



**EIGHTH JUDICIAL DISTRICT COURT
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Elizabeth A. Brown
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April 24, 2023

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: GERALD LEE WHATLEY, JR., vs. THE EIGHTH JUDICIAL DISTRICT COURT

S.C. CASE: 86185

D.C. CASE: A-22-861330-W

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated March 27, 2023, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed April 21, 2023 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

Heather S. Linn
CLERK OF THE COURT

FOFCL

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DISTRICT COURT
CLARK COUNTY, NEVADA

GERALD LEE WHATLEY, JR., aka,
Gerald L. Whatley Jr., #275395
Petitioner,

-vs-

THE STATE OF NEVADA
Respondent.

CASE NO: A-22-861330-W

C-21-357412-1

DEPT NO: XX

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: January 19, 2023
TIME OF HEARING: 8:30 A.M.

THIS CAUSE having come on for hearing before the Honorable ERIC JOHNSON, District Judge, on January 19, 2023, the Petitioner not present, Respondent represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BRITTNI GRIFFITH, Deputy District Attorney, and this Court having considered the matter, including briefs, transcripts, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On August 2, 2021, the State filed an Information charging Gerald Lee Whatley Jr., (hereinafter "Petitioner") with one count of Reckless Driving (Category B Felony-NRS 484B.653). On August 3, 2021, Petitioner was arraigned and pled guilty as charged. The Court accepted the plea and set the case for sentencing. On that same day, the Guilty Plea Agreement

1 (hereinafter "GPA") was filed, whereby both parties stipulated to probation not exceeding
2 three (3) years; with an underlying sentence of twenty-eight (28) to seventy-two (72) months
3 in the Nevada Department of Corrections (hereinafter "NDOC").

4 On November 30, 2021, the Court declined to accept the negotiated plea agreement
5 without further information from the parties. On December 16, 2021, the Court stated that it
6 was not inclined to sentence Petitioner to probation due to the facts of the case and Petitioner's
7 prior record including repeated driving under the influence (hereinafter "DUI"). During that
8 same hearing, the Court allowed Petitioner to withdraw his plea and set the case for trial.

9 On December 29, 2021, the State filed an Amended Information charging Petitioner
10 with one count of DUI (Category B Felony). On December 29, 2021, the State filed a Notice
11 of Witnesses and/or Experts listing forensic scientists who would testify about Petitioner's
12 blood alcohol level. On April 25, 2022, the State filed a Second Amended Information
13 charging Petitioner with Driving Under the Influence (Category B Felony – NRS 484C.110,
14 484C.410, 484C.105).

15 Jury trial commenced on April 25, 2022. On April 26, 2022, the jury found the
16 Petitioner guilty of Driving and/or Being in Actual Physical Control of a Motor Vehicle While
17 Under the Influence of An Intoxicating Liquor or Alcohol. On May 4, 2022, the State filed
18 Third Amended Information. On May 5, 2022, the State filed a Fourth Amended Information.

19 On May 26, 2022, the Court sentenced Petitioner to four (4) to fifteen (15) years in the
20 Nevada Department of Correction, with thirty-one days credit for time served. The Judgment
21 of Conviction was filed on June 1, 2022. Petitioner filed a Notice of Appeal on July 22, 2022.
22 The Nevada Supreme Court filed an Order Dismissing the Appeal on September 22, 2022.
23 Remittitur issued on October 17, 2022.

24 On November 16, 2022, Petitioner filed the instant Petition for Writ of Habeas Corpus
25 (Post-Conviction) (hereinafter "Petition"). On that same day, Petitioner filed a Supplemental
26 to Writ of Habeas Corpus (hereinafter "Supplement"). On January 19, 2023, the Court heard
27 and denied Petitioner's Petition and Supplement.

28 //

1 **FACTUAL BACKGROUND**

2 On November 23, 2019, at around 5:20 p.m., around the intersection of Theme and
3 Desert Inn in Las Vegas, Petitioner drove a minivan while under the influence of alcohol.
4 Witnesses, Jerylyn Skilbred (hereinafter "Skilbred") and Oscar Castillo (hereinafter
5 "Castillo") testified that they saw the minivan speeding, run a read light and stop sign without
6 slowing down, drive into oncoming traffic, then smash right into concrete road barriers. Both
7 called 911 to report the incident. Castillo identified Petitioner as the driver and said he saw
8 Petitioner get out of the minivan. He said Petitioner was very intoxicated, had a strong odor of
9 alcohol, looked disoriented, could not maintain his balance and had very sloppy speech.

10 Officer Rainier Frost testified that he was a traffic officer for Las Vegas Metropolitan
11 Police Department (hereinafter "LVMPD"). On November 23, 2019, he responded to the scene
12 on Theme Road and Dessert Inn Road in Las Vegas. While conducting an inventory of the
13 minivan, Officer Rainier saw an open container.

14 Brian Bounds testified that he was a nurse at Sunrise Hospital. He testified that pursuant
15 to a search warrant, he drew Petitioner's blood at 6:52 p.m., less than two hours after
16 Petitioner's car crash. LVMPD forensic scientist Denise Heineman analyzed Petitioner's
17 blood sample and testified that it had a blood alcohol content of .249 grams of ethanol per 100
18 milliliters of blood, well above the .08 legal limit.

19 **ANALYSIS**

20 Petitioner's Petition claims trial counsel was ineffective for failing to challenge whether
21 or not his prior DUI conviction was certified and asks this Court for an evidentiary hearing.
22 The Supplement claims sentencing error and that trial counsel was ineffective for failing to
23 timely file a notice of appeal. Petitioner fails to establish his claims and they are denied.

24 **I. PETITIONER FAILS TO ESTABLISH INEFFECTIVE ASSISTANCE**
25 **OF COUNSEL**

26 The Sixth Amendment to the United States Constitution provides that in "all criminal
27 prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his
28 defense." The United States Supreme Court has long recognized that "the right to counsel is

1 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,
2 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323
3 (1993).

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

15 The court begins with the presumption of effectiveness and then must determine
16 whether the defendant has demonstrated by a preponderance of the evidence that counsel was
17 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel
18 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of
19 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,
20 537 P.2d 473, 474 (1975).

21 Counsel cannot be ineffective for failing to make futile objections or arguments. See
22 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
23 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
24 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
25 (2002). As a tactical decision, counsel’s choice not to object so as not to emphasize the State’s
26 argument should be respected and not second-guessed. Doleman, 112 Nev. at 846, 921 P.2d
27 at 280.

1 Based on the above law, the role of a court in considering allegations of ineffective
2 assistance of counsel is “not to pass upon the merits of the action not taken but to determine
3 whether, under the particular facts and circumstances of the case, trial counsel failed to render
4 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711
5 (1978). This analysis does not mean that the court should “second guess reasoned choices
6 between trial tactics nor does it mean that defense counsel, to protect himself against
7 allegations of inadequacy, must make every conceivable motion no matter how remote the
8 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel
9 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel
10 cannot create one and may disserve the interests of his client by attempting a useless charade.”
11 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

12 “There are countless ways to provide effective assistance in any given case. Even the
13 best criminal defense attorneys would not defend a particular client in the same way.”
14 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after
15 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,
16 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784
17 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s
18 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s
19 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

20 Even if a defendant can demonstrate that his counsel's representation fell below an
21 objective standard of reasonableness, he must still demonstrate prejudice and show a
22 reasonable probability that, but for counsel’s errors, the result of the trial would have been
23 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
24 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability
25 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,
26 694, 104 S. Ct. at 2064-65, 2068).

27 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the
28 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of

1 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,
2 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must
3 be supported with specific factual allegations, which if true, would entitle the petitioner to
4 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”
5 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS
6 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims
7 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your
8 petition to be dismissed.” (Emphasis added).

9 The State can plead alternative theories of liability and needs to only show one theory
10 in order to sustain a conviction. Bolden v. State, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005)
11 (overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008) (citing
12 Griffin v. United States, 502 U.S. 46, 56–57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991)); Turner
13 v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970)). While a guilty
14 verdict must be unanimous, the jury need not be unanimous on the means or the theory of
15 liability in arriving at your verdict. Evans v. State, 113 Nev. 885, 893-95, 944 P.2d 253, 258-
16 60 (1997).

17 **A. Petitioner Fails To Establish That Trial Counsel Was Ineffective For Not**
18 **Objecting To Petitioner’s Prior DUI Conviction**

19 Petitioner claims his trial counsel was ineffective for failing to challenge whether or not
20 his prior DUI conviction was certified. Petition, at 6.

21 Prior convictions for driving under the influence of alcohol do not have to be evidenced
22 by certified copies of formal, written judgments of conviction to support enhancement of a
23 defendant's present DUI conviction to felony. Pettipas v. State, 106 Nev. 377, 379, 794 P.2d
24 705, 706. See NRS 484C.400(2). To use a prior felony conviction for enhancement purposes,
25 the state has the initial burden of producing prima facie evidence of the prior conviction.
26 Dressler v State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96. If the record of the prior
27 conviction, on its face, raises a presumption of constitutional infirmity, then, the state must
28 present evidence to prove by a preponderance that the prior conviction is constitutionally valid;

1 but, if the record raises no such presumption on its face, then the conviction is afforded a
2 presumption of regularity and the defendant must overcome that presumption by presenting
3 evidence to prove by a preponderance that a prior conviction is constitutionally infirm. Id. To
4 rely on a prior misdemeanor judgment of conviction for enhancement purposes, the state only
5 has to show that the defendant was represented by counsel or validly waived that right, and
6 that the spirit of constitutional principles was respected in the prior misdemeanor proceedings.
7 Id.

8 Trial counsel is not ineffective, by failing to object to a prior DUI conviction to support
9 enhancement to a felony, when information supplied by appellant, in open court, indicated that
10 he did not wish to challenge the validity of the prior DUI convictions and that he had been
11 represented by counsel in the prior proceedings. Krauss v. State, 116 Nev. 307, 310, 998 P.2d
12 163, 165. It was reasonable for counsel to rely on his client's assertions. Citing Strickland v.
13 Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (stating that the
14 reasonableness of counsel's actions may be determined or substantially influenced by the
15 defendant's own statements or actions. Counsel's actions are usually based, quite properly, on
16 informed strategic choices made by the defendant and on information supplied by the
17 defendant).

18 Here, trial counsel was not ineffective by failing to object to a prior DUI conviction to
19 support enhancement to felony because it was reasonable for trial counsel to rely on
20 Petitioner's lack of objection to his prior DUI convictions. During trial and sentencing,
21 Petitioner's prior DUI convictions were discussed several times.

22 First, prior to jury selection on April 25, 2022, the State introduced into evidence a
23 judgment of conviction of Petitioner's prior DUI for felony enhancement purposes. Day 1 Jury
24 Trial Transcript (hereinafter "JTT"), at 3-4. It was admitted as a court exhibit without
25 Petitioner's objection. Id.

26 Second, after the State rested, the Court discussed Petitioner's right to testify or not
27 testify and his prior record, including the prior conviction that was used to enhance his DUI to
28 felony; Petitioner again did not question his prior conviction. Id. at 155-156.

1 Third, on April 26, 2022, after receiving the jury's guilty verdict, the State reminded
2 the Court of its intention to ask for sentence enhancement due Petitioner's prior DUI
3 conviction. Day 2 JTT, at 135-136. The Court also stated that Petitioner had a "whole series
4 of DUIs." Id.

5 Fourth, during the sentencing hearing on May 26, 2022, Petitioner informed the Court
6 that he read his PSI and that it did not need to be corrected:

7 THE COURT: All right. This is then on for sentencing on defendant's guilty
8 verdict to driving and/or being in actual physical control of a motor vehicle while
9 under the influence of an intoxicated liquor or alcohol. Turning to the -- the
10 presentenced investigation report dated May 10, 2022; Ms. Park, have you read
that? Have you read the May 10th, 2022 presentenced investigation report?

MS. PARK: Yes, Your Honor.

11 THE COURT: Anything in there that you saw that needed to be correct or
12 brought to my attention?

MS. PARK: No, Your Honor.

13 THE COURT: All right. Mr. Whatley, have you read your presentenced
14 investigation report?

THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Had a chance to discuss it with your attorney?

THE DEFENDANT: Yes.

16 THE COURT: She answered any questions you had about it?

THE DEFENDANT: Yes.

17 THE COURT: Anything in there you saw that needed to be corrected or brought
18 to my attention?

THE DEFENDANT: No.

19 Sentencing Transcript, at 2-3.
20

21 The PSI and Supplemental PSI both show that Petitioner had several prior convictions,
22 including DUI convictions in Las Vegas and California. Based on Petitioner's lack of
23 objection, trial counsel would not have any reason to believe that she needed to object to the
24 prior DUI convictions. Thus, Petitioner failed to show that his counsel was ineffective.

25 Furthermore, Petitioner fails to show that he was prejudiced by counsel's failure to
26 object because the Court would have overruled such objection. As shown, the State met its
27 burden by providing proof of Petitioner's prior conviction, thus, objection to its admission
28 would have been futile and would not have changed the outcome of this case.

1 Finally, Petitioner fails to establish prejudice due to the overwhelming evidence
2 supporting Petitioner's Judgment of Conviction of Driving and/or Being in Actual Physical
3 Control of A Motor Vehicle Under the Influence of An Intoxicating Liquor or Alcohol. The
4 Information charged that Petitioner committed DUI by driving on a highway or on public
5 premises by either (1) driving under the influence of alcohol which rendered him incapable of
6 driving safely and/or exercising actual physical control of a vehicle; and/or (2) having a blood
7 alcohol concentration of .08 or more within two hours after driving and/or being in actual
8 physical control of a vehicle. There was no contention at trial that Petitioner was not on public
9 highway. Eyewitnesses, Skilbred and Castillo, both testified Petitioner drove the minivan over
10 the speed limit, ran a red light and stop sign, drove into oncoming traffic, then crashed into
11 concrete road barriers. Castillo said Petitioner was very intoxicated, had a strong odor of
12 alcohol, looked disoriented, could not maintain his balance and had very sloppy speech.
13 Officer Rainier also said he found an open container in Petitioner's minivan. Less than two
14 hours after the crash, Petitioner's blood alcohol content was .249 grams of ethanol per 100
15 milliliters of blood. Thus, the State provided overwhelming evidence to sustain Petitioner's
16 conviction under either theory of liability. Accordingly, this claim is denied.

17 **B. Petitioner Fails to Establish That Counsel Was Ineffective For Failing To**
18 **File A Timely Notice Of Appeal**

19 Petitioner claims his counsel was ineffective for failing to timely file a Notice of
20 Appeal. Supplement, at 5. The Nevada Supreme Court dismissed Petitioner's appeal because
21 it was untimely filed on July 22, 2022, outside of the 30-day appeal period from the Judgment
22 of Conviction filed on June 1, 2022. Petitioner fails to establish prejudice and this claim is
23 denied.

24 First, Petitioner does not identify any error by the trial court that would have succeeded
25 on appeal. Petitioner's claims are all meritless and are suitable only for summary denial. See
26 Section II, *infra*. Second, any alleged error would have been harmless due to the overwhelming
27 evidence supporting Petitioner's Judgment of Conviction. See Section I(A), *supra*. Further,
28 Petitioner's conduct in this case and his extensive DUI history demonstrate that his sentence

1 was appropriate. Thus, even if trial counsel timely filed the Notice of Appeal and challenged
2 Petitioner's sentence, the outcome of the case would have been the same. In summary,
3 Petitioner fails to demonstrate prejudice for Strickland purposes, and his claim is denied.

4 **II. PETITIONER'S CLAIMS, ALLEDGING SENTENCING ERROR, MUST**
5 **BE DISMISSED BECAUSE THEY ARE MERITLESS AND WERE**
6 **WAIVED BY PETITIONER'S FAILURE TO RAISE THEM ON DIRECT**
7 **APPEAL**

8 Petitioner complains the Court erred when it sentenced him to prison by claiming that
9 (1) the Court denied him his statutory right to treatment; (2) the Court could not sentence him
10 to prison because the current conviction had not been finalized through a direct appeal, and
11 the 2013 DUI conviction was too old; and (3) the Court punished him for exercising his right
12 to trial. Supplement, at 2-4.

13 A postconviction petition for a writ of habeas corpus is not a substitute for and does not
14 affect any remedies, which are incident to the proceedings in the trial court, or the remedy of
15 direct review of the sentence or conviction. NRS 34.724.

16 The court shall dismiss a petition if the court determines that the petitioner's conviction
17 was the result of a trial and the grounds for the petition could have been (1) presented to the
18 trial court; (2) raised in a direct appeal, or a prior petition for a writ of habeas corpus or
19 postconviction relief; or (3) raised in any other proceeding that the petitioner has taken to
20 secure relief from the petitioner's conviction and sentence, unless the court finds both cause
21 for the failure to present the grounds and actual prejudice to the petitioner. NRS 34.810(1)(b).

22 The Nevada Supreme Court has held that challenges to the validity of a guilty plea and
23 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
24 conviction proceedings; all other claims that are appropriate for a direct appeal must be
25 pursued on direct appeal, or they will be considered waived in subsequent proceedings.
26 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (disapproved on other
27 grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). A court must dismiss a
28 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

1 raising them again and actual prejudice to the petitioner.” Evans v. State, 117 Nev. 609, 646-
2 47, 29 P.3d 498, 523 (2001).

3 Here, Petitioner’s three (3) claims were waived they are allegations of sentencing errors
4 that could have been raised on direct appeal. Petitioner does not address good cause and fails
5 to identify any impediment external to the defense that prevented him from raising these claims
6 on direct appeal. Regardless, all facts and law necessary to raise these complaints were
7 available to him.

8 Petitioner fails to establish prejudice to overcome the procedural bar because the
9 underlying three (3) complaints are meritless. First, Petitioner had no statutory right to
10 treatment. Petitioner cites NRS 484C.320, but it does not support his claim. NRS 484C.320(1)
11 does not apply to an offender who was found to have a concentration of alcohol of 0.18 or
12 more in his blood:

13 An offender who is found guilty of a violation of NRS 484C.110 or 484C.120
14 that is punishable pursuant to paragraph (a) of subsection 1 of NRS 484C.400,
15 other than an offender who is found to have a concentration of alcohol of 0.18
16 or more in his or her blood or breath, may, at that time or any time before the
offender is sentenced, apply to the court to undergo a program of treatment for
an alcohol or other substance use disorder for at least 6 months.

17 NRS 484C.320(1). Thus, Petitioner did not qualify because his blood alcohol level was 0.249.

18 Second, Petitioner does not provide a coherent factual or legal analysis to support his
19 claim that the Court could not sentence him to prison because the current conviction had not
20 been finalized through a direct appeal, and the 2013 DUI conviction was too old. Supplement,
21 at 2-3. Thus, they are bare and naked assertions suitable only for summary denial. Hargrove,
22 100 Nev. at 502, 686 P.2d at 225.

23 Last, Petitioner’s claim that the Court punished him for exercising his right to jury trial,
24 is meritless. In fact, Petitioner pled guilty to Reckless Driving on August 3, 2021. Guilty Plea
25 Agreement, at 1-6. On December 16, 2021, the Court stated that it was not inclined to sentence
26 Petitioner to probation due to the facts of the case and Petitioner’s prior record including
27 repeated DUIs. 12/16/2021 Sentencing Transcript, at 2-5. During that same hearing, the Court
28 allowed Petitioner to withdraw his plea and set the case for trial. Id. at 5-6. At the sentencing

1 hearing on May 26, 2022, the Court stated its reasoning for the prison sentence, including
2 Petitioner's numerous DUI convictions and danger to the community. 5/26/2022 Sentencing
3 Transcript, at 7-8. Thus, Petitioner's assertion that his sentence was a punishment for
4 exercising his right to trial is belied by the record, and only suitable for summary denial.
5 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

6 In summary, Petitioner's claims were waived by Petitioner's failure to raise them on
7 direct appeal; Petitioner fails to show good cause for such failure; and, there is no actual
8 prejudice to Petitioner because his claims are meritless. Petitioner's claims are denied.

9 **III. DEFENDANT DOES NOT MEET THE STATUTORY FACTORS FOR**
10 **APPOINTMENT OF COUNSEL**

11 The Nevada Legislature has, given courts the discretion to appoint post-conviction
12 counsel so long as "the court is satisfied that the allegation of indigency is true and the petition
13 is not dismissed summarily." NRS 34.750. It reads:

14 A petition may allege that the petitioner is unable to pay the costs of the
15 proceedings or employ counsel. If the court is satisfied that the allegation of
16 indigency is true and the petition is not dismissed summarily, the court may
17 appoint counsel at the time the court orders the filing of an answer and a return.
18 In making its determination, the court may consider whether:

- 19 (a) The issues are difficult;
20 (b) The petitioner is unable to comprehend the proceedings; or
21 (c) Counsel is necessary to proceed with discovery.

22 More recently, the Nevada Supreme Court examined whether a district court
23 appropriately denied a petitioner's request for appointment of counsel based upon the factors
24 listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-
25 Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75,
26 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the petitioner
27 filed a pro se postconviction petition for writ of habeas corpus and requested counsel be
28 appointed. Id. The district court ultimately denied the petition and his appointment of counsel
request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the
statutory factors listed under NRS 34.750 and concluded that the district court's decision

1 should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his
2 petition could not be summarily dismissed, and he had in fact satisfied the statutory factors.
3 Id. at 76, 391 P.3d 760-61.

4 As for the first factor, the Court concluded that because petitioner had represented that
5 he had issues with understanding the English language, which was corroborated by his use of
6 an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend
7 the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he
8 faced—a minimum eighty-five (85) year sentence—were severe and his petition may have
9 been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62.
10 Finally, his ineffective assistance of counsel claims may have required additional discovery
11 and investigation beyond the record. Id.

12 Petitioner has not met the statutory factors for appointment of counsel. First, Petitioner
13 raised issues that are not difficult. Petitioner's claim that his counsel was ineffective by failing
14 to object to the judgment of conviction of Petitioner's prior DUI conviction is meritless since
15 the judgment of conviction was valid and an objection would have been futile. Petitioner's
16 claim that his counsel was ineffective by failing to timely file a notice of appeal is denied
17 because Petitioner does not present claims that would have been successful on direct appeal.
18 Furthermore, Petitioner fails to establish prejudice due to the overwhelming evidence
19 supporting his Judgment of Conviction. Last, Petitioner's claim of sentencing error is belied
20 by the record.

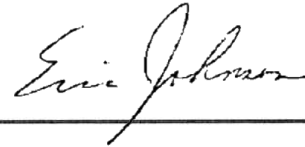
21 Second, there has been no indication that Petitioner is unable to comprehend the
22 proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the
23 English language, Petitioner has failed to demonstrate any inability to understand these
24 proceedings.

25 Last, counsel is not necessary to proceed with further discovery in this case.
26 Defendant's claims are not supported by the law and belied by the record. Due to relief not
27 being warranted, there is no need for additional discovery, let alone counsel's assistance to
28 conduct such investigation. Based on these factors, Defendant's request for counsel is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that this Petition for Writ of Habeas Corpus
(Post-Conviction), shall be, and is, hereby DENIED.

Dated this 21st day of April, 2023



**8E3 586 2DA8 C145
Eric Johnson
District Court Judge**

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

BY




JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 10th day of
April, 2023, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

Gerald Lee Whatley Jr., BAC #48057
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

BY



Theresa Dodson
Secretary for the District Attorney's Office

April 24, 2023

jc/JEV/td/vcu



1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Gerald Whatley, Jr., Plaintiff(s) | CASE NO: A-22-861330-W
7 vs. | DEPT. NO. Department 20
8 Eighth Judicial District Court,
9 Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 4/21/2023

15 Steven Wolfson

16 motions@clarkcountynyda.com
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