IN THE SUPREME COURT OF THE STATE OF NEVADA

ADRIAN POWELL,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 85955

RESPONDENT'S ANSWERING BRIEF

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

COLLEEN SAVAGE, ESQ.
Nevada Bar #014947
Sgro & Roger
720 S. 7th Street, 3rd Floor
Las Vegas, Nevada 89101
(702) 384-9800

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

ADRIAN POWELL, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 85955

RESPONDENT'S ANSWERING BRIEF

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

ROUTING STATEMENT

This appeal is not presumptively assigned to the Nevada Court of Appeals because it relates to the denial of a post-conviction petition for writ of habeas corpus, concerning a plea of guilty involving one (1) Category A felony. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the Petition is procedurally barred and Appellant has failed to demonstrate good cause or prejudice to overcome the procedural bars.
2. Whether Appellant did not receive ineffective assistance of counsel.
3. Whether Appellant's plea was knowingly and voluntarily entered.
4. Whether cumulative error does not apply to ineffective assistance of counsel claims.
5. Whether Appellant is not entitled to another evidentiary hearing.

STATEMENT OF THE CASE

On November 8, 2017, Adrian Powell (hereinafter "Appellant") and his Co-Defendant Larenzo Pinkey aka, Larenzo Pinkney were charged by way of Indictment with: Counts 1 and 8 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 9 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Counts 3, 10 and 14 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165); Counts 4-7, 11-12 and 15 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); and Count 13 – Unlawful Taking of Motor Vehicle (Gross Misdemeanor – NRS 205.2715). I Joint Appendix ("JA") 0201-210.

On July 30, 2018, the State filed an Amended Indictment charging Appellant and his Co-Defendant with: Counts 1 and 8 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Counts 2 and 9 – Burglary While in Possession of a Deadly Weapon (Category B Felony – NRS 205.060); Counts 3 and 13 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165); and Counts 4-7, 10-11 and 14 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165). II JA 0285-291. The case proceeded to jury trial on July 30, 2018. II JA 0292. Voir Dire commenced on July 30, 2018. Id. The district court concluded for the day, and the

parties returned the following day to resume jury selection. Id. On July 31, 2018, the parties negotiated for hours, and the State ultimately agreed to allow both Appellant and his Co-Defendant to plead guilty. II JA 0308.

On July 31, 2018, Appellant pled guilty to Counts 1 and 8 - Conspiracy to Commit Robbery, Counts 2 and 9 - Burglary While in Possession of a Deadly Weapon, Counts 3 and 13 - First Degree Kidnapping With Use of a Deadly Weapon, and Counts 4, 5, 6, 7, 10, 11 and 14 - Robbery With Use of a Deadly Weapon. II JA 0293-307. The terms of the Guilty Plea Agreement (hereinafter "GPA") were as follows:

> The Defendants agree to plead guilty to all counts in the Amended Indictment. The State will maintain the full right to argue, including for consecutive time between the counts, however, the State agrees to not seek a Life sentence on any count. The State retains the full right to argue the facts and circumstances, but agrees to not file charges, for the following events:
>
> 1. LVMPD Event No. 170605-0220: Armed robbery at 7-Eleven located at 4800 West Washington, Las Vegas, Clark County, Nevada, on June 5, 2017.
> 2. LVMPD Event No. 170614-0524: Armed robbery at Roberto's/Mangos located at 6650 Vegas Drive, Las Vegas, Clark County, Nevada, on June 14, 2017.
> 3. LVMPD Event No. 170618-0989: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on June 18, 2017.
> 4. LVMPD Event No. 170701-0545: Armed robbery at Roberto's located at 2685 South Eastern Avenue, Las Vegas, Clark County, Nevada, on July 1, 2017.
> 5. LVMPD Event No. 170812-3809: Armed robbery at Pizza Bakery located at 6475 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 12, 2017.

6. LVMPD Event No. 170817-0241: Armed robbery at Terrible Herbst located at 6380 West Charleston Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.
7. LVMPD Event No. 170817-0470: Armed robbery at Rebel located at 6400 West Lake Mead Boulevard, Las Vegas, Clark County, Nevada, on August 17, 2017.
8. LVMPD Event No. 170824-0521: Armed robbery at Roberto's located at 6820 West Flamingo Road, Las Vegas, Clark County, Nevada, on August 24, 2017.
9. LVMPD Event No. 170824-0645: Armed robbery at Roberto's located at 907 North Rainbow Boulevard, Las Vegas, Clark County, Nevada, on August 24, 2017.
10. LVMPD Event No. 170825-0589: Armed robbery at Pepe's Tacos located at 1401 North Decatur, Las Vegas, Clark County, Nevada, on August 25, 2017.

The Defendants agree to take no position at sentencing regarding the aforementioned ten (10) armed-robbery events.

This Agreement is contingent upon the co-defendant's acceptance and adjudication on his respective Agreement.

II JA 0293-94.

On October 31, 2018, the time set for sentencing, Appellant expressed concerns about his plea, counsel was withdrawn, and new counsel, Monique McNeill, Esq., was appointed. II JA 0320. On January 14, 2019, Appellant filed a Motion to Withdraw Guilty Plea. II JA 0322-34. The State filed its Opposition on February 5, 2019. II JA 0335-56. On February 27, 2019, the district court denied Appellant's motion without conducting an evidentiary hearing. II JA 361-80.

On May 22, 2019, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – twelve (12) to forty-eight (48) months; as to

Count 2 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 1; as to Count 3 – five (5) to fifteen (15) years with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 2; as to Count 4 – thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 3; as to Count 5 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 4; as to Count 6 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 5; as to Count 7 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 6; as to Count 8 – twelve (12) to forty-eight (48) months concurrent with Count 7; as to Count 9 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 8; as to Count 10 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 7; as to Count 11 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 10; as to Count 13 - five (5) to fifteen (15) years with a consecutive term of thirty-six

(36) to ninety-six (96) months for use of a deadly weapon consecutive to Count 3; and as to Count 14 - thirty-six (36) to one hundred twenty (120) months with a consecutive term of thirty-six (36) to ninety-six (96) months for use of a deadly weapon concurrent with Count 11, with six hundred two (602) days credit for time served. II JA 0384-407. The aggregate total sentence was five hundred fifty-two (552) months maximum with a minimum parole eligibility of one hundred ninety-two (192) months. II JA 0384-407.

The Judgment of Conviction was filed on May 24, 2019. II JA 0410-13.

On June 14, 2019, Appellant filed a Notice of Appeal. On May 11, 2020, the Nevada Court of Appeals remanded the case for an evidentiary hearing to be conducted. Remittitur issued on June 5, 2020. Respondent's Appendix ("RA") 022-23. On August 13, 2020, an evidentiary hearing was conducted and Appellant's counsel Michael Kane, Esq. testified. II JA 0423-59. At the conclusion of the evidentiary hearing, the district court found that Appellant was not entitled to relief. Id. The district court found there was no ineffective assistance of counsel and no grounds or fair and just reason to withdraw Appellant's plea. Id. The Findings of Fact, Conclusions of Law and Order was filed on February 11, 2021. II JA 0465-80.

On August 10, 2021, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). III JA 0501-521. On September 14, 2021, the State filed a Response. III JA 0522-56. On October 18, 2021, the district court

appointed Julian Gregory, Esq. (hereinafter "Gregory") as counsel for Appellant. III JA 0564. On January 11, 2022, Gregory filed a Motion to Withdraw as Counsel of Record. On January 26, 2022, the district court granted the motion and appointed Colleen Savage, Esq. as counsel for Appellant. III JA 0571.

On May 27, 2022, Appellant filed a Supplement to Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Supplement"). III JA 0586-620. The State's Response was filed on August 2, 2022. IV JA 0680-717. Appellant filed a Reply on September 1, 2022. IV JA 0718-34. The district court's Order denying the Petition and Supplement was filed on December 16, 2022. IV JA 0746-51.

On January 11, 2023, Appellant filed a Notice of Appeal. IV JA 0775-804.

STATEMENT OF THE FACTS

In sentencing Appellant, the district court relied on the following factual synopsis from the Presentence Investigation Report ("PSI"), prepared on August 20, 2018:

> Records provided by the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office reflect that the instant offense occurred substantially as follows:
>
> On September 28, 2017, at approximately 0241 hours, Adrian Powell and Larenzo Pinkey, aka, Larenzo Pinkney, entered a local Pepe's Tacos. The two co-defendants were armed with semi-automatic firearms. Co- Defendant #1 approached two customers and pointed the firearm at them, ripping a necklace off of the male customer and taking the female customer's purse. Co-Defendant #2 approached the cashier at gun point and demanded money from the register. Co-Defendant #1 then grabbed the cook and escorted him to the front and forced him to

> his knees while the defendants took money from the register. The co-defendants fled from the business.
>
> On September 28, 2017, at approximately 0405 hours, the two co-defendants entered a local Walgreens, armed with semi-automatic firearms. While a clerk was stocking shelves, one of the co-defendants approached her, pointed a gun at her, and demanded she open the registers. She opened three registers and the co-defendant took money from the registers. She then led the co-defendant to the safe and opened it. He took a large amount of money from the safe. The co-defendant threatened to kill her if she did not comply. On his way out, he grabbed a bag belonging to another employee.
>
> Another employee was working in the pharmacy when the other co-defendant jumped over the counter, pointed a gun at her, and grabbed her ponytail. He demanded Xanax pills and another drug. She retrieved several bottles of Xanax and the co-defendant took them, and ordered her to open the register. She opened the register and the co-defendant took cash out and then ordered the employee to empty her pockets. The co- defendants fled from the business.
>
> Adrian Powell and Larenzo Pinkey, aka, Larenzo Pinkney were located in a stolen vehicle, arrested, and transported to the Clark County Detention Center where they were booked accordingly.

PSI, at 5.[1]

SUMMARY OF THE ARGUMENT

Appellant's habeas petition is procedurally barred as time-barred, and the application of the procedural bars is mandatory. Appellant's failure to raise substantive issues regarding the constitutionality of his convictions for both robbery and kidnapping on direct appeal means they are waived. Res Judicata bars

[1] The State has contemporaneously filed a Motion to Transmit Presentence Investigation Report with the instant Answering Brief.

Appellant's claims regarding the voluntariness of the plea and whether counsel misled him about his sentence, as the district court previously addressed them. Moreover, Appellant has not demonstrated good cause or prejudice to overcome the procedural bars. Additionally, Appellant did not receive ineffective assistance of counsel. Appellant's trial counsel was not ineffective for failing to file a futile pre-trial motion. Appellant fails to establish any conflict of interest between himself and counsel. Appellant fails to establish counsel did not conduct a thorough investigation. Appellant fails to establish counsel was ineffective for not acquiring the discovery for the dismissed cases. Appellant fails to establish trial counsel was ineffective for not raising other issues on appeal, for not calling Nelson to testify, and for not advising him of his right to file a habeas corpus petition. Furthermore, Appellant knowingly and voluntarily entered his plea of guilty, despite his claims to the contrary. Notably, cumulative error does not apply to claims regarding ineffective assistance of counsel. Finally, Appellant was not entitled to another evidentiary hearing.

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. APPELLANT'S PETITION IS PROCEDURALLY BARRED

Appellant's Petition is time-barred. The Petition was not filed within the one-year statutory limit after the Judgment of Conviction. Thus, the Petition is time-barred pursuant to NRS 34.726(1):

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

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

from a timely direct appeal is 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 (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

This is not a case wherein the Judgment of Conviction was, for example, not final. See, e.g., Johnson v. State, 133 Nev. 571, 402 P.3d 1266 (2017) (holding that the defendant's judgment of conviction was not final until the district court entered a new judgment of conviction on counts that the district court had vacated); Whitehead v. State, 128 Nev. 259, 285 P.3d 1053 (2012) (holding that a judgment of conviction that imposes restitution in an unspecified amount is not final and therefore does not trigger the one-year period for filing a habeas petition). Nor is there any other legal basis for running the one-year time-limit from the filing of the Amended Judgment of Conviction. Thus, Appellant had one year from the filing of his *original* Judgment of Conviction to file a timely petition. Absent a showing of good cause to excuse this delay, Appellant's Petition and Supplement must be dismissed.

Here, given that Appellant's Judgment of Conviction was never vacated, there is no legal basis for running the one-year time-limit from anything but the date of Remittitur. Remittitur issued on June 5, 2020. RA 022-23. Thus, Appellant had one year from June 5, 2020, to file his Petition. Appellant did not file his Petition until August 10, 2021, over two (2) months late. III JA 0501-21. Absent a showing of good cause and prejudice to excuse this delay, and noting that Appellant failed to include any argument for good cause to overcome the procedural bars, (IV JA 0749), the district court properly denied Appellant's Petition and its decision should be affirmed.

A. Application of the Procedural Bars Is Mandatory

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

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

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

B. Issues That Are Not Raised on Direct Appeal Are Waived

Appellant's substantive claims regarding the constitutionality of his convictions for both robbery and kidnapping are waived. See AOB at 19-21.

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).

NRS 34.810 (1)(a) specifically states that if a conviction was based upon a plea of guilty, the Court shall dismiss a petition if the claim is one other than "that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." As such, the only claims Appellant could raise in a Petition for Writ of Habeas Corpus must be those related to whether his plea was involuntarily or unknowingly entered, or whether he received ineffective assistance of counsel.

In reviewing a district court's ruling on a pre-sentence motion to withdraw a plea, "'this Court will presume that the lower court correctly assessed the validity of

the plea and will not reverse absent a clear showing of an abuse of discretion.'" Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (*quoting* Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)); Mitchell v. State, 109 Nev. 137, 138, 848 P.2d 1060, 1060 (1993). "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). To show that the district court abused its discretion, the defendant has the burden of proving that the district court failed to consider the totality of the circumstances when determining whether the defendant knowingly and intelligently entered the plea. Stevenson v. State, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015); Crawford v. State, 117 Nev. 718, 721-22, 30 P.3d 1123, 1125-26 (2001). This Court must give deference to the factual findings made by the district court in the course of a motion to withdraw a guilty plea as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

The district court properly denied this claim, as Appellant alleges he cannot be convicted for both kidnapping and robbery within his ineffective assistance of counsel claim. AOB at 19-21. This is a substantive claim that should have been raised on direct appeal. Therefore, it is waived, and Appellant has failed to demonstrate good cause or prejudice to overcome the procedural bars. Furthermore, Appellant unconditionally waived his right to challenge this issue:

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

II JA 0298.

Regardless, Appellant's substantive claim is meritless. A jury could have found the movement "substantially exceeds that required to complete the associated crime charged." Mendoza v. State, 122 Nev. at 274-75, 130 P.3d at 180. As such, he could have been punished for both robbery and kidnapping. Thus, Appellant's claim was properly denied and this Court should affirm.

C. Res Judicata Bars Appellant's Claims, as the District Court Previously Addressed Them

Res Judicata bars Appellant's claims regarding the voluntariness of the plea and whether counsel misled him about his sentence. See AOB at 28-31. The decisions of the district court are final decisions absent a showing of changed circumstances, and relitigation of claims is barred by the doctrine of res judicata. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's

applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

This is not Appellant's first attempt to claim that the entry of his plea was unknowingly and involuntarily. The district court previously ruled on a similar claim:

> Therefore, any claim from Petitioner that he was coerced into entering his plea is belied by the record and suitable for only summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. Any claim that Petitioner was coerced lacks merit. **Accordingly, this Court finds that Petitioner knowingly and voluntarily entered his guilty plea.** Thus, the Court finds no "the fair and just" reason to have withdrawn Petitioners guilty plea

III JA 0474 (emphasis added). Appellant then claims counsel misled him about possible sentencing ranges. The district court also denied this claim:

> Petitioner's counsel never promised him 6 to 15 years. Rather, Mr. Kane went over the Guilty Plea Agreement several times with the Petitioner. At the Evidentiary Hearing on August 13, 2020, Mr. Kane testified that he never told the Defendant he would receive 6 to 15 years. The Court found Mr. Kane's testimony to be credible. As such, Defendant's claim that he was "misled" or "convinced" to plead guilty is belied by the record and suitable only for summary of denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Id. at 0478. Appellant also reraises a claim regarding counsel's investigation of new charges which the district court also denied:

> The Defendant has not yet established that the State could not have proved the new charges with the evidence it presented to Defendant. Thus, Defendant has not established that counsel was objectively unreasonable for not further investigating the police reports and witness statements or that he was at all prejudiced by this alleged failure. Because Defendant cannot establish either Strickland prong, this claim is denied.

Appellant has already litigated these issues resulting in the denial of his claims by this Court. Further litigation violates the principles of Res Judicata. Therefore, these claims were properly denied and the district court's decision should be affirmed.

D. Appellant Has Not Shown Good Cause or Prejudice to Overcome the Procedural Bars

Appellant attempts to claim that he "experienced prejudice from the onset when he was first appointed trial counsel." AOB at 19. However, Appellant fails to demonstrate good cause to overcome the procedural bars, and his claims of prejudice are belied by the record.

To avoid procedural default under NRS 34.726 and NRS 34.810, 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 comply with the statutory requirements. See Hogan, 109 Nev. at 959-60, 860 P.2d at 715-16; Phelps, 104 Nev. at 659, 764 P.2d at 1305.

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

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

in Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

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

Additionally, in order to demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. at 960, 860 P.2d at 716 (internal quotation omitted), Little v. Warden, 117 Nev. 845, 853, 34 P.3d 540, 545.

Here, Appellant fails to include any argument for good cause. Failure to address good cause amounts to an admission that he is unable to do so. DCR 13(2); EDCR 3.20(b); Polk v. State, 126 Nev. 180, 186, 233 P.3d 357, 360-61 (2010).

Nowhere in his Petition, Supplement, or Opening Brief does Appellant address the issue of good cause. He fails to allege any impediments that necessitated bringing a claim outside of the one-year deadline. The district court found that Appellant "has not demonstrated good cause" when denying his Petition and Supplement. III JA 0749. Thus, Appellant's silence should be read as an admission that no good cause exists.

Even if Appellant did address the issue, good cause cannot be demonstrated. Appellant's claims rely upon facts that he had at his disposal. Appellant knew about the Indictment, his communications with counsel, and the ten (10) aforementioned armed robberies. Appellant had all of the facts and law available to file his Petition earlier but failed to do so. Based on this failure to properly allege good cause, the district court properly declined to consider these claims.

Additionally, in this case, Appellant cannot establish prejudice to ignore the procedural defaults because his claims are without merit and belied by the record, as will be further discussed in more detail below. "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 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). As Appellant cannot satisfy both prongs of Strickland or the

basis of his other claims, he cannot demonstrate sufficient prejudice to ignore the procedural defaults. Ultimately, the district court found Appellant to be asking for "another bite out of the apple," by ignoring the procedural bars. See IV JA 0743. Accordingly, these claims were properly denied, and the district court's decision should be affirmed.

II. APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100

Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

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). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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).

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).

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 v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, 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).

A. Counsel Was Not Ineffective for Failing to File a Futile Pre-Trial Motion

Appellant argues counsel was ineffective for failing to file a pretrial petition for writ of habeas corpus challenging the kidnapping and robbery charges.[2] AOB at 19. This Court has clarified that:

> [W]here the movement or restraint serves to substantially increase the risk of harm to the victim over and above that necessarily present in an associated offense, *i.e.*, robbery, extortion, battery resulting in substantial bodily harm or sexual assault, or where the seizure, restraint or movement of the victim substantially exceeds that required to complete the associated crime charged, dual convictions under the kidnapping and [associated offense] statutes are proper.

Mendoza v. State, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006). However, "whether the movement of a victim is incidental to the associated offense and whether the risk of harm is substantially increased thereby are questions of fact to be determined by the trier of fact in all but the clearest cases." Curtis D. v. State, 98

[2] NRS 34.810(1)(A) limits Appellant's ineffective assistance of counsel claims to those regarding his plea being "entered without effective assistance of counsel." The failure to file a pretrial petition for writ of habeas corpus is waived as it relates to an event arising before he entered the guilty plea. See Gonzalez v. State, 137 Nev. Adv. Op. 40, 492 P.3d 556, 561 (2021).

Nev. 272, 274, 646 P.2d 547, 548 (1982). As such, "the district court should deny a motion to dismiss the kidnapping charge in all but the clearest cases." Binh Minh Chung v. State, No. 73657, 2019 WL 2743766, at *3 (Nev. June 26, 2019).

The Indictment charged Appellant with the kidnappings of Chavarria, Hessing, and Bobbitt. The evidence presented at the Grand Jury proceedings established the trier of fact should determine Appellant's guilt regarding the kidnappings. Hessing and Bobbitt were forced at gunpoint to move to the register area and then to the office. I JA 0015-16; I JA 0103-06. Chavarria was forced at gunpoint from the kitchen area to the register area. I JA 0034-36. A jury could have found the movement "substantially exceeds that required to complete the associated crime charged." Mendoza v. State, 122 Nev. at 274-75, 130 P.3d at 180. As such, the facts of this case do not constitute the clearest of cases where the district court can dismiss the kidnapping charges. Accordingly, any motion would have been futile. 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, Appellant's claim was properly denied, and the district court's decision should be affirmed.[3]

[3] At the end of Appellant's argument, he claims counsel was also ineffective for failing to file other pretrial motions. AOB at 21-22. Appellant fails to make any argument to support this claim. As such, this claim fails as it is nothing more than a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, this claim was properly denied.

B. Appellant Fails to Establish Any Conflict of Interest Between Himself and Counsel

Appellant argues Roy Nelson (hereinafter "Nelson"), Esq., and Michael Kane (hereinafter "Kane"), Esq., were ineffective due to a conflict of interest. AOB at 22. A conflict of interest exists when "an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (internal quotation omitted). "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." Id., 831 P.2d at 1376.

Appellant first argues there was a conflict of interest between himself and Nelson due to Nelson's removal from other cases and participation in a diversion program. AOB at 22-23. Exhibit "X" shows that Nelson consented to a diversion program that would "remain in effect for two (2) years, from December 1, 2019, through November 1, 2021." RA 030. If Nelson breached the agreement, then his license to practice law would be suspended. RA 032.

Appellant's argument regarding Nelson's conflict fails for multiple reasons. First, Appellant entered his plea on July 31, 2018. II JA 0293-307. This is a year and four months prior to the diversion program. Secondly, pursuant to the agreement, Nelson's license to practice law was only suspended if he failed to meet certain conditions. As such, Nelson's conduct did not warrant an automatic suspension or terminate his ability to practice law. Finally, Appellant fails to show how Nelson's

personal struggles represented a conflict in this case. His removal from other cases and participation in a diversion program has no impact on his conduct in this case. As such, the district court properly denied Appellant's claim that there was a conflict of interest with Nelson and its decision should be affirmed.

Appellant then argues there was a conflict of interest between himself and Kane due to Kane experiencing a family tragedy. AOB at 23-25. Appellant attempts to fashion a rule that an attorney facing a family tragedy necessarily constitutes a conflict of interest. This is in direct opposition to the Court's statement that the "specific facts" of a potential conflict must be evaluated. Clark 108 Nev. at 316, 831 P.2d 1376. Here, the record belies any claim that Kane had divided loyalties between his personal life and his representation of Appellant. At an evidentiary hearing, Kane testified to the following: (1) he met with Appellant twice in person about the case; (2) he had fifteen (15) or more telephonic conversations with Appellant about the case; (3) he discussed the discovery with Appellant (4) he prepared and was ready for trial, and (5) he explained the plea to Appellant. II JA 0428-35, 0437-38. The record clearly shows that Kane's family tragedy did not impact his ability to represent Appellant. As such, Appellant's claim was properly denied, and the district court's decision should be affirmed.

…

…

C. Appellant Fails to Establish Counsel Did Not Conduct A Thorough Investigation

Appellant claims that trial counsel was ineffective for not conducting "any pretrial investigation for Powell's alibi, despite his insistence that he had an alibi and provided contact information for witnesses." AOB at 27-28. Appellant fails to show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064.

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

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

Moreover, a defendant is not entitled to a particular "relationship" with his attorney. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See Id.

Indeed, to establish a claim of ineffective assistance of counsel for advice regarding a guilty plea, a defendant must show "gross error on the part of counsel." Turner v. Calderon, 281 F.3d 851, 880 (9th Cir. 2002). A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel, and the burden is on a defendant to show that the plea was not voluntarily entered. Bryant, 102 Nev. at 272, 721 P.2d at 368 (*citing* Wingfield v. State, 91 Nev. 336, 337, 535 P.2d 1295, 1295 (1975)); Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

Here, the record belies any claim that counsel did not thoroughly investigate possible witnesses. Counsel testified that he did follow up on possible alibi witnesses leading up to trial:

> A [Mr. Kane]: [H]e would have – he wanted to talk to us about alibi witnesses, you know, that we checked out.
>
> …
>
> …
>
> …

> A: It goes back to what I was talking about with the alibi. You know, part of the issue when we were talking about defenses was this case, it was a tough case for him. And so, you know, going through the evidence and talking to him, I would and then I know I did, and then I'm almost a hundred percent sure Rob Lawson did as well, but if you asked him, well, listen, what's missing? What should we look for? Your alibi witness, you know, whatever. And so, we did discuss the defenses leading up to trial.

II JA 0438; 0439. No evidence in the record indicates that counsel failed to investigate witnesses. Thus, Appellant's claim was properly denied as it is belied by the record.

Even if Appellant could show deficiency, which he cannot, he makes no claims about what further investigation would have revealed. The Petition contains no mention of what an alibi witness would have testified about. As such, Appellant's failure to show what further investigation would reveal necessitates the denial of this claim.

D. Appellant Fails to Establish Counsel Was Ineffective for Not Acquiring the Discovery for the Dismissed Cases

Appellant argues counsel was ineffective for failing to acquire discovery related to the cases dismissed by the plea agreement.[4] AOB at 31. Appellant cites no law entitling him to pre-indictment discovery. The State is unaware of any Nevada case law directly addressing this issue. However, the Supreme Court of Nevada has

[4] As discussed above, the district court already ruled on this claim. As such, relitigation of this claim is barred by the doctrine of res judicata.

previously stated that a defendant maintains no constitutional right to discovery in the grand jury setting. See Mayo v. Eighth Judicial Dist. Court of State in & for Cnty. of Clark, 132 Nev. 801, 806, 384 P.3d 486, 490 (2016) ("Brady's constitutional disclosure obligation, and by extension, the presumption stated in Agurs, thus do not apply in the grand jury setting"). Certainly, a person who has no right to discovery in a grand jury setting, also has no right to discovery prior to the grand jury proceeding. As such, counsel's representation could not be deficient for failing to acquire discovery to which Appellant is not entitled.

Furthermore, counsel did review some of the evidence related to the ten (10) uncharged armed robberies:

> Q [Mr. Giordani]: Right. And you were shown some discovery on those other uncharged acts like photographs -- still shots of photographs from surveillance videos in the uncharged cases, correct?
> A [Mr. Kane]: Correct.
> Q: And we kind of pointed out, look, you can see the shoes are the exact same in some of the events and the way they all jumped, the MO is the same. Do you recall those conversations?
> A: I don't recall specifics. I recall that -- that you guys, the DA's office, you know, thought they had evidence to file.
> Q: Okay. And you recall going through some of it or at least having some understanding of there are ten other events that are potentially related and potentially could be charged after this trial occurs, correct?
> A: Yeah, that's correct. And then, in fact, after that discussion, we – Mr. Powell and I, I don't know Pinkney or Pikney, they wanted to have a conversation with all the attorneys together. And so we went back for an extended period of time.

II JA 0443-44. Not only did counsel review the evidence, but he also discussed it with Appellant. Ultimately, the decision of whether to accept the plea offer rested with Appellant. Rhyne, 118 Nev. at 8, 38 P.3d at 163. As such, Appellant's claim was properly denied and the district court's decision should be affirmed.

E. Appellant Fails to Establish Trial Counsel was Ineffective for Not Raising Other Issues on Appeal

Appellant argues counsel was ineffective for failing to raise other issues in his direct appeal. AOB at 36. By entering a plea, Appellant "unconditionally waive[ed] [his] right to a direct appeal" of his conviction. II JA 0298. He does not assert what other claims could have been raised in his direct appeal. As such, this claim fails as a naked assertion suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d.

F. Appellant Fails to Establish Trial Counsel was Ineffective for Not Calling Nelson to Testify

Appellant argues counsel was ineffective for failing to call Nelson to testify at the evidentiary hearing. AOB at 35-36. On appeal, the Court of Appeals remanded this case to the district court to conduct an evidentiary hearing regarding the following issues: (1) whether counsel advised Appellant to enter into a guilty plea without understanding the new charges and (2) whether counsel advised Appellant he would receive a sentence of approximately six (6) to fifteen (15) years. Powell v. State, No. 79037-COA, 2020 WL 2449207, at *1 (Nev. App. 2020). Appellant's

claim fails as Nelson's purported testimony related to "suspected substance abuse and overall ineffective assistance" is irrelevant to the purpose of the evidentiary hearing. AOB at 36. Counsel's advice regarding the plea was the only relevant matter at the evidentiary hearing. Kane testified about the statements made in relation to these matters. As such, Nelson's testimony was not necessary. Thus, Appellant's claim was properly denied and the district court's decision should be affirmed.

G. Appellant Fails to Establish Counsel was Ineffective for Not Advising Him of His Right to File a Habeas Corpus Petition

Appellant argues counsel did not advise him of his post-conviction rights. AOB at 35-37. Appellant fails to demonstrate that counsel had any duty to advise him of his right to file a post-conviction petition for writ of habeas corpus or file one on his behalf. This failure is fatal. Edwards v. Emperor's Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (A party seeking review bears the responsibility "to cogently argue, and present relevant authority" to support his assertions; 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 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).

Regardless, counsel had no duty to advise Appellant or file a habeas corpus petition since Appellant did not have the right to the effective assistance of counsel for habeas matters. Halbert v. Michigan, 545 U.S. 605, 610, 125 S.Ct. 2582, 2587 (2005) (The right of assistance of counsel extends only to "first appeals as of right … however, … a state need not appoint counsel … in discretionary appeals"); McKague v. Whitley, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) ("no right to effective assistance of counsel, let alone any constitutional or statutory right to counsel at all, [exists in] post-conviction proceedings").

Additionally, cannot establish prejudice as the GPA informed Appellant of his right to file a habeas corpus petition. II JA 0298. Accordingly, as he cannot establish ineffective assistance of counsel, Appellant's claim was properly denied, and the district court's decision should be affirmed.

III. APPELLANT KNOWINGLY AND VOLUNTARILY ENTERED HIS PLEA

Appellant asserts that "his plea was signed involuntarily because of the misrepresentations made by his counsel during plea negotiations." AOB at 30-35.

NRS 176.165 permits a defendant to file a motion to withdraw a guilty plea before sentencing. The district court may grant such a motion in its discretion for

any substantial reason that is fair and just. State v. Second Judicial Dist. Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969). "On appeal from a district court's denial of a motion to withdraw a guilty plea, this court 'will presume that the lower court correctly assessed the validity of the plea, and [] will not reverse the lower court's determination absent a clear showing of an abuse of discretion.'" Riker v. State, 111 Nev. 1316, 1322, 905 P.2d 706, 710 (1995) (quoting Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986)).

A plea of guilty is presumptively valid, particularly where it is entered into on the advice of counsel. Jezierski v. State, 107 Nev. 395, 397, 812 P.2d 355, 356 (1991). The defendant has the burden of proving that the plea was not entered knowingly or voluntarily. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); Wynn v. State, 96 Nev. 673, 615 P.2d 946 (1980); Housewright v. Powell, 101 Nev. 147, 710 P.2d 73 (1985).

In determining whether a guilty plea is knowingly and voluntarily entered, the court will review the totality of the circumstances surrounding the defendant's plea. Bryant, 102 Nev. at 271, 721 P.2d at 367. The proper standard set forth in Bryant requires the trial court to personally address a defendant at the time he enters his plea in order to determine whether he understands the nature of the charges to which he is pleading. Id. at 271; State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). The guidelines for voluntariness of guilty pleas "do not require the

articulation of talismanic phrases." Heffley v. Warden, 89 Nev. 573, 575, 516 P.2d 1403, 1404 (1973). It requires only "that the record affirmatively disclose that a defendant who pleaded guilty entered his plea understandingly and voluntarily." Brady v. United States, 397 U.S. 742, 747-748, 90 S.Ct. 1463, 1470 (1970); United States v. Sherman, 474 F.2d 303 (9th Cir. 1973).

Specifically, the record must affirmatively show the following: 1) the defendant knowingly waived his privilege against self-incrimination, the right to trial by jury, and the right to confront his accusers; 2) the plea was voluntary, was not coerced, and was not the result of a promise of leniency; 3) the defendant understood the consequences of his plea and the range of punishment; and 4) the defendant understood the nature of the charge, i.e., the elements of the crime. Higby v. Sheriff, 86 Nev. 774, 781, 476 P.2d 950, 963 (1970). Consequently, in applying the "totality of circumstances" test, the most significant factors for review include the plea canvass and the written guilty plea agreement. See Hudson v. Warden, 117 Nev. 387, 399, 22 P.3d 1154, 1162 (2001).

The Nevada Supreme Court recently decided Stevenson v. State, 354 P.3d 1277, 131 Nev. Adv. Rep. 61 (2015), holding that the statement in Crawford v. State, 117 Nev. 718, 30 P.3d 1123 (2001), which focuses the "fair and just" analysis solely upon whether the plea was knowing, voluntary, and intelligent is more narrow than contemplated by NRS 176.165. The Nevada Supreme Court therefore disavowed

Crawford's exclusive focus on the validity of the plea and affirmed that the district court must consider the totality of the circumstances to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just. However, the Court also held that appellant had failed to present a fair and just reason favoring withdrawal of his plea and therefore affirmed his judgment of conviction. Stevenson, 354 P.3d 1277, 1281, 131 Nev. Adv. Rep. 61 (2015).

In Stevenson, the Nevada Supreme Court found that none of the reasons presented warranted the withdrawal of Stevenson's guilty plea, including allegations that the members of his defense team lied about the existence of the video in order to induce him to plead guilty. Id. The Court found similarly unconvincing Stevenson's contention that he was coerced into pleading guilty based on the compounded pressures of the district court's evidentiary ruling, standby counsel's pressure to negotiate a plea, and time constraints. Id. As the Court noted, undue coercion occurs when a defendant is induced by promises or threats which deprive the plea of the nature of a voluntary act. Id., quoting Doe v. Woodford, 508 F. 3d 563, 570 (9th Cir. 2007).

The Nevada Supreme Court also rejected Stevenson's implied contention that withdrawal was warranted because he made an impulsive decision to plead guilty without knowing definitively whether the video could be viewed. Id. Stevenson did not move to withdraw his plea for several months. Id. The Court made clear that one

of the goals of the fair and just analysis is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty. Id. at 1281-82, quoting United States v. Alexander, 948 F.2d 1002, 1004 (6th Cir. 1991). The Court found that considering the totality of the circumstances, there was no difficulty in concluding that Stevenson failed to present a sufficient reason to permit withdrawal of his plea. Id. at 1282. Permitting him to withdraw his plea under the circumstances would allow the solemn entry of a guilty plea to become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim, which the Court cannot allow. Id., 354 P.3d at 1282, quoting United States v. Barker, 514 F. 2d 208, 222 (D.C. Cir. 1975).

i. Appellant Voluntarily and Knowingly Entered His Plea

Appellant alleges that he involuntarily entered his plea. AOB at 30. The overwhelming evidence in the record indicates this claim is meritless. First, the signed GPA established that Appellant understood he waived certain rights by pleading guilty:

WAIVER OF RIGHTS

> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> 1. The Constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which

event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The Constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial the State would bear the burden of proving beyond a reasonable doubt each element of the offense(s) charged.
3. The constitutional right to confront and cross-examine any witness who would testify against me
4. The constitutional right to subpoena witnesses to testify on my behalf.
5. The constitutional right to testify in my own defense
6. The right to appeal the conviction with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). I understand this means I am unconditionally waiving my right to a direct appeal of this conviction, including any challenge based upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34

II JA 0298. Not only did Appellant acknowledge the Waiver of Rights, but he also acknowledged that his plea was voluntary and that he understood his charges:

> I have discussed the element of all the original charge(s) against me with my attorney and I understand the nature of the charge(s) against me
>
> . . .
>
> I am signing this agreement voluntarily, after consultation with my attorney, and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement

Id. at 0298-99. Appellant's counsel also executed a "Certificate of Counsel" as an officer of the Court affirming the following:

CERTIFICATE OF COUNSEL

1. I have fully explained to the Defendant the allegations contained in the charge(s) to which guilty pleas are being entered.
2. I have advised the Defendant of the penalties for each charge and the restitution that the Defendant may be ordered to pay.
3. I have inquired of Defendant facts concerning Defendant's immigration status and explained to Defendant that if Defendant is not a United States citizen any criminal conviction will most likely result in serious negative immigration consequences including but not limited to:
    a. The removal from the United States through deportation;
    b. An inability to reenter the United States;
    c. The inability to gain United States citizenship or legal residency;
    d. An inability to renew and/or retain any legal residency status; and/or
    e. An indeterminate term of confinement, by with United States Federal Government based on the conviction and immigration status.

Moreover, I have explained that regardless of what Defendant may have been told by any attorney, no one can promise Defendant that this conviction will not result in negative immigration consequences and/or impact Defendant's ability to become a United States citizen and/or legal resident.

4. All pleas of guilty offered by the Defendant pursuant to this agreement are consistent with the facts known to me and are made with my advice to the Defendant.
5. To the best of my knowledge and belief, the Defendant:
    a. Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement,
    b. Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily, and

> c. Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time I consulted with the Defendant as certified in paragraphs 1 and 2 above.

Id. at 0300.

In addition to the GPA, the district court thoroughly canvassed Appellant during his entry of plea. During the canvassing, Appellant illustrated that he entered the plea both knowingly and voluntarily:

> THE COURT: Okay. Fine. Mr. Powell, will you state and spell your name for the record.
> DEFENDANT POWELL: Adrian Powell, A-D-R-I-A-N, P-O-W-E-L-L.
> THE COURT: And --
> MR. KANE: I'll come over here. [Court and Court Recorder confer]
> THE COURT: Sure. Okay. Mr. Powell, how hold are you?
> DEFENDANT POWELL: I'm 23 years old. I'll be 24 on Thursday.
> THE COURT: How far did you go in school?
> DEFENDANT POWELL: I graduated high school.
> THE COURT: And do you have any learning disability?
> DEFENDANT POWELL: No, Your Honor.
> THE COURT: Do you read, write and understand the English language?
> DEFENDANT POWELL: Yes, Your Honor.
> THE COURT: And is English your primary language?
> DEFENDANT POWELL: Yes, Your Honor.
> THE COURT: Have you been treated recently for any mental illness or addiction of any kind?
> DEFENDANT POWELL: No, Your Honor.
> THE COURT: Has anyone ever suggested you should be treated for mental health?
> DEFENDANT POWELL: No, Your Honor.
> THE COURT: Are you currently under the influence of any drug, medication or alcohol?
> DEFENDANT POWELL: No, Your Honor.

THE COURT: Have you been on any medication during your stay in jail?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: What medication?
DEFENDANT POWELL: Remeron.
THE COURT: What is -- what type of medication is that?
DEFENDANT POWELL: It treats depression.
THE COURT: How do you feel today?
DEFENDANT POWELL: I feel excellent, Your Honor.
THE COURT: Do you understand what's happening?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Does the medication affect your ability to understand what's going on today?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Are you under any other effects of the medication?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Have you received a copy of the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you read the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you understand everything in the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Have you discussed this case with your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Are you satisfied with the representation and advice given to you by your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: As to the charges in the guilty plea agreement, how do you plead?
DEFENDANT POWELL: I plead guilty, Your Honor
THE COURT: I'm making this plea freely and voluntarily?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Has anyone forced or threatened you or anyone close to you to get you to enter this plea?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Has anyone made any promises other than what's in the guilty plea agreement to get you to enter the plea?
DEFENDANT POWELL: No, Your Honor.

THE COURT: I have before me the guilty plea agreement, and I'm going to hold this up, on page 7, is this your signature?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Did you understand everything contained in the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And do you understand that as part of the guilty plea agreement, although you are not pleading guilty to these alleged offenses, the State will be allowed to argue then at the time of sentencing?
DEFENDANT POWELL: Yes, Your Honor.
. . .
THE COURT: So I don't know if I asked you, before you sign this plea agreement, did you read it and discuss it with your attorney?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Do you understand everything contained in this agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: You understand that there are certain constitutional rights that you're giving up by entering the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: You understand that you have a right to appeal on reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And, again, do you understand the range of punishment? And counsel –
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Well, we're going to go through and put these on the record, so it's clear.
MR. KANE: That's Counts 1 and 8, Your Honor. They carry with it a 1 to 6 range; Counts 2 and 9, 2 to 15. Counts 3 and 13, 5 to life or 5 to 15, plus a consecutive term of 1 to 15 for deadly weapon enhancement. Counts 4, 5, 6, 7, 10, 11 and 14, they're 2 to 15; a term of 1 to 15 for use of deadly weapon enhancement.
THE COURT: Do you understand the range for each of those counts?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Do you understand that sentencing is entirely up to me?
DEFENDANT POWELL: Yes, Your Honor.

THE COURT: And do you understand that, again, it's up to me as to whether any or whether all of those counts run consecutively or concurrently?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And no one is in a position to promise you leniency or special treatment of any kind?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: In the information in the indictment, it says -- or what is it that you did on the 28th of September to cause you to plead guilty?
DEFENDANT POWELL: I went into two establishments, Your Honor, and I committed the armed robbery.
THE COURT: And those establishments a -- is this Roberto's -- MR. KANE: Pepe's -- Pepe's and Walgreen's.
THE COURT: Pepe's and Walgreen's. Thank you. Pepe's and Walgreen's?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: You went in those establishments and committed the armed robberies?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And do you have any questions you'd like to ask me or your attorney before I accept this plea?
DEFENDANT POWELL: No, Your Honor.
THE COURT: Anything that I left out?
MR. GIORDANI: No.
THE COURT: Okay. And also for the record, you had approximately two hours to discuss all of this -- maybe longer than that now -- with your attorney before accepting this? DEFENDANT POWELL: Yes, Your Honor.
THE COURT: And without telling me what they were, your attorney answered all your questions regarding the guilty plea agreement?
DEFENDANT POWELL: Yes, Your Honor.
THE COURT: Okay. The Court finds the Defendant's plea of guilty is freely and voluntarily made and the Defendant understands the nature of the offenses and the consequences of his plea and, therefore, accepts the plea of guilty. The matter is referred to Department of Parole & Probation for a PSI. What's the date for sentencing?

RA 014-20 (emphasis added).

Any claim that Appellant entered the plea unknowingly and involuntarily is belied by the record and suitable for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d. In his GPA, Appellant acknowledged that he waived certain rights and privileges. II JA 0298. He also acknowledged that his decision to enter the plea was voluntary and not because of a promise of leniency. II JA 0299; RA 019. In both the district court's canvassing and his GPA, Appellant showed that he understood the nature of his crime as well the terms of plea. The totality of the circumstances show that Appellant's plea was knowingly and voluntarily entered.

ii. Appellant Fails to Establish He Involuntarily Entered the Guilty Plea Due to Counsel's Misrepresentations

Appellant argues his plea was involuntary because counsel told him he was "guaranteed six (6) to fifteen (15) years in prison." AOB at 30. This is not Appellant's first attempt to make this claim.[5] In a prior motion before the district court, Appellant alleged that trial counsel promised he would receive six (6) to fifteen (15) years. Appellant's counsel testified that no such conversation ever took place:

> Q [Ms. McNeill]: Okay. When you were discussing the deal with Mr. Powell, did you tell him that you were going to get him a 6-to-15-year sentence?
> A [Mr. Kane]: Never.
> Q: You never told him that.
> A: Nope.

[5] This Court already ruled on this claim. As such, relitigation of this claim is barred by the doctrine of res judicata.

> Q: Okay. Did you tell him that if it weren't for the uncharged cases, you could have gotten the 3 to 8?
> A: No.

II JA 0431. On cross-examination, Appellant's counsel made further statements regarding their conversation:

> Q [Mr. Giordani]: He also claimed in his affidavit: My attorney told me that regardless of what the guilty plea agreement said, I was going to get a sentence of 6 to 15 years. Is that true or false?
>
> A [Mr. Kane]: No, and that's, you know, when I was reading that today, that's the one I took the most offense of, out of all of them. And that's because very early on in my career, I forgot how it came about, but one of my mentors, Josh Tomshek, he says, listen, you can never promise a sentence. Just like in civil cases, you can never promise a client that they're going to get X amount of money out of a settlement. Never have done it on any of my cases, either criminal or civil. And so, yeah, that absolutely did not take place. I've never promised a sentence. And going further, you go -- I went over the Guilty Plea Agreement with him as well as the sentencing memo multiple times. He -- we cannot guarantee you a sentence. You cannot be guaranteed a sentence. This is the sentencing range that you're looking at. The discretion's up to the Judge. We'll do our best. We're going to get a sentencing memo for you which we did. And we'll argue like hell for you, but, no, did not tell him that.

Id. at 0439-40. At no point does the record indicate that trial counsel made any promises regarding the sentence Appellant would receive. Thus, Appellant's claim was properly summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, the district court's decision should be affirmed.

…

…

IV. CUMULATIVE ERROR DOES NOT APPLY TO INEFFECTIVE ASSITANCE OF COUNSEL CLAIMS

Appellant asserts a claim of cumulative error in the context of ineffective assistance of counsel. AOB at 38.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Appellant's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Appellant's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

At the hearing held on November 2, 2022, the district court stated the following regarding Appellant's cumulative error claim:

> And as far as the other issues, **cumulative error, there's nothing either in the record or your allegations that somehow these attorneys were, I can't remember what you put it as, under extreme**

> **stress or something that they were ineffective.** There's nothing in there to show that and especially given the fact that he took a deal after halfway -- I can't remember if we were completely done with picking a jury, but the other, or one of the other many issues you brought up, the fact that he didn't see all the discovery on the other cases, they spent, I do recall, an hour going over what they had on those other cases, even though all they were agreeing to is not even charging him with those other cases.

IV JA 0743.There was no error in this case let alone cumulative error. Therefore, this claim was properly denied, and the district court's decision should be affirmed.

V. APPELLANT IS NOT ENTTITLED TO AN EVIDENTIARY HEARING

Appellant claims that the district court erred in "failing to grant an evidentiary hearing." AOB at 37.

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).

Here, the district court found that Appellant was not entitled to relief, and, thus, an evidentiary hearing was unnecessary. IV JA 0749. The district court found that Appellant failed to demonstrate good cause or prejudice to overcome the procedural bars, Appellant knowingly and voluntarily entered his plea, and Appellant failed to establish that he entered his plea agreement due to counsel's misrepresentations. Id. Moreover, the district court found that Appellant failed to established that he received ineffective assistance of counsel, and ultimately, found that Appellant's claims failed to satisfy the two-prong test under Strickland. Therefore, the district court properly found that Appellant was not entitled to an evidentiary hearing, and the decision should be affirmed.

CONCLUSION

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

/ / /

/ / /

Dated this 22nd day of August, 2023.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,389 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 22nd day of August, 2023.

Respectfully submitted,

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

BY */s/ Taleen Pandukht*
TALEEN PANDUKHT
Chief Deputy District Attorney
Nevada Bar #005734
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 August 22, 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

COLLEEN SAVAGE, ESQ.
Counsel for Appellant

TALEEN PANDUKHT
Chief Deputy District Attorney

/s/ E. Davis
Employee, Clark County
District Attorney's Office

TP/Lauren Ripandelli/ed