a new crime. Appellant was given an opportunity to improve his actions by being released on his own recognizance and chose to commit another crime. There is nothing that an evidentiary hearing would bring to light that would change this fact. Moreover, Appellant's previous request to withdraw his plea was denied. Therefore, there is no need to expand the record and no basis for an evidentiary hearing.

CONCLUSION

The State respectfully requests that this Court affirm the District Court's denial of Appellant's petition for writ of habeas corpus (post-conviction).

Dated this 25th day of May, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,481 words and 33 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 25th day of May, 2023.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 25th day of May, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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