

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant(s),

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF CLARK,
Respondent(s),

Electronically Filed
May 02 2023 10:11 AM
Elizabeth A. Brown
Clerk of Supreme Court

Case No: A-22-861330-W

Docket No: 86185

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
GERALD LEE WHATLEY, JR. #48057,
PROPER PERSON
P.O. BOX 208
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-22-861330-W Gerald Whatley, Jr., Plaintiff(s) vs. Eighth Judicial District Court,
Defendant(s)

I N D E X

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A-22-861330-W

Gerald Whatley, Jr., Plaintiff(s)

vs.

Eighth Judicial District Court, Defendant(s)

I N D E X

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Gerald Lee Whitely Jr. #48057
HIGH DESERT STATE PRISON
Dist Office Box 650
Indian Springs Nevada 89310.

FILED
NOV 16 2022

CLERK OF COURT

A-22-861330-W
Dept. 20

Case No.
Dept. No.

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

GERALD LEE WHITELY JR.
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT
Respondent.

PETITION FOR WRIT
OF HABEAS CORPUS
(POSTCONVICTION)

APPOINTMENT OF ATTORNEY REQUESTED
WITH REQUEST TO PROCEED IN FORMA PAUPERIS
PURSUANT TO NRS 2.015, I.L., NEVADA AREA

INSTRUCTIONS:

- (1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.
- (2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.
- (3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.
- (4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.
- (5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.
- (6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.
- (7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: HIGH DESERT STATE PRISON

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: 5-20-00

4. Case number: C357412 I.D. C357412

5. (a) Length of sentence: 4 to 15 years Category B

(b) If sentence is death, state any date upon which execution is scheduled: *NA*

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes No

If "yes," list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged: *(DUI) Driving under the influence*

8. What was your plea? (check one)

(a) Not guilty ☒

(b) Guilty

(c) Guilty but mentally ill

(d) Nolo contendere

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: *NA*

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ☒

(b) Judge without a jury

11. Did you testify at the trial? Yes No ☒

12. Did you appeal from the judgment of conviction? Yes ☒ No

13. If you did appeal, answer the following:

(a) Name of court: *Nevada Supreme Court*

(b) Case number or citation: *85077*

(c) Result: *ORDERED TO SHOW CAUSE AND SUSPENDING BRIEFING*

(d) Date of result: *filed August 3, 2002*

(Attach copy of order or decision, if available.)

1 14. If you did not appeal, explain briefly why you did not: Supreme Court divested
2 of its jurisdiction. i.e., Jurisdictional defect
3 due to untimely notice of appeal

4 15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any
5 petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ☒ No ☐

6 16. If your answer to No. 15 was "yes," give the following information:

7 (a) (1) Name of court: Nevada Supreme Court

8 (2) Nature of proceeding: Notice of Appeal

9
10 (3) Grounds raised: Notice of Appeal

11
12
13 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒

14 (5) Result: —

15 (6) Date of result: —

16 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

17 Order to show cause and suspended Briefing; AUG 30 2012

18 (b) As to any second petition, application or motion, give the same information:

19 (1) Name of court: NA

20 (2) Nature of proceeding: —

21 (3) Grounds raised: —

22 (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ☐ No ☒

23 (5) Result: —

24 (6) Date of result: —

25 (7) If known, citations of any written opinion or date of orders entered pursuant to such result:

26
27 (c) As to any third or subsequent additional applications or motions, give the same information as above, list
28 them on a separate sheet and attach. NA

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion? NA

(1) First petition, application or motion? Yes No

Citation or date of decision:

(2) Second petition, application or motion? Yes No

Citation or date of decision:

(3) Third or subsequent petitions, applications or motions? Yes No NA

Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NA

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: None

(b) The proceedings in which these grounds were raised: NA

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NA

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) NO

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes No ✓

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Leslie A. Park, Attorney at Law

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes No ✓

If yes, specify where and when it is to be served, if you know: NA

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the

facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

EACH GROUND IS BEING PRESENTED PURSUANT TO THE PETITIONER'S 6th amendment right to effective assistance of counsel during trial court proceedings and sentencing, inter alia.

i.e., right to appeal. Cf. 14th amendment Due process with 6th amendment right to effective assistance of counsel rights was violated as set forth herein under Nevada's Constitution and under the United States Constitution also Violated.

1 (a) Ground ONE: NEVADA'S CONSTITUTION Art. 4, Sec. 6, and Sec. 8, etc.

2 DUE PROCESS was violated due to ineffective assistance of
3 Counsel prior to and during trial court proceedings. et seq.
4 Ineffective Assistance of Appellate/ Appeal Counsel in
5 Violation of the petitioner's 6th Amendment right, U.S. Const. VII.

6 Supporting FACTS (Tell your story briefly without citing cases or law.):

7 The petitioner's argument is that trial Court Counsel was
8 ineffective for failing to challenge the petitioner's prior DUI
9 convictions to wit: whether or not those convictions were
10 certified convictions. The record reflects that the State
11 presented for the record two prior DUI convictions as
12 required under state law. However, trial Court Counsel never
13 challenged whether or not those priors had been certified
14 thus it is jurisdictionally required in this instance that this
15 materially untrue foundation is, compelled the Honorable District
16 Court to rely upon untrue information, or help form this
17 Court's subjective misapprehension of otherwise true information.
18 In either case, if the resulting sentence foundation is materially
19 untrue, the Court has the power to correct or modify the
20 sentence imposed. Cf. The State of Nevada v. THE EIGHTH JUDICIAL DIST.
21 Court of the State of Nevada in and for the County of Clark, The
22 Honorable Joseph S. Pavlikowski, District Judge, Dept. No. III, and
23 Stymore Husney, respondents, 180 Nev. 90, 677 p.2d 1044; 1984 Nev.
24 LEXIS 330 No. 13402 February 16, 1984.

25 The petitioner maintains and says that trial Court Counsel
26 should have submitted and raised this issue per MOTION TO
27 to VACATE JUDGMENT.

28 In retrospect the petitioner, given this analytic framework
request that the Honorable Court of, Staley v. State, 787 p.2d 396.

GROUND ONE Continued:

1. Where a felony driving under the influence charge had
2. been dismissed due to ambiguity in the record of the
3. defendant's prior ~~and~~ conviction as to whether the
4. defendant had formally waived his right to Counsel,
5. the district court erred in granting the State leave
6. to file an information by affidavit for the dismissed
7. charge; by filing the information by affidavit the
8. State was impermissibly attempting to cure deficiencies
9. in the presented at the preliminary hearing.

10. Persons v. State, 115 Nev. 91, 978 P.2d 963, 115 Nev. Adv. Rep.
11. 16, 1997 Nev. Lexis 20 (Nev. 1997) (distinguishable), cert. den.

THIS document does not contain the
social security number of any person
pursuant to NRS 239B.030

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at H.D.S.P. on the 30 day of the month of Sept. of the year 2022

(High Desert State Prison)

Harold Whitley
Signature of petitioner

#48557

Address: HIGH DESERT STATE PRISON
POST OFFICE BOX 650
INDIAN SPRINGS, NEVADA
89320

Signature of attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

Pursuant to NRS 239.145

Harold Whitley
Petitioner

#48557

In propria persona
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Harold Lee Whitley, hereby certify, pursuant to N.R.C.P. 5(b), that on this 30 day of the month of September of the year 2022, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

NA

Respondent prison or jail official

Address

ARMON FORD, Attorney General
Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

Steve Wolfson District Attorney
District Attorney of County of Conviction

Address: 200 E. WIS 242, LOS VEGAS, NEVADA 89155

Harold Whitley

#48557

2022

Signature of Petitioner

Garland Whitley #48054
High Desert State Prison
P.O. Box 650
Indian Springs NV 89040



FOREVER USA FOREVER USA

NOV 17 2022

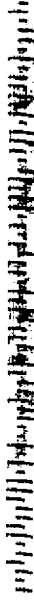
10/17/2022 10:00 AM

OCT 17 2022

10/17/2022

Steven D. Anderson, Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas NV 89155-1160

8910136300 0075



Heather A. Smith
CLERK OF THE COURT

1 PPOW
2

3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5 Gerald Whatley, Jr.,

6 Petitioner,

7 vs.

8 Eighth Judicial District Court,

9 Respondent,
10

Case No: A-22-861330-W
Department 20

**ORDER FOR PETITION FOR
WRIT OF HABEAS CORPUS**

11 Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on
12 November 16, 2022. The Court has reviewed the Petition and has determined that a response would assist
13 the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and
14 good cause appearing therefore,

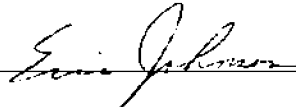
15 **IT IS HEREBY ORDERED** that Respondent shall, within 45 days after the date of this Order,
16 answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS
17 34.360 to 34.830, inclusive.

18 **IT IS HEREBY FURTHER ORDERED** that this matter shall be placed on this Court's
19 January 19, 2023 at 8:30 am.

20 Calendar on the _____ day of _____, 20____, at the hour of

21 _____ o'clock for further proceedings.
22

23 Dated this 16th day of November, 2022

24 
25 _____
District Court Judge

26 **CA8 94A CDFD E2DC**
27 **Eric Johnson**
28 **District Court Judge**

1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5	
6	Gerald Whatley, Jr., Plaintiff(s)
7	vs.
8	Eighth Judicial District Court,
9	Defendant(s)

10

CASE NO: A-22-861330-W

DEPT. NO. Department 20

11 **AUTOMATED CERTIFICATE OF SERVICE**

12 Electronic service was attempted through the Eighth Judicial District Court's
13 electronic filing system, but there were no registered users on the case.

14 If indicated below, a copy of the above mentioned filings were also served by mail
15 via United States Postal Service, postage prepaid, to the parties listed below at their last
16 known addresses on 11/17/2022

17	Gerald Whatley	#48057
18		HDSP
19		P.O. Box 650
20		Indian Springs, NV, 89070

21
22
23
24
25
26
27
28

1. Gerald Lee Whitley Jr. # 48057

2. P.O. Box 450

3. Indian Springs, Nevada 89070

4. Additioral - A-2

5.

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DISTRICT COURT
CLARK COUNTY, NEVADA

A-22-861330-W
Dept. 20

CASE NO. 6357912

DEPT. NO. ERIC JOHNSON COURT

DATE: 10-26-2022

TIME: 6:00 PM

Gerald Lee Whitley Jr.,

Petitioner,

vs.

Walter Calvin Johnson, et al.,

Respondents.

PETITIONER'S SUPPLEMENTAL TO WRIT
OF HABEAS CORPUS : Beckwith State, 22285 Nev.
Sup. Ct.

COMES NOW, Gerald L. Whitley Jr., the Petitioner,
and moves the court to entertain this supplemental habeas
petition and grant the relief sought.

This Supplemental is made and based upon
Ground 1 of the Petitioner's original Post-Conviction
Habeas Petition and Grounds 2 thru 4 of this
Supplemental Habeas Petition.

RESPECTFULLY SUBMITTED,

DATE: 10-26-2022

FILED

NOV 17 2022

CLERK OF COURT

Memoir 1/10/22
Gerald Lee Whalley - Petitioner

1
2
3 MEMORANDUM OF POINTS AND AUTHORITIES

4 Ground II I. STATEMENT OF THE FACTS

5 Here, the Petitioner adopts Ground I of the
6 original habeas petition and preserves claims of in-
7 effective assistance of counsel during the Petition-
8 er's trial as a matter of comity.

9 A. PETITIONER BELIEVES HIS SUBSTANTIVE
10 AND PROCEDURAL SAFEGUARDS AFFORDED
11 UNDER THE 14TH AMEND. OF THE U.S.
12 CONST. WERE VIOLATED UPON SENTENCING
13 THE PETITIONER ABSENT COURT FULFILL-
14 ING ENTITLEMENTS OF SETFORTH STATUT-
15 ORY PROVISION :

16 Ground II :

17 1). Here, the judicial record, on 5-26-22 reflects
18 during the sentencing phase of the Petitioner, the
19 Petitioner sought voluntary submission to treat-
20 ment upon reflecting back, he had not addressed
21 his addiction to alcohol after 2013 convictions (DUI),
22 while being faced with a D.U.I. trial verdict on an
23 conviction (2022) that was not constitutional affirm
24 due to the 2022 conviction, had not been appealed
25 to the states highest ;

26 2). That, because the 2013 D.U.I. was (4) nine years
27 later and the 2022 D.U.I. was not finalized at the

1. time of the Petitioner's sentencing, Petitioner made
2. plea to the court for treatment, after having been
3. dosed on alcohol, while being subjected to medical
4. emergency while awaiting the arrival of medical
5. assistance;
6. 3) That, the sentencing court knew or should have known
7. upon the Petitioner exercising his statutory right
8. to treatment prior to prison, was entitled to receive
9. treatment, where the Petitioner's arrest, indicated, the
10. concentration of alcohol was over 0.18, whom applied
11. for program of treatment for alcoholism, prior to
12. the sentencing the Petitioner, without providing the
13. Petitioner program of treatment, because the Petitioner
14. exercised his constitutional right to a jury trial;
15. 4). That, because the sentencing court lacked a disregard
16. for the state statutory entitlements afforded to Petitioner
17. under Chapter 484C.320 of the Nevada Revised Statutes
18. et seq., deprived the sentencing court 'actual' jurisdiction
19. ion, absent the sentencing court, aided in programs
20. of treatment upon the Petitioner's request prior to
21. sentencing;
22. 5). That, the Petitioner's sentence phase demonstrated
23. ated because a jury trial occurred, the sentencing
24. court relied a 2016 citation, to justify subject-
25. the Petitioner to 67 prison term.

1. Ground 3: Petitioner Believes He Was Retaliated
2. Against When The Sentencing Court Arbitrarily
3. Violated The Petitioner's First Amend. Rights (Retaliate
4. ion/imprisonment for seeking a jury trial) Upon Seeking
5. The Imposition of A Prison Term Without Juris-
6. diction:

7.

8. Petitioner adopts Ground 1 of the original habeas
9. petition.

10. 6). It is believed the sentencing court became bias
11. during the Petitioner's sentencing phase, when the
12. court denied the Petitioner's request for program
13. of treatment during sentence, because the Petitioner
14. exercised his first amendment right to a jury trial;
15. 7). That, once jurors returned a verdict of guilt, 4.25.
16. 22, the sentencing court seized its opportunity
17. to retaliate against the Petitioner during the
18. sentencing phase, 5.26.22, using a 2016 citation
19. as a prior felony conviction, to cover-up, the
20. Petitioner had to be sanctioned for taking his crim-
21. inal case to trial;

22. 8). That, the sentencing court knew or should have
23. known the Petitioner was entitled to treatment of
24. program upon his request prior to being sentenced
25. under statutory provisions.

26. ///

27. ///

28. ///

1. Ground 4:

2. Petitioner Believes Counsel Was Ineffective
3. When It Created A Jurisdictional Defect During
4. The Appellate Process Denying The Appellant A
5. Statutory Right To A Direct Appeal And Effective
6. Counsel On Direct Review A Violation Of The 6th
7. And The 14th Amend. Of The U.S. Const.:

8.

9. Petitioner adopts Grounds 1 thru 3 of habeas
10. petition.

11. 9). That, after 4-25-22 jury verdict, counsel for the
12. Petitioner knew or should have known the Petition-
13. er held a statutory constitutional right, to a direct
14. appeal, after verdict of guilt;

15. 10). That, the courts reflects, the trial attorney for
16. Petitioner, did not authorize its Notice of Appeal
17. 7-22-22, far beyond the allotted time afforded
18. by the Nevada Rules Of Appellate Procedures;

19. 11). The prejudicial effect, occurred when the Nevada
20. Supreme Court decided it would not entertain the
21. errors that occurred during the Petitioner's trial;

22. 12). That ^{counsel} could not waive the Petitioner's Rights
23. to a criminal appeal without the approval, of the
24. Petitioner;

25. 13). That, because the Petitioner can not exercise
26. his statutory appellate right, at the fault of
27. counsel, amount to the denial of the state and
28.

1 and federal rules of criminal proceedings, and
2 entitlement that should have been provided to
3 Petitioner, the criminal defendant.

4 RESPECTFULLY SUBMITTED,

5 Date: 10-26-2022

6 Gerald L. Whorby
7 Gerald L. Whorby, Esq. Attorney

8
9 CERTIFICATE OF SERVICE

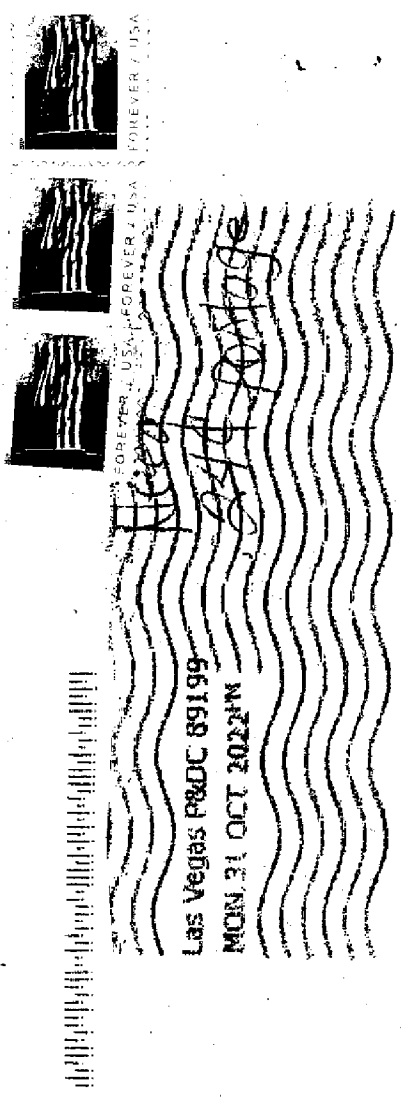
10 I, hereby certify, that, On the 26 day of October,
11 2022, I mailed my PETITIONER'S SUPPLEMENTAL
12 TO WRIT OF HABEAS CORPUS to the following:

13
14 Steven D. Emerson
15 200 Lewis Ave. 3rd Fl -
16 Las Vegas, Nevada
17 89155

Steve Wolfson
200 Lewis Ave.
Las Vegas, Nevada 89101

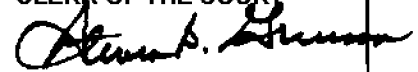
18
19 Cynthia Daily
20 ATTORNEY
21 10-26-22

GERALD WHATLEY #48057
High Desert State Prison
P.O. Box 650
Indian Springs, NV 89070



Steven D. Gaierson
200 Lewis Avenue 3rd floor
Las Vegas NV 89155-1100

66-22
CORRECTIONAL
INSTITUTION



RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: A-22-861330-W

C-21-357412-1

DEPT NO: XX

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS
CORPUS (POST-CONVICTION)

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in response to Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

//

//

//

1 POINTS AND AUTHORITIES

2 STATEMENT OF THE CASE

3 On August 2, 2021, the State filed an Information charging Gerald Lee Whatley Jr.,
4 (hereinafter "Petitioner") with one count of Reckless Driving (Category B Felony-NRS
5 484B.653). On August 3, 2021, Petitioner was arraigned and pled guilty as charged. The
6 Court accepted the plea and set the case for sentencing. On that same day, the Guilty Plea
7 Agreement was filed, whereby both parties stipulated to probation not exceeding three (3)
8 years; with an underlying sentence of twenty-eight (28) to seventy-two (72) months in the
9 Nevada Department of Corrections (hereinafter "NDOC").

10 On November 30, 2021, the Court declined to accept the negotiated plea agreement
11 without further information. On December 16, 2021, the Court stated that it was not inclined
12 to sentence Petitioner to probation due to the facts of the case and Petitioner's prior record
13 including repeated driving under the influence (hereinafter "DUI"). During that same
14 hearing, the Court allowed Petitioner to withdraw his plea and set the case for trial. On
15 December 29, 2021, the State filed an Amended Information charging Petitioner with one
16 count of Driving Under the Influence (Category B Felony). On December 29, 2021, the State
17 filed a Notice of Witnesses and/or Experts listing forensic scientists who would testify about
18 Petitioner's blood alcohol level. On April 25, 2022, the State filed a Second Amended
19 Information charging Petitioner with Driving Under the Influence (Category B Felony –
20 NRS 484C.110, 484C.410, 484C.105).

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

26 On May 26, 2022, the Court sentenced Petitioner to four (4) to fifteen (15) years in
27 NDOC, with thirty-one days credit for time served. The Judgment of Conviction was filed on
28 June 1, 2022. Petitioner filed a Notice of Appeal on July 22, 2022. The Nevada Supreme

1 Court filed an Order Dismissing the Appeal on September 22, 2022. Remittitur issued on
2 October 17, 2022.

3 On November 16, 2022, Petitioner filed the instant Petition for Writ of Habeas Corpus
4 (Post-Conviction) (hereinafter "Petition"). On that same day, Petitioner filed a Supplemental
5 to Writ of Habeas Corpus.

6 STATEMENT OF FACTS

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

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

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

25 ARGUMENT

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,
2 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d
3 322, 323 (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
6 of Strickland, 466 U.S. at 686–87, 104 S. Ct. at 2063–64; see also Love, 109 Nev. at 1138,
7 865 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
10 have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada
11 State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland
12 two-part test). “[T]here is no reason for a court deciding an ineffective assistance claim to
13 approach the inquiry in the same order or even to address both components of the inquiry if
14 the defendant makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct.
15 at 2069.

16 The court begins with the presumption of effectiveness and then must determine
17 whether the defendant has demonstrated by a preponderance of the evidence that counsel
18 was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective
19 counsel does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the
20 range of competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev.
21 430, 432, 537 P.2d 473, 474 (1975). .

22 Counsel cannot be ineffective for failing to make futile objections or arguments. See
23 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the
24 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if
25 any, to call, and what defenses to develop.” Rhync v. State, 118 Nev. 1, 8, 38 P.3d 163, 167
26 (2002). As a tactical decision, counsel’s choice not to object so as not to emphasize the
27 State’s argument should be respected and not second-guessed. Doleman, 112 Nev. at 846,
28 921 P.2d 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
4 render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708,
5 711 (1978). This analysis does not mean that the court should "second guess reasoned
6 choices 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
9 counsel do what is impossible or unethical. If there is no bona fide defense to the charge,
10 counsel cannot create one and may disserve the interests of his client by attempting a useless
11 charade." United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19
12 (1984).

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

21 Even if a defendant can demonstrate that his counsel's representation fell below an
22 objective standard of reasonableness, he must still demonstrate prejudice and show a
23 reasonable probability that, but for counsel's errors, the result of the trial would have been
24 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
25 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
26 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-
27 89, 694, 104 S. Ct. at 2064-65, 2068).

28 //

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

11 **I. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING**
12 **TO PETITIONER'S PRIOR DUI CONVICTION**

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

15 Prior convictions for driving under the influence of alcohol do not have to be
16 evidenced by certified copies of formal, written judgments of conviction to support
17 enhancement of a defendant's present DUI conviction to felony. Pettipas v. State, 106 Nev.
18 377, 379, 794 P.2d 705, 706. See NRS 484C.400(2). To use a prior felony conviction for
19 enhancement purposes, the state has the initial burden of producing prima facie evidence of
20 the prior conviction. Dressler v State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96. If the
21 record of the prior conviction, on its face, raises a presumption of constitutional infirmity,
22 then, the state must present evidence to prove by a preponderance that the prior conviction is
23 constitutionally valid; but, if the record raises no such presumption on its face, then the
24 conviction is afforded a presumption of regularity and the defendant must overcome that
25 presumption by presenting evidence to prove by a preponderance that a prior conviction is
26 constitutionally infirm. Id. To rely on a prior misdemeanor judgment of conviction for
27 enhancement purposes, the state only has to show that the defendant was represented by
28

1 counsel or validly waived that right, and that the spirit of constitutional principles was
2 respected in the prior misdemeanor proceedings. Id.

3 Trial counsel is not ineffective, by failing to object to a prior DUI conviction to
4 support enhancement to a felony, when information supplied by appellant, in open court,
5 indicated that he did not wish to challenge the validity of the prior DUI convictions and that
6 he had been represented by counsel in the prior proceedings. Krauss v. State, 116 Nev. 307,
7 310, 998 P.2d 163, 165. It was reasonable for counsel to rely on his client's assertions. Citing
8 Strickland v. Washington, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (stating
9 that the reasonableness of counsel's actions may be determined or substantially influenced by
10 the defendant's own statements or actions. Counsel's actions are usually based, quite
11 properly, on informed strategic choices made by the defendant and on information supplied
12 by the defendant).

13 Here, trial counsel was not ineffective by failing to object to a prior DUI conviction to
14 support enhancement to felony because it was reasonable to rely on Petitioner's lack of
15 objection to his prior DUI convictions. During trial and sentencing, Petitioner's prior DUI
16 convictions were discussed several times. First, prior to jury selection on April 25, 2022, the
17 State introduced into evidence a judgment of conviction of Petitioner's prior DUI for felony
18 enhancement purposes. Day 1 Jury Trial Transcript (hereinafter "JTT") at 3-4. It was
19 admitted as a court exhibit without Petitioner's objection. Id. Second, after the State rested,
20 the Court discussed Petitioner's right to testify or not testify and his prior record, including
21 the prior conviction that was used to enhance his DUI to felony; Petitioner again did not
22 question his prior conviction. Id. at 155-156. Third, on April 26, 2022, after receiving the
23 jury's guilty verdict, the State reminded the Court of it's intention to ask for sentence
24 enhancement due Petitioner's prior DUI conviction. Day 2 JTT at 135-136. The Court also
25 stated that Petitioner had a "whole series of DUIs." Id. Fourth, during the sentencing hearing
26 on May 26, 2022, Petitioner informed the Court that he read his PSI and that it did not need
27 to be corrected:

28 //

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

7 MS. PARK: Yes, Your Honor.

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

10 MS. PARK: No, Your Honor.

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

13 THE DEFENDANT: Yes, Your Honor.

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

15 THE DEFENDANT: Yes.

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

17 THE DEFENDANT: Yes.

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

20 THE DEFENDANT: No.

21 Sentencing Transcript at 2-3.

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

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

Finally, Petitioner cannot establish prejudice due to the overwhelming evidence that
he committed DUI by driving on a highway or on public premises by either (1) driving under
the influence of alcohol which rendered him incapable of driving safely and/or exercising
actual physical control of a vehicle; and/or (2) having a blood alcohol concentration of .08 or

1 more within two hours after driving and/or being in actual physical control of a vehicle.
2 Here, there was no contention at trial that Petitioner was not on public highway. Eye
3 witnesses, Skilbred and Castillo, both testified Petitioner drove the minivan over the speed
4 limit, ran a red light and stop sign, drove into oncoming traffic, then crashed into concrete
5 road barriers. Castillo said Petitioner was very intoxicated, had a strong odor of alcohol,
6 looked disoriented, could not maintain his balance and had very sloppy speech. Officer
7 Rainier also said he found an open container in Petitioner's minivan. Less than two hours
8 after the crash, Petitioner's blood alcohol content was .249 grams of ethanol per 100
9 milliliters of blood. Thus, the State provided overwhelming evidence to sustain Petitioner's
10 conviction under either theory of liability.

11 Accordingly, this claim must be denied.

12 **II. DEFENDANT DOES NOT MEET THE STATUTORY FACTORS FOR**
13 **APPOINTMENT OF COUNSEL**

14 Defendant's request for counsel should be denied, as he does not meet any of the
15 additional statutory factors under NRS 34.750. The Nevada Legislature has, given courts the
16 discretion to appoint post-conviction counsel so long as "the court is satisfied that the
17 allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. It
18 reads:

19 A petition may allege that the petitioner is unable to pay the costs of the
20 proceedings or employ counsel. If the court is satisfied that the allegation of
21 indigency is true and the petition is not dismissed summarily, the court may
22 appoint counsel at the time the court orders the filing of an answer and a return.
23 In making its determination, the court may consider whether:
24 (a) The issues are difficult;
25 (b) The petitioner is unable to comprehend the proceedings; or
26 (c) Counsel is necessary to proceed with discovery.

25 More recently, the Nevada Supreme Court examined whether a district court
26 appropriately denied a petitioner's request for appointment of counsel based upon the factors
27 listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In
28 Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to

1 life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct
2 appeal, the petitioner filed a pro se postconviction petition for writ of habeas corpus and
3 requested counsel be appointed. Id. The district court ultimately denied the petition and his
4 appointment of counsel request. Id. In reviewing the district court's decision, the Nevada
5 Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that
6 the district court's decision should be reversed and remanded. Id. The Court explained that
7 the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact
8 satisfied the statutory factors. Id. at 76, 391 P.3d 760-61.

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

17 In this case, Petitioner has not met the statutory factors for appointment of counsel.
18 First, Petitioner raised a single issue that is not difficult. Defendant's claim that his client
19 was ineffective by failing to object to the judgment of conviction of Petitioner's prior DUI
20 conviction is meritless since the judgment of conviction was valid and an objection would
21 have been futile.

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

26 Finally, counsel is not necessary to proceed with further discovery in this case.
27 Defendant's claims are not supported by the law and belied by the record. Due to relief not
28 being warranted, there is no need for additional discovery, let alone counsel's assistance to

1 conduct such investigation. Based on these factors, Defendant's request for counsel should
2 be denied.

3 **CONCLUSION**

4 For the foregoing reasons, the State respectfully requests that this Court DENY
5 Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction).

6 DATED this 4th day of January, 2023.

7 Respectfully submitted,

8 STEVEN B. WOLFSON
9 Clark County District Attorney
Nevada Bar #1565

10
11 BY /s/Jonathan Vanboskerck
12 JONATHAN VANBOSKERCK
13 Chief Deputy District Attorney
14 Nevada Bar #6528

15 **CERTIFICATE OF MAILING**

16 I hereby certify that service of the above and foregoing State's Response To
17 Petitioner's Petition For Writ Of Habeas Corpus (Post-Conviction) was made this 4th day of
18 January, 2023, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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

22
23 BY Theresa Dodson
24 Theresa Dodson
25 Secretary for the District Attorney's Office
26
27

28 jc/JEV/td/vcu



RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

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

Defendant.

CASE NO: A-22-861330-W

C-21-357412-1

DEPT NO: XX

**STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL TO WRIT OF
HABEAS CORPUS**

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

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in response to Petitioner's Supplemental for Writ of Habeas Corpus.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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1 **POINTS AND AUTHORITIES**

2 **STATEMENT OF THE CASE**

3 On August 2, 2021, the State filed an Information charging Gerald Lee Whatley Jr.,
4 (hereinafter "Petitioner") with one count of Reckless Driving (Category B Felony-NRS
5 484B.653). On August 3, 2021, Petitioner was arraigned and pled guilty as charged. The
6 Court accepted the plea and set the case for sentencing. On that same day, the Guilty Plea
7 Agreement was filed, whereby both parties stipulated to probation not exceeding three (3)
8 years; with an underlying sentence of twenty-eight (28) to seventy-two (72) months in the
9 Nevada Department of Corrections (hereinafter "NDOC").

10 On November 30, 2021, the Court declined to accept the negotiated plea agreement
11 without further information. On December 16, 2021, the Court stated that it was not inclined
12 to sentence Petitioner to probation due to the facts of the case and Petitioner's prior record
13 including repeated driving under the influence (hereinafter "DUI"). During that same
14 hearing, the Court allowed Petitioner to withdraw his plea and set the case for trial. On
15 December 29, 2021, the State filed an Amended Information charging Petitioner with one
16 count of Driving Under the Influence (Category B Felony). On December 29, 2021, the State
17 filed a Notice of Witnesses and/or Experts listing forensic scientists who would testify about
18 Petitioner's blood alcohol level. On April 25, 2022, the State filed a Second Amended
19 Information charging Petitioner with Driving Under the Influence (Category B Felony –
20 NRS 484C.110, 484C.410, 484C.105).

21 Jury trial commenced on April 25, 2022. On April 26, 2022, the jury found the
22 Petitioner guilty of Driving and/or Being in Actual Physical Control of a Motor Vehicle
23 While Under the Influence of An Intoxicating Liquor or Alcohol. On May 4, 2022, the State
24 filed a Third Amended Information. On May 5, 2022, the State filed Fourth Amended
25 Information. On May 26, 2022, the Court sentenced Petitioner to four (4) to fifteen (15)
26 years in NDOC, with thirty-one days credit for time served. The Judgment of Conviction was
27 filed on June 1, 2022. Petitioner filed a Notice of Appeal on July 22, 2022. On September 22,
28 2022, the Nevada Supreme Court filed an Order Dismissing the Appeal due to untimely

1 filing of the Notice of Appeal, which failed to vest jurisdiction in the Supreme Court.
2 Remittitur issued on October 17, 2022.

3 On November 16, 2022, Petitioner filed a Petition for Writ of Habeas Corpus (Post-
4 Conviction). On that same day, Petitioner filed the instant Petitioner's Supplemental to Writ
5 of Habeas Corpus (hereinafter "Petition").

6 **STATEMENT OF FACTS**

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

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

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

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ARGUMENT

I. PETITIONER'S CLAIMS, ALLEDGING SENTENCING ERROR, MUST BE DISMISSED BECAUSE THEY ARE MERITLESS AND WERE WAIVED BY PETITIONER'S FAILURE TO RAISE THEM ON DIRECT APPEAL

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

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

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

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; all 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) (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

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

3 Here, all three of Petitioner’s claims were waived since all are allegations of
4 sentencing errors. Petitioner waived all claims by failing to raise them on direct appeal.

5 Petitioner also does not address good cause for failing to present these claims on
6 direct appeal. Regardless, all facts and law necessary to raise these complaints were available
7 to him. Furthermore, Petitioner fails to identify any impediment external to the defense that
8 prevented him from raising these claims.

9 Finally, Petitioner cannot demonstrate prejudice because the underlying three (3)
10 complaints are meritless. First, Petitioner had no statutory right to treatment. Petitioner cites
11 NRS 484C.320, but it does not support his claim. NRS 484C.320(1) does not apply to an
12 offender who was found to have a concentration of alcohol of 0.18 or 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
17 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.

18 NRS 484C.320(1). Thus, Petitioner did not qualify because his blood alcohol level was
19 0.249.

20 Second, Petitioner does not provide a coherent factual or legal analysis to support his
21 claim that the Court could not sentence him to prison because the current conviction had not
22 been finalized through a direct appeal, and the 2013 DUI conviction was too old. Thus, they
23 are bare and naked assertions suitable only for summary denial. Hargrove, 100 Nev. at 502,
24 686 P.2d at 225.

25 Last, the record belies Petitioner’s claim that the Court punished him for exercising
26 his right to jury trial. In fact, Petitioner pled guilty to DUI on August 3, 2021. On December
27 16, 2021, the Court stated that it was not inclined to sentence Petitioner to probation due to
28 the facts of the case and Petitioner’s prior record including repeated DUIs. During that same

1 hearing, the Court allowed Petitioner to withdraw his plea and set the case for trial. At the
2 sentencing hearing, the Court stated its reasoning for the prison sentence, including
3 Petitioner's numerous DUI convictions and danger to the community. Thus, Petitioner's
4 assertion that his sentence was a punishment for exercising his right to trial is belied by the
5 record, and only suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

9 **II. PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL**
10 **MUST BE DISMISSED BECAUSE HE CANNOT SHOW THAT HE WAS**
11 **PREJUDICED**

12 The Sixth Amendment to the United States Constitution provides that in "all criminal
13 prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his
14 defense." The United States Supreme Court has long recognized that "the right to counsel is
15 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668,
16 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d
17 322, 323 (1993).

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

1 at 2069. "A reasonable probability is a probability sufficient to undermine confidence in the
2 outcome." McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
3 Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064-65, 2068).

4 The State can plead alternative theories of liability and needs to only show one theory
5 in order to sustain a conviction. Bolden v. State, 121 Nev. 908, 913, 124 P.3d 191, 194
6 (2005) (overruled on other grounds by Cortinas v. State, 124 Nev. 1013, 195 P.3d 315 (2008)
7 (citing Griffin v. United States, 502 U.S. 46, 56-57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991));
8 Turner v. United States, 396 U.S. 398, 420, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970)). While a
9 guilty verdict must be unanimous, the jury need not be unanimous on the means or the theory
10 of liability in arriving at your verdict. Evans v. State, 113 Nev. 885, 893-95, 944 P.2d 253,
11 258-60 (1997).

12 Here, Petitioner claims his counsel was ineffective for failing to timely file a Notice
13 of Appeal. Petition at 5. The Nevada Supreme Court dismissed Petitioner's appeal because it
14 was untimely filed on July 22, 2022, outside of the 30-day appeal period from the Judgment
15 of Conviction filed on June 1, 2022. This Court must dismiss this claim because Petitioner
16 cannot establish prejudice.

17 First, Petitioner does not identify any error by the trial court that would have
18 succeeded on appeal. As shown, Petitioner's claims are all meritless, suitable only for
19 summary denial. See Section I, *infra*.

20 Furthermore, any alleged error would have been harmless due to the overwhelming
21 evidence supporting Petitioner's Judgment of Conviction of Driving and/or Being in Actual
22 Physical Control of A Motor Vehicle Under the Influence of An Intoxicating Liquor or
23 Alcohol. The Information charged that Petitioner committed DUI by driving on a highway or
24 on public premises by either (1) driving under the influence of alcohol which rendered him
25 incapable of driving safely and/or exercising actual physical control of a vehicle; and/or (2)
26 having a blood alcohol concentration of .08 or more within two hours after driving and/or
27 being in actual physical control of a vehicle.

28 ///

1 At trial, there was no contention that Petitioner was not on a public highway; all
2 witness testified that Petitioner was driving on a public highway on Theme Road and Dessert
3 Inn Road in Las Vegas. There was also overwhelming evidence that Petitioner was under the
4 influence of alcohol that rendered him incapable of driving his minivan safely. For instance,
5 Skilbred and Castillo both testified that Petitioner drove the minivan over the speed limit, ran
6 a red light and stop sign, drove into oncoming traffic, and then crashed into concrete road
7 barriers. Castillo said Petitioner was very intoxicated, had a strong odor of alcohol, looked
8 disoriented, could not maintain his balance and had very sloppy speech. Officer Rainier also
9 said he found an open container in Petitioner's minivan. Less than two hours after the crash,
10 Petitioner's blood alcohol content was .249 grams of ethanol per 100 milliliters of blood.
11 Thus, the State provided overwhelming evidence to sustain Petitioner's conviction under
12 either theory of liability. Further, Petitioner's conduct in this case and his extensive DUI
13 history demonstrate that his sentence was appropriate. Even if trial counsel timely filed the
14 Notice of Appeal, the outcome of Petitioner's case would have been the same. In summary,
15 Petitioner cannot demonstrate prejudice for Strickland purposes, and his claim must be
16 denied.

17 CONCLUSION

18 For the foregoing reasons, the State respectfully requests that this Court DENY
19 Petitioner's Supplemental to Writ of Habeas Corpus.

20 DATED this 4th day of January, 2023.

21 Respectfully submitted,

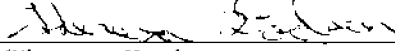
22 STEVEN B. WOLFSON
23 Clark County District Attorney
Nevada Bar #1565

24
25 BY /s/Jonathan Vanboskerck
26 JONATHAN VANBOSKERCK
27 Chief Deputy District Attorney
28 Nevada Bar #6528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing State's Response To
Petitioner's Supplemental To Writ Of Habeas Corpus was made this 4th day of January,
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

jc/JEV/td/vcu

Heather L. Smith
CLERK OF THE COURT

1. Gerald Lee Whitley Jr. 48657
2. P.O. Box 650
3. Indian Springs, Nevada 89070
4. Petitioner. In Pro Se

6. DISTRICT COURT
7. CLARK COUNTY, NEVADA

9. Gerald Lee Whitley Jr.,
10. Petitioner,

case No. A-22-861330-W

DEPT. NO. 20

11. vs.

DATE : 1-19-23

12. Warden Calvin Johnson et al.,
13. Respondents.

TIME : 8:30

15. PETITIONER'S SECOND SUPPLEMENTAL
16. TO WRIT OF HABEAS (Book V. State, 2285 New Sup.
17. Ct.) CORPUS

19. COMES NOW, Gerald L. Whitley, Petition-
20. er, Pro Se files Second Supplemental Habeas
21. Petition, where the judicial record is absent, the
22. Respondents have responded to the Petitioner's
23. Original Habeas petition, its Supplemental
24. habeas petition.

25. This Second Supplemental Habeas Petition
26. is made and based upon the Petitioner's prior
27. attorney, providing the Petitioner a copy of
28.

CLERK OF THE COURT

JAN 09 2023

RECEIVED

1. the pre-trial record, 12-28-22, after the filing
2. of both habeas petitions before the court, that,
3. has revealed blatant acts of ineffective assistance
4. of counsel set forth: (this pleading and grounds
5. incorporated with the original and supplement-
6. al habeas pleadings before the court)
7. Cause 5: Counsel For The Petitioner During
8. The Pre-Trial Phase Was Ineffective When Counsel
9. Did Not Suppress Officer Polion's Repeated Declarations
10. To Obtain A Search Warrant To Abstract Blood
11. Sample Violating The 4th (illegal search and seizure),
12. 6th (effective counsel) and The 14th Amendments (denial
13. of substantive procedural due process) of The U.S.
14. Court.

15. cause

16. That, on the 23rd day of November, 2019,
17. Officer Polion #9800 sought an electronic telephonic
18. Search Warrant, swearing under oath, before Judge
19. Rouens, a 7 blood test was needed from the Petition-
20. er "because he caused the death or substantial bodily
21. harm to another person as a result of the Petition-
22. er driving while impaired by a prohibited or controlled
23. substance or an alcoholic beverage";

24. That, counsel knew or should have known
25. upon Officer Polion obtaining a search warrant,
26. to obtain blood, in a criminal proceeding, has
27. long been held unconstitutional (Rockin v. Cal =
28. 40953), where the arrest

1. of the Petitioner, does not demonstrate another
2. person was subjected to substantial bodily harm or
3. a death, requiring of counsel to suppress the
4. blood testing results, when blood test results
5. became the fruits of the poisonous tree, when
6. a declaration was made, shaking the conscience
7. of the court, the Petitioner's car wreck caused
8. serious physical harm to another, without even
9. a name of an alleged victim;

10. Prejudicial Effect

11. That, because Petitioner's counsel did not
12. seek to suppress the illegal obtained blood results,
13. that was intended to be used to dispute, the
14. Petitioner's van malfunctioned causing the wreck,
15. counsel allowed the Respondent's to rely upon a
16. perjured declaration, that serious harm had
17. been caused to another, yet, the Respondent's
18. did not produce a victim of substantial
19. bodily harm during the Petitioner's criminal
20. trial nor did counsel present to the jurors
21. the lying methods used by Officer Polio #9800,
22. to obtain blood to be used in a criminal pro-
23. ceeding, after it refusal and neglect to acknow-
24. ledge the Petitioner van had malfunction while
25. in use 11-23-2019.

26. ///

27. ///

28. ///

CERTIFICATE OF SERVICE

I, hereby certify, that, On the 3rd day of January, 2023, I mailed Petitioner's Second Supplemental To Writ of Habeas Corpus to the following:

Steven D. Garrison
200 Lewis Ave. 3rd Fl.
Las Vegas, Nevada
89155

Mercel Whatley #48057
GERALD L. WHATLEY - PETITIONER

Note: Judge the prison law library here at the prison, is, not providing legal copywork, requiring of the Petitioner to seek an Order from the court to issue an Order, asking of its clerk to provide a copy of this pleading to the Respondents and the Petitioner he provided a filed stamp copy of this pleading.

1. Supports the sworn allegations and
2. evidence supportive of the pleading
3. before the court.

4. Respectfully Submitted,

5. Date. 1-3-23

6. Gerald Whatley

7. Gerald Whatley - Petitioner

8.

9. CERTIFICATE OF SERVICE

10. I, hereby certify, that On the _____ day of _____

11. _____, 2023, I mailed my Judicial NOTICE

12. PURSUANT TO CHAPTER 47 OF THE NEV. REV

13. STATS to the following

14.

15. Judge Eric Johnson

16. 200 Lewis Ave

17. Las Vegas Nevada 89155

18. Gerald Whatley #48057

19. Gerald Whatley - Debtor

20.

21.

22.

23. Note: The Prison Law Library, here at the

24. High Desert State Prison, is not providing

25. copy work, to any prisoners housed at

26. the prison.

27.

28.

1. GERALD Whatley #48057
2. P.O. Box 650
3. Indian Springs Nevada 89070
4. Petitioner - In Pro Se

5.

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District Court
Clark County, Nevada

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GERALD Whatley
Petitioner,

VS.

The State of Nevada et al,
Respondents

Case no. A-22-861330-W

Dept no 20

Date: 1-19-23

Time: 8:30 AM

Judicial Notice Pursuant
to Chapter 47 of the Nev. Rev. Stats.

Comes Now, GERALD Whatley

Petitioner, Pro Se provides this Court

Judicial notice, the Petitioner have not received

a timely response to the above - mentioned

Case number Dept. 20 Time and Date,

Where [a] Reply to the Respondents Opposition

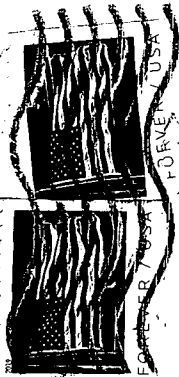
Require of the Petitioner, to be provided an

opportunity and a time set by the court,

ensuring the Petitioner's direct evidence

Charles L. McPherson Jr. #A80571
P.O. Box 930
Indian Springs, Nevada 89309

LAS VEGAS NV 890
5 JAN 2023 PM 5 L



Steven D. Connerhan
200 Lewis Ave. Bldg. 1
Las Vegas, Nevada 89155

89101-630000

HIGH DESERT STATE PRISON

8 7 2022

UNIT - 6 C/D

Heather J. Gemin
CLERK OF THE COURT

Gerald L. Whalley Jr.
A2057 /In Propria Persona
Post Office Box 650 (HDSP)
Indian Springs, Nevada. 89018

DISTRICT COURT

~~CLARK~~ COUNTY, NEVADA

Gerald L. Whalley Jr.
Petitioner
vs. *Warden
Calvin Johnson et al*
Respondents

Case No. 1-22-861330-W

Dept. No. 20

Docket _____

MOTION TO APPOINT COUNSEL

DATE OF HEARING: 1-19-23

TIME OF HEARING: 8:30 AM

COMES NOW the Defendant *Gerald L. Whalley Jr.*, in proper persona and moves
this court for an Order granting him counsel in the proceeding action.

This motion is made and based upon all papers and pleadings on file herein and attached
points and authorities.

Dated this 9th day of January, 2023

RECEIVED
JAN 17 2023
CLERK OF THE COURT

Respectfully Submitted,

Gerald Whalley

1
2 **POINTS AND AUTHORITIES**

3 NRS 34.750 Appointment of Counsel for indigents; pleading supplemental to petition;
4 response to dismiss.

5 "If the Court is satisfied that the allegation of indigency is true and the petition is not
6 dismissed summarily, the Court may appoint counsel to represent the petitioner."

7 NRS 171.188 Procedure for appointment of attorney for indigent defendant.

8 "Any defendant charged with a public offense who is an indigent may, be oral statement to the
9 District Judge, justice of peace, municipal judge or master, request the appointment of an attorney to
10 represent him."

11 NRS 178.397 Assignment of counsel.

12 "Every defendant accused of a gross misdemeanor or felony who is financially unable
13 to obtain counsel is entitled to have counsel assigned to represent him at every stage of the
14 proceedings from his initial appearance before a magistrate or the court through appeal, unless he
15 waives such appointment."

16 WHEREFORE, petitioner prays the Court will grant his motion for appointment of counsel to
17 allow him the assistance that is needed to insure that justice is served.

18
19 — Dated this 9th day of January, 2023

20
21 — Respectfully submitted,

22 Dereald Whately
23
24
25
26
27
28

CERTIFICATE OF SERVICE BY MAILING

I, Margaret Wharfey, hereby certify, pursuant to NRCP 5(b) that on this 19th
day of January, 2023 I mailed a true and correct copy of the foregoing "Motion
To Appointment Counsel"

by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, Fully prepaid,
addressed as follows:

Judge E. Johnson
200 Lewis Ave. 3rd Fl.
Las Vegas, Nevada
89155

DATED: THIS 9th day of January, 2023

Margaret Wharfey
→ 48057 /In Propria Persona
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada. 89018

Garrett Whitely Jr. A8057
P.O. Box 650
Tomball Springs, Nevada 89070

LAS VEGAS STATE PRISON
HIGH DESERT
17 JAN 2023 PM 5 L
JAN 11 2023
UNIT 6 C/D

STEWART D. GIBSON
100 Lewis Ave 3rd Fl.
Las Vegas, Nevada 89153

Confidential

69104-630000

Legal Mail

Heather L. Lemin
CLERK OF THE COURT

1 Gerald L. Whitley Jr.
2 48057 / In Propria Personam
3 Post Office Box 650 [HDSP]
4 Indian Springs, Nevada 89018

5 **DISTRICT COURT**
6 **CLARK COUNTY, NEVADA**

7
8 Gerald L. Whitley Jr.
9 Petitioner

10 vs.
11 Warden
12 Carroll Johnson et al.
13 Respondents

— Case No. A-22-861330-w
— Dept No. 20
Docket _____

14 **NOTICE OF MOTION**

15 **YOU WILL PLEASE TAKE NOTICE, that** the above-mentioned Motion

16
17 will come on for hearing before the above-entitled Court on the 19th day of January, 2023
18 at the hour of 8:30 o'clock AM M. In Department 20, of said Court.

19
20 CC:FILE

21
22 **DATED:** this 9th day of January, 2023

23
24
25 — BY: Gerald Whitley
26 Gerald L. Whitley Jr. #48057
27 /In Propria Personam
28

RECEIVED

JAN 17 2023

CLERK OF THE COURT



CNND

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Gerald Whatley, Jr., Plaintiff(s)

A-22-861330-W

vs.

Department 20

Eighth Judicial District Court, Defendant(s)

CLERK'S NOTICE OF NONCONFORMING DOCUMENT

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, notice is hereby provided that the following electronically filed document does not conform to the applicable filing requirements:

Title of Nonconforming Document:

Motion to Appoint Counsel

Party Submitting Document for Filing:

Gerald Whatley Jr

Date and Time Submitted for Electronic Filing:

2-5-2023 at

Reason for Nonconformity Determination:

- ☐ The document filed to commence an action is not a complaint, petition, application, or other document that initiates a civil action. *See* Rule 3 of the Nevada Rules of Civil Procedure. In accordance with Administrative Order 19-5, the submitted document is stricken from the record, this case has been closed and designated as filed in error, and any submitted filing fee has been returned to the filing party.
- ☐ The document initiated a new civil action and a cover sheet was not submitted as required by NRS 3.275.

☐ The document was not signed by the submitting party or counsel for said party.

☐ The document filed was a court order that did not contain the signature of a judicial officer. In accordance with Administrative Order 19-5, the submitted order has been furnished to the department to which this case is assigned.

☒ Motion does not have a hearing designation per Rule 2.20(b). Motions must include designation “Hearing Requested” or “Hearing Not Requested” in the caption of the first page directly below the Case and Department Number.

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, a nonconforming document may be cured by submitting a conforming document. All documents submitted for this purpose must use filing code “**Conforming Filing – CONFILE.**” Court filing fees will not be assessed for submitting the conforming document. Processing and convenience fees may still apply.

Dated this: 5th day of February, 2023

By: /s/ Michelle McCarthy

Deputy District Court Clerk

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By: /s/ Michelle McCarthy

53

Heather L. Smith
CLERK OF THE COURT

1. Gerald Whatley JR. #48057
2. P.O. Box 650
3. Indian Springs, Nevada 89070
- 4.

5. Petitioner - In Prose

6.

7.

8.

9.

District Court
Clark County, Nevada

10. Gerald L. Whatley JR.,
11. Petitioner,

12. V.

13. Warden

14. Calvin Johnson, et al

15. Respondent

Case no - A22-861330-W

Dept no - 20

Date: 1-12-23

Time: 5:00 pm

16.

17.

18.

19.

Motion Requesting Extension
Of Time

20. Comes now, Gerald Whatley, The Petitioner,
21. in Prose seeks a [30] thirty day extension, after the 19th
22. of January 2023, based on the following -

23. A) Petitioner is a lay person of the law, being
24. afforded only two hours a week in the prison law
25. library to research and prepare a Reply to the
26. Respondents Responses to the original filing of
27. habeas petition, its first Supplemental and the
28.

RECEIVED

JAN 17 2023

CLERK OF THE COURT

1. Petitioner's 2nd Supplemental filed prior to
2. physically receiving the Respondent's pleadings,
3. 1-10-23, whom have not been provided an
4. opportunity to invoke waiver for the Petitioner's
5. Attorney blatantly disregarded for any of the
6. Statutory entitlements made available through the
7. 6th and 14th Amendments of the Federal and Nevada
8. Constitutions.
9. B) Additionally, because prison population is
10. kept on lockdown (22) twenty-two hours everyday
11. prohibiting the Petitioner an opportunity to obtain
12. the help of an inmate of some knowledge of the
13. Law and the methods used to ensure the court does
14. not use the layperson status, relying upon the
15. Respondent's affirmative defense of waiver while
16. attempting to elude the judicial record, the
17. grounds raised within the habeas Petition, the
18. Petitioner was representing himself and there
19. was no attorney of record to be held responsible
20. during those time frames set forth in the grounds
21. raised presently before the court.
22. (C) The sought extension of time will make matters
23. questionable, if the Respondents can not
24. demonstrate the Petitioner was able to make
25. decisions and or make pleadings on his behalf
26. while the record silencing the Petitioner, whom
27. can not be blamed for providing the Respondent's
28.

1. there waiver defense, while in the same breath the
2. Petitioner is entitled to any and all effective
3. assistance of counsel Relief, where the Cause
4. Shown by the Respondent's affirmative defense of
5. waiver and grounds of Relief before the Court while
6. the Prejudicial effect, exist when Counsel
7. Provided the Respondents on affirmative defense
8. that requires of the petitioner to show the Court,
9. waiver can not be made available to the respon-
10. dents where the grounds presently before the
11. Court, has been supported by the Respondent's
12. pleadings while remaining silent in its pleadings
13. the Petitioner attorney of record ineffectiveness
14. by not motioning the Court during the pre-trial
15. phase, the arresting officer committed perjury
16. when it swear the Petitioner wreck caused
17. another substantial bodily harm and death,
18. shocking the conscience of the probable cause
19. Court, to illicit a search warrant, that permitted
20. Law enforcement to be relied upon, make
21. demands upon the Petitioner to submit to blood
22. test, that, was intended by Law enforcement to
23. be relied upon during a criminal proceeding
24. Had counsel of record suppressed perjured
25. declaration, due the arresting of the petitioner,
26. the Record does not provide the name or
27. medical reports of the substantial bodily
28.

1. harm and or death caused by a wreck, did
2. not legally afford law enforcement viola-
3. ted constitutional Rights provided long ago,
4. prohibiting waiver of grounds Raised, because
5. no defendant can be deprived Relief on it's
6. Attorney's failure to preserve the record, aff-
7. ords both parties their Reliefs, on the
8. disadvantages Required of the Petitioner
9. pleaded against an illegal imprisonment based
10. upon the Petitioner's Attorney, during pre-trial
11. Refusal to suppress sworn declaration of
12. arresting officers claiming the Petitioner
13. wreck, subjected another to substantial
14. bodily harm to obtain a search warrant
15. forcing blood testing and results to be
16. used in a criminal proceeding to imprison
17. Requires an extension of (30) thirty days after
18. 1-19-23, to establish Counsel's Representation
19. fail well below ADK+411 Standard on the
20. Sixth Amendment.

Conclusion

24. Surely in the interest of fair play,
25. Court grants the request sought
26. Respectfully

27. 1-12-23

28. Date

Gerald Whately
57 Gerald Whately
(4)

1.

Certificate of Service

2.

Clerk of

3.

Steven D Grierson

4.

200 Lewis Avenue 3rd floor

5.

Las Vegas Nevada 89155

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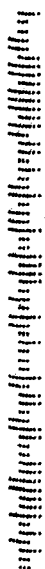
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Gerald Whitham IF 48057
HDSF
P.O. Box 650
Indian Springs NV 89070

NSF 3763

Steven D. Grierson
200 Lewis Avenue 3rd
Las Vegas NV 89155

85101-630000



LAS VEGAS PRISON
HIGH DESERT STATE PRISON
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UNIT 6 C/D





CNND

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Gerald Whatley, Jr., Plaintiff(s)

A-22-861330-W

vs.

Department 20

Eighth Judicial District Court, Defendant(s)

CLERK'S NOTICE OF NONCONFORMING DOCUMENT

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, notice is hereby provided that the following electronically filed document does not conform to the applicable filing requirements:

Title of Nonconforming Document:	Motion Requesting Extension of Time
Party Submitting Document for Filing:	Gerald Whatley
Date and Time Submitted for Electronic Filing:	2-7-2023 at

Reason for Nonconformity Determination:

- ☐ The document filed to commence an action is not a complaint, petition, application, or other document that initiates a civil action. *See* Rule 3 of the Nevada Rules of Civil Procedure. In accordance with Administrative Order 19-5, the submitted document is stricken from the record, this case has been closed and designated as filed in error, and any submitted filing fee has been returned to the filing party.

☐ The document initiated a new civil action and a cover sheet was not submitted as required by NRS 3.275.

☐ The document was not signed by the submitting party or counsel for said party.

☐ The document filed was a court order that did not contain the signature of a judicial officer. In accordance with Administrative Order 19-5, the submitted order has been furnished to the department to which this case is assigned.

☒ Motion does not have a hearing designation per Rule 2.20(b). Motions must include designation "Hearing Requested" or "Hearing Not Requested" in the caption of the first page directly below the Case and Department Number.

Pursuant to Rule 8(b)(2) of the Nevada Electronic Filing and Conversion Rules, a nonconforming document may be cured by submitting a conforming document. All documents submitted for this purpose must use filing code "**Conforming Filing – CONFILE.**" Court filing fees will not be assessed for submitting the conforming document. Processing and convenience fees may still apply.

Dated this: 7th day of February, 2023

By: /s/ Michelle McCarthy

Deputy District Court Clerk

1 **CERTIFICATE OF SERVICE**

2

3 I hereby certify that on February 07, 2023, I concurrently filed and served a copy of the
4 foregoing Clerk's Notice of Nonconforming Document, on the party that submitted the
5 nonconforming document, via the Eighth Judicial District Court's Electronic Filing and Service
6 System.
7

8

9

10

11 By: /s/ Michelle McCarthy

12

13 Deputy District Court Clerk

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Heather J. Smith
CLERK OF THE COURT

1. Gerald L. Whatley Jr #48057
2. P.O. Box 650
3. Indian Springs Nevada 89070

4.
5. Petitioner - In Prose

6.
7. DISTRICT COURT
8. CLARK COUNTY, NEVADA
9.

10. Gerald L. Whatley Jr
11. Petitioner,

Case no A-22-861330-W

Dept no 20

12. VS.

Date: 2-1-2023

13. Warden

Time: 9:30 AM

14. Calvin Johnson, et al.,
15. Respondents.

16.
17.
18. PETITIONER'S REPLY
19. TO RESPONDENTS RESPONSE
20. TO ORIGINAL 1st AND 2nd SUPPLEMENTAL
21. HABEAS PETITION
22.

23. Comes now, Gerald L. Whatley Jr, the Petitioner,
24. Prose moves the court to entertain and grant the
25. Relief Sought

26. The Petitioner's Reply is made and based upon the
27. memorandum points and authorities and direct evidence attached

28. hereto Dated: 2-1-2023

Gerald L. Whatley Jr.
Gerald Whatley Jr.

CLERK OF THE COURT

FEB - 7 2023
RECEIVED

1. MEMORANDUM POINTS AND AUTHORITIES

2. I.

3. STATEMENT OF THE FACTS

4. First, the filing of the Petitioners Original Habeas
5. Petition, the Court issued the order, Requiring the
6. Respondents plead within 45 days of the courts
7. order.
8. That, prior to the Petitioner receiving the Respo-
9. dents Response to the Petitioner's Original Plead-
10. ing and first Supplemental Habeas Pleading the
11. Petitioner had not received their Responses until
12. 1-10-2023 Allowing the Petitioner to author LAT
13. Second Supplemental Habeas Pleading, upon receiving
14. the arresting officer's sworn declaration proof of
15. Perjury, Seeking an order from a court, to forcefully
16. Requite of the Petitioner to submit blood test,
17. where it was alleged in officer's sworn declaration,
18. the Petitioner caused a substantial bodily harm
19. and or death, upon the Petitioners van malfunction,
20. causing the Petitioner to wreck causing damages
21. to the van only and not providing the identity the
22. name of an allege victim and or medical status
23. Supporting its Reason to violate the Petitioners 4th
24. Amendment Right to force Blood testing, eluding
25. probable cause court, someone suffering substantially
26. bodily harm and or death, illiciting a shock of
27. Courts conscience, while seeking of the court

28.

1. to conspire approving a violation of the 4th
2. Amendment (obtain lawful properties, the
3. Petitioner's prior Rejections to blood taking
4. arresting officer Anthony Manginelli perjury
5. used to obtain blood testing results became the
6. fruits of the poisonous tree and counsel was
7. clearly ineffective, when the perjured declaration
8. stated the Petitioner physically caused a
9. serious bodily harm or death upon another and
10. without Petitioner counsel requiring of officer
11. Anthony Manginelli to provide the name person
12. and the medical status of the person whom
13. suffered substantial bodily harm and wreck or
14. death cause by the wrecking of the Petitioners,
15. Required of Counsel suppress the sworn declaration
16. of arresting officer the only evidence (the
17. Blood Result) illegally obtained and relied upon
18. and objected to, prior to trial and further con-
19. firmation from the Respondent did not make
20. mentioned to the Court, the ground raised in the
21. habeas Petition and Supplemental restricted the
22. Petitioner of any decision-making, because the
23. judicial record, establish Counsel of record, Prohib-
24. iting any input from the Petitioner while
25. eluding the court responsive pleadings Pres-
26. ented the causes and prejudices from the
27. Petitioner's attorney, the waiver doctrine do not

1. Requires the Court to overlook ineffectiveness
2. outlined by the Respondents own admissions,
3. Counsel was not in compliance of ADKT 411
4. provisions and 6th Amendment Representation, at
5. pretrial phase (did not seek suppression on
6. proof, the arresting officer committed perjury
7. to force blood test and its results to use in criminal
8. proceeding, prohibited by the 4th Amendment
9. and other mentioned including not timely appealing
10. the jury verdict draws a strong inferences Representation
11. of the petitioner served as an agent of
12. the Respondent, by permitting an affirmative defense
13. of waiver rightfully so however the deprivation
14. of ADKT 411 requires of a court to be allowed to
15. deny blatant ineffective assistance so presented
16. by Respondent upon invoking the waiver doctrine
17. and grounds presently before the court
18. and legal arguments in support grounds presently
19. before the court.

20.

II

21. Ground I LEGAL ARGUMENTS

22. a) This Petitioner Hereby Invokes the Single ground
23. Raised In the Petitioners Timely filed 2nd Supplemental
24. Habeas Petition:

25. First the mailing log of the High Desert
26. State Prison will reveal, the Petitioner received
27. the evidence in support of ground Raised in the

28.

1. Petitioner's 2nd Supplemental, from Leslie
2. Parks on the 28th day of December 2022 prior
3. to the Respondents serving upon the Plaintiff
4. their Response to the Plaintiff's Original and
5. 1st Supplemental Habeas Petition on the
6. 10th day of January 2023 after the Petitioner
7. mailing the 2nd Supplemental Habeas Petition,
8. depriving the Respondents to invoke any
9. affirmative defense that infringes upon the
10. procedural safeguards afforded on collateral
11. Review, especially, where the United States Supreme
12. Court has long held, its [a] violation of the 4th
13. Amendment of the US Constitution to force its
14. Citizens to provide anything of internal, and
15. later be relied upon in a Criminal Proceeding, to
16. imprison, on forced taken incriminating evidence,
17. Rochin v. California, 34 US 165 (1952) well
18. established law)

19. Also, the Petitioner reminds the reviewing
20. Court Article 6 Section 2 of the US Const.
21. has not amended and or notified State Courts,
22. they are no longer Required to follow,
23. this Constitution and the Law of the United
24. States which shall (Mandatory) be made
25. in Persuance there of and all treaties
26. made or which shall be made under the
27. Authority of the United States, shall (Man-

28.

1. dated) be the Supreme Law of the Land and
2. the Judges in every State (Nevada Judges Inc-
3. uded) shall be bound there by anything in
4. the Constitution or Laws of any State to the
5. contrary notwithstanding.

6. Such is brought to the Courts Attention

7. where it has been [a] common-practice of
8. modern day Judges, especially those judge elected by
9. the people, to aid, state prosecuting attorney's in con-
10. cealing evidence and ensuring evidences in favor
11. of criminal defendants during criminal trials, only
12. for the limited purpose of the State prosecution main-
13. taining a tactical advantage during pre-trial and
14. trial, where in a logic sense of Reality, the
15. judge and the prosecuting attorneys pick there
16. paychecks the same day.

17. Being so the Rights of this Petitioner under
18. the Due Process Clause places upon this Court
19. the Duty of exercising a judgement within the
20. narrow confines of judicial power in reviewing
21. the Petitioners convictions, when the use of [a]
22. Perjured sworn declaration authored by officer
23. Anthony Maginelli swearing and shocking the
24. conscience of the Probable cause judge the
25. wreck of the Petitioner caused an unknown
26. citizen substantial bodily harm to obtain a
27. Search Warrant to force the Plaintiff to blood
28.

1. testing, whom the probable cause court and
2. the arresting officer, knew or should have known
3. the plaintiff could not be forced by any
4. judicial order that requires the Plaintiff to
5. Self-Incrimination in the fifth Amendment made
6. available to the Petitioner through the 14th
7. Amendment (due Process) of the US Const-
8. itution see Adams v. California, 67th Ct 1672
9. (force Blood testing) violated Wolf v. Colorado,
10. 69th Ct 1359, does relieve the Court "The forc-
11. ing of Blood taking for the use of criminal
12. proceeding, does not allow this reviewing court
13. in fair play Cause Had counsel of record auth-
14. orized [a] suppression, prior to trial bring to a
15. court the sworn declaration held perjured
16. statements a human being was subjected to
17. substantial bodily harm to obtain order, that
18. would subject the plaintiff to self-incrimi-
19. nation, while the prejudicial effect, the
20. issue raised above, counsel did not preserve
21. for appeal and or objecting during trial the
22. results obtained from the blood test was sought
23. from a criminal act of perjury prior to
24. and during sentence, its objections the use
25. of self incriminating evidence (forcing the
26. Plaintiff to an order from a court, to submit
27. to blood testing or held down by law
28.

1. enforcement inducing fear into the Petitioner
2. he will be physically harmed if not in comp-
3. liance with courts and to ensure the judicial
4. Remain Silent, counsel chose not file a timely
5. appeal, protecting the Petitioner's Rights
6. Statutory or Constitutional, while ensuring the
7. Respondents illegal methods at the pre-trial
8. and trial proceedings and sentencing of the
9. Lay Person Petitioner were never Protected through
10. out court proceedings nor in compliance with
11. the Nevada Supreme Courts ADKT 411 provisions,
12. Removing discretion from bias courts who
13. purposely blindfold themselves to protect
14. independent contract attorneys, whom also
15. violated the conspiracy statute; title 423 1985 (2)
16. and (3) (The KLU KLUX KLAN Act) with the Respondants
17. and the court, violating rights that had not been
18. violated and the Clark County Nevada Judicial
19. System had no evidence (other than those that
20. testified during the Petitioner trial week
21. occurred nor was it established beyond the sworn
22. declaration, allegedly there someone) injured and
23. or dead from the van malfunctioning causing
24. damage to the van Only became the fruits of the
25. Poisonous tree and a Strickland violation and
26. Most of all the burden imprisonment, a sei z-
27. ure of the Petitioners Liberty where had been
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1. Provided the discovery prior to trial to preserve
2. the record while requesting the court to prohibit
3. the Respondents during trial be prohibited to
4. Rely on self incrimination evidence obtained blood
5. Results on the Bochin Doctrine and or proof of
6. Perjury, provides the petitioner relief pursuant to the
7. 5th, 6th and 14th Amend. Of the U.S. by way of
8. Perjury, pursuant Reviewing court whom priorly
9. abridged the contract of a plea agreement, it lacked
10. the passion to step out its judicial body govern-
11. ment, to impose its personal views to punish
12. the Afro-american defendant where it has long
13. observed alcoholism is a disease depriving treat-
14. ment under NRS 484C.330 even after a crim-
15. inal act of perjury occurred by arresting officer
16. whom surely will not be arrested because it
17. has been held Caucasians of law enforcement can
18. freely validate Criminals code, to ensure jail
19. and prisons are full of Afro-Americans, espec-
20. ially those that don't understand the secret agenda
21. and antics used to maintain the views of the Unq-
22. bolished Virginia Constitution.

23. Thus, Black Lives Really Matter, it has
24. become a moment of time to provide this
25. Petitioner equal protection of the Law, as if,
26. Caucasian Man of wealth who provided this
27. court direct evidence criminal act occurred to
28.

1. abridge upon the Liberties without any pro-
2. tection from the Attorney of Record demands the
3. relief in the interest of justice, where ineffective-
4. ness is clear and evidentiary hearing would
5. Require the court, to order the Arrest of Officer
6. Anthony Manginelli using a lie to subject Petitioner
7. [a] felony judicial proceeding after abusing its
8. power, as a representative of law enforcement to
9. excessively treat the Petitioner beyond the mis-
10. demeanor occurrence See (Exhibit A Declaration
11. of Arresting Officer)

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14. SPACE LEFT BLANK BY THE
15. PETITIONER ! ! !
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Ground II

1. Here, the Petitioner Adopts Ground I
2. of the Petitioner's Original Writ of Habeas
3. Corpus, its Points and Authorities Foretells points
4. too, the United States Supreme have vocal on
5. what [a] Constitutional affirm and infirm
6. Convictions are... when allowed to be used
7. to enhance a primary offense.

8. CAUSE

9. First, the Nevada Constitution Article I
10. Session 3 provides: the right to trial...
11. while these convictions, that went to trial
12. and decided the States Highest Court, where
13. the trial conviction lays is, considered [a]
14. Constitutionally affirm conviction and can be
15. used by enhancement sentencing court where [a]
16. judicial Record Reflects the prior relied
17. upon conviction to enhance a primary
18. offense:

19. 1) A trial occurred and finalized by States
20. Highest Court

21. 2) Nor can a recent trial conviction absent
22. [a] direct review fact finding due to the States
23. High Court final order, affords a prosecu-
24. tion, it can rely upon "Constitutional Infirm"
25. to enhance a primary, relying upon prior
26. convictions, that have raised out of Plea
27. agreements - see Romdass v. Angelone,
28.

1. 120 S. Ct. 2112 (2000) Also see O'Dell v Nether-
2. land, 117 S. Ct. 1969 (Quoting The State Highest
3. to declare a conviction for the purpose of a
4. three strike statute).

5. Once a verdict has been rendered, verdicts
6. may be overturned by the trial court appellate
7. process or collateral review.

8. Prejudice

9. 3) Counsel knew or should have known prior to the
10. Court imposing Sentencing Counsel was requir-
11. ed to examine the conviction it would rely up-
12. on, while fairly claiming jurisdiction upon
13. enhancing Driving and/or Being In Actual Phy-
14. sical Control of a Motor Vehicle while Under
15. The Influence Statutory provision, deprived the
16. Sentencing Court Jurisdiction where the Courts
17. issuance of its Judgment of Court conviction
18. the J.O.C. Does Not make reference to the Jurors
19. spoken verdict April 25, 2022 and the cited In
20. the Petitioners J.O.C. Components deprived the
21. Nevada Department of Corrections their Present
22. Restraint upon the Petitioners Liberty;
23. Exhibit "A" J.O.C. Also it's not to be overloo-
24. ked in fair play the judicial record does not
25. indicate the Petitioner was taken back to
26. Preliminary hearing and or Indictment proc-
27. eedings to change the Petitioner with the

28.

1. Death a Class C felony (NRS 239.330)
2. where it should have been known the
3. United States Supreme Court had long held;
4. no internal unlawful contraband can be
5. forced out of its citizens and later relied
6. upon to seize liberty. See Rochin, Supra.
7. (emphasis added).
8. What's so sadly, Counsel of Record
9. knew or should have known, she was
10. required to plea the Rochin (1957) Doctrine
11. (well established law) to avoid being preju-
12. dice, where the grounds contained within
13. the Petitioner's Habeas Petition, has shown
14. on the judicial record, a total breakdown,
15. where the Attorney provided the Respondents
16. an opportunity to invoke an affirmative
17. defense while disconcerting herself when
18. the Petitioner was protected from unfair-
19. ness in the criminal process by the Due
20. process Requirements and [a] conviction
21. can not stand, where a Law enforcement
22. used a classical tactic requesting of a
23. probable cause court to conspire with
24. him in abusing his law enforcement
25. status to commit a Category C felony
26. just to be able to submit upon Respondents
27. unconstitutionally obtained evidence (Blood
28.

1. Listed Nev. Rev. Stats. 484C.110, 484C.410 OR
2. 484C.105 set forth in the J.O.C. is unconstitutional-
3. ionally, where the trial evidence did not pro-
4. duce an alleged victim as sworn to under the
5. penalty of perjury, officer M. Polion and OR
6. Anthony Manginelli # 15931 by way of sworn Decla-
7. ration, the wreck caused someone substantial
8. bodily harm or death shocking the conscience of
9. the probable cause court forcing the Petitioner
10. to submit to blood testing and the results to
11. be relied upon during trial, was the fruits to
12. the poisonous tree and a violation of the Petit-
13. ioner's fourth, fifth and 14th Amendments (illegal
14. seizure of liberty self discrimination) both
15. through the 14th Amendment of the U.S. Const.
16. Where Respondent was allowed to constri-
17. ctionally amended the Petitioner's after trial
18. testimony and verdict, absent, notice of the
19. above statutes and the absence of [a] 2016
20. relied upon by the sentencing court, did not
21. possess (3) three-finalized affirmed convict-
22. ions, a wreck caused by malfunction, a
23. matter not raised at trial and the sentenc-
24. ing phase not brought to the Nevada Supre-
25. me Court on direct appeal, in which wai-
26. ved his procedural safeguards pursuant to
27. Rule (3) of the Nev. Rev. Of Appellate Pro-

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1. Cedue that requires a hearing under the
2. ~~Stickland~~ Standard and ADKT 411 mandate...
3. Exhibit C pg. 7 of the PSI.

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Ground III

1. HERE THE PETITIONER ADOPTS
2. GROUND II OF THE PETITIONER'S
3. SUPPLEMENTAL TO WRIT OF HABEAS
4. CORPUS FILE NOVEMBER 17th 2022:
- 5.

6. Thus, drug-addicts and alcoholism has been declared a disease and those appearing to suffer from the
7. above-mentioned social disorder, the law afforded
8. procedural safeguards and the entitlements of
9. drug treatment, where the Petitioner's attorney knew or
10. should have known, where there's Statutory State
11. entitlements Nev. Rev. Stat 484c.320 deprives the
12. Respondent No Permission, to avoid liabilities when
13. counsel throughout the record and priorly shown
14. herein, Counsel's representation has shown and
15. demonstrated has been long-disregards for the
16. Petitioner's citizen status and Counsel overlooked
17. papers when showing PSI did not have prior
18. 2016 DUI on it. The PSI notified of the Court
19. to issue to an Order 90 day evaluation in patient
20. drug treatment program or deemed [a]
21. program of evaluation tailored from the Social
22. Profile of the Petitioner's especially, where
23. the driving record does not present before the
24. Court Substantial Bodily Harm of Another, prior
25. to and or the present an indicated, abut of
26. conscience for public safety required of
27.
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1. Counsel, to have Petition, the pre and or trials
2. Courts, Seeking Drug Treatment Prior to Sent-
3. encing and or trial, especially where tangible
4. fault evidence is Relied upon counsel, not objecting
5. to prison before statutory entitlements and the
6. Petitioner's prior to sentencing could also have
7. been labeled as an abuse of discretion, where
8. the court knew or should have known the drug
9. treatment sought during sentencing, Request of
10. the court to stay the case and Petition the
11. Nevada Supreme Court Pursuant NRS 34.150
12. thru 185 (30 day Preview upon Request from Coun-
13. sel) compelling the sentencing Court, based up-
14. on Mandated Requirements Set forth in the
15. above-mentioned Law of the State of Nevada
16. acknowledgement of Procedural entitlements
17. the Petition were not by counsel nor pres-
18. erved for an appeal or Raised on direct
19. direct Review where Record demonstrates the
20. Petitioner was represented by counsel and
21. the record does not reflect the Plaintiff waived
22. his Right to a direct appeal.

23. Surely such disregard for a defendants
24. fundamental Rights as an officer of the Court
25. sworn to uphold the rights of these they
26. Represent here, Counsel can not Reach for the
27. Common Affirmative defense.

28.

GROUND IV

PETITIONER ADOPTS GROUND III OF SUPPLEMENTAL WRIT OF HABEAS CORPUS:

It is clear, a structural error occurred, during the sentencing phase, where upon the Petitioner requesting drug treatment pursuant to NRS 484C.330, discovered through the Prison Law Library an entitlement that was available to the Petitioner, prior to the sentencing court announcement of an illegal sentence - see Weaver v. Mass, 137 S Ct. 1899 (2017)

Also, the sentencing court knew or should have known of subsequent offense within (7) seven years. Rather the court (in its drunkenness) claimed during sentencing, stated "Because you went to trial, you'll receive more time". See NRS 484.3792.

In other words Because you cost the court its time, to exercise your right to a trial, you are going to prison. (emphasis added)

Further, this court knew counsel for the Petitioner exhibited an actual breakdown in the adversarial process during the entire representation when the Petitioner's was protected from unfairness in a criminal process by

1. the due PROCESS Requirements see:
2. Cronic, 466 U.S. at 658 (pre trial violations)
3. and Strickland, 104 S ct, 2052 (1984)
4. (trial and Post-trial violations) where the
5. proceedings afforded to the Petitioner was
6. egregiously prejudicial ineffective assist-
7. ance of counsel is presumed.

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Ground IV

1. PETITIONER ADOPTS 2. GROUND III OF HIS FIRST 3. SUPPLEMENTAL HABEAS PETITION

4.
5. ✓ Here what's presently before this
6. Court counsel for the Petitioner did not
7. concern herself with any strategies, objections
8. OR laws that provided the petitioner pre-
9. procedural safeguards that ensured the
10. Petitioner would receive [a] direct appeal
11. after May 26, 2022 - Sentencing and it was
12. trial attorneys responsibility to ensure
13. a timely Notice of Appeal be filed on
14. the Petitioner's behalf especially where
15. there is an attorney of record the Peti-
16. tioner was prohibited from personally
17. petitioning the court See Rule 3.70 and
18. 7.055.

19. Additionally, the Petitioner points to
20. the court counsel was deficient at every
21. level of the criminal proceedings, was
22. to a clear violation of 5th Amendment
23. through the 14th Amendment of US Const.
24. (Self discrimination) avoiding a suppre-
25. ssion hearing (the perjured sworn declara-
26. tion that eluded the court, someone was
27. subjected to substantial Bodily Harm OR
28.

1. Samples Require to be given ~~pre~~-courts
2. order), while counsel silenced herself
3. pre and trial and the appellate process
4. Requires of the court to appoint counsel
5. and evidentiary hearing ensuring law
6. enforcement and counsel can be adequ
7. atly cross-examined on grounds presently
8. before the court.

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CERTIFICATE OF SERVICE

- 1.
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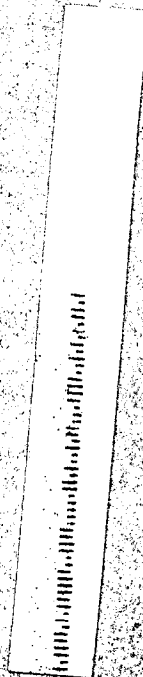
I hereby certify, that on the 1st day of February, 2023 I mailed my PETITIONERS REPLY TO RESPONDENTS RESPONSE TO ORIGINAL 1st AND 2nd SUPPLEMENTAL HABEAS PETITION to the following:

Steven D. Grierson
200 Lewis Avenue 3rd Floor
Las Vegas NV 89155-1160

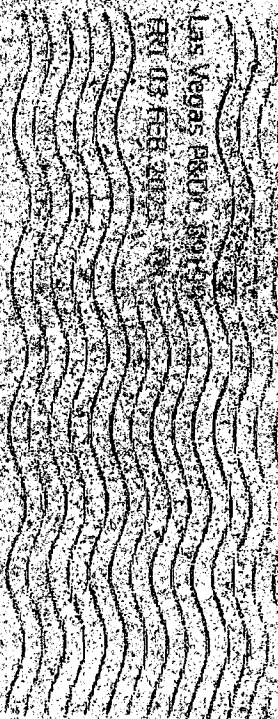
Steven Wolfson
200 Lewis Avenue 3rd Fl
Las Vegas NV 89101

Gerald Whatley Jr
Gerald Whatley Jr The Declarant
Title; 2831746

Cecilia Whately #48057
High Desert State Prison
P.O. Box 650
Indian Springs Nevada 89070



Steven D. Grierson
200 Lewis Ave 3rd Floor
Las Vegas Nevada 89155-1160



Heather L. Linn
CLERK OF THE COURT

Gerald L. Whitley Jr #48057

P.O. Box 650

Indian Springs, Nevada

89070

~~Attorney - In Pro Se~~

DISTRICT COURT
CLARK COUNTY, NEVADA

Gerald L. Whitley,
Declarant,

case NO: A-22-861330-W

dept-NO 20

vs
Whitley,
Calvin Johnson et al -
Respondents

SWORN AUTHENTICATION OF EXHIBITS

I, Gerald L. Whitley, the Declarant, first
duly sworn, I, the Declarant, hereby swear and
authenticate Exhibits B and C attached to un-
der Chapter 52 of the Nevada Revised Statutes
and can testify upon being called to do so.

DATED: 2-1-2023

Gerald Whitley Jr #48057
Gerald L. Whitley Jr - Declarant
Title 251746

EXHIBIT

B

JUDGMENT OF CONVICTION

Heather L. Smith
CLERK OF THE COURT

JOC

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

GERALD LEE WHATLEY, JR., aka
Gerald L. Whatley Jr.
#2753951

Defendant.

CASE NO. C-21-357412-1

DEPT. NO. XX

FILED

JUDGMENT OF CONVICTION
(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crime of DRIVING UNDER THE INFLUENCE (Category B Felony) in violation of NRS 484C.110, 484C.410, 484C.105, and the matter having been tried before a jury and the Defendant having been found guilty of the crime of DRIVING AND/OR BEING IN ACTUAL PHYSICAL CONTROL OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF AN INTOXICATING LIQUOR OR ALCOHOL (Category B Felony) in violation of NRS 484C.110, 484C.410, 484C.105; thereafter, on the 26th day of May, 2022, the Defendant was present in court for sentencing with counsel LESLIE A. PARK, Esq., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said felony offense(s) and, in addition to the \$25.00 Administrative Assessment Fee, \$2,000.00 Fine and \$150.00 DNA Analysis Fee including testing to determine genetic markers, WAIVED if previously

1 taken, plus \$3.00 DNA Collection Fee, the Defendant is SENTENCED to the Nevada
2 Department of Corrections (NDC) as follows: a MAXIMUM of FIFTEEN (15) YEARS
3 with a MINIMUM parole eligibility of FOUR (4) YEARS; with THIRTY-ONE (31) DAYS
4 credit for time served.
5

6 COURT FURTHER ORDERED, pursuant to NRS 484C.340, 484C.460, prior to
7 any reinstatement of driving privileges, the Defendant shall have an Interlock Device
8 installed and inspected on Defendant's vehicle at Defendant's expense for a period of
9 36 months, said period to commence after any period of imprisonment, residential
10 confinement, confinement in a treatment facility or on parole or probation.
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Dated this 1st day of June, 2022

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21 1FA AD4 30E2 ABF0
22 Eric Johnson
23 District Court Judge
24
25
26
27
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EXHIBIT

C's

PRESENTENCE INVESTIGATION REPORT/
DUI CASE CHECKLIST

PRESENTENCE INVESTIGATION REPORT

Page 7

GERALD LEE WHATLEY JR AKA GERALD L WHATLEY JR
CC#:C-21-357412-1Exhibit
C-5

07-01-06 Stockton, CA Stockton SO	1. Evade Peace Officer: Disregard Safety (F) 2. Driving Under the Influence of Alcohol/Drugs (M) 3. Driving Under the Influence of Alcohol/0.08 Percent (M) 4. Obstructs/Resists Public Officer/Etc. (M) Charges added: 12-11-06 5. Willful Cruelty to Child (M)	SF100884A 12-11-06: Convicted of Count 1 – Driving Under the Influence of Alcohol/Drugs, Enhancement with Prior (M), Count 2 – Driving Under the Influence of Alcohol/0.08 Percent, Enhancement with Prior (M), Count 3 – Obstructs/Resists Public Officer (M), Count 4 – Willful Cruelty to Child (M), Count 5 – Evade Peace Officer: Disregard Safety, Enhancement with Prior Prison and Use of Gun: Great Bodily Injury/Death (F), 3 years probation, restitution, fine
12-08-11 North Las Vegas, NV NLVPD	1. Driving Under the Influence (M) 2. Possession of Controlled Substance Marijuana (F) 3. Possession of Controlled Substance PCP (F) BW: 02-01-12	CR009229-11 04-03-12: Convicted of Driving Under the Influence of Alcohol/Drugs (M), 180 days jail, suspended, victim impact panel, fine 12-29-13: Amended to Reckless Driving (M)
12-11-11 Las Vegas, NV LVMPD	FTA: Driving Under the Influence (F) RMD: 01-08-13	C-12-279225-1 01-08-13: Convicted of Driving and/or Being in Actual Physical Control While Under the Influence of Intoxicating Liquor (F), 12-30 months NDOC 04-04-13: Sentence amended to include 53 days CTS
07-21-18 Las Vegas, NV LVMPD	WA: 1. Battery with Deadly Weapon (F) 2. Attempt Robbery – Enhancement/Deadly Weapon (F) 3. Conspiracy to Commit Battery (GM) RMD: 03-02-20	C-19-338413-1 03-02-20: Convicted of Conspiracy to Commit Robbery (F), 28-72 months NDOC, suspended, probation NTE 5 years, 90 days CCDC
11-23-19 Las Vegas, NV LVMPD	1. Driving Under the Influence, (2 nd) (M) RMD: 04-26-22 2. Driving Under the Influence with Prior Felony Driving Under the Influence (F)	Instant Offense, C-21-357412-1 19M24489X 07-14-21: Convicted of Driving Under the Influence of Alcohol and/or Controlled or Prohibited Substance, 1 st Offense (M), CTS, 185 days breath interlock device



Transportation Safety Bureau

DUI CASE CHECKLIST

*** NOT FOR DISSEMINATION ***



T.A.R.G.E.T.

Exhibit
3-15
C's

Name: WHATLEY, GERALD L.	Event #: 191100108577
Scope ID #: 2753951	Case #: CC - 19M24489X

CITATION

Citation ☒
Officer's Report ☒
Arrest Report ☒
LVMPD # 295 ☒

ARREST

Booking Voucher ☒
Temporary Custody Record ☒
Declaration Of Arrest ☒
Officer's Report ☒
Arrest Report ☒
LVMPD # 295 ☒
Search Warrant ☒

ACCIDENT REPORT

Accident Report ☒

STATEMENTS

Victim/witness ☒

BREATH TEST

Check List ☒
Breath Strip ☒
Operator Affidavit ☒

BLOOD DRAW

Nurse's Affidavit ☒

LAB ANALYSIS

Blood ☒
Urine ☒

LAB RESULTS

Alcohol BAC > 0.08% ☒ .249
Controlled Substance Present ☒
Alcohol BAC < 0.08% ☒
No Drugs Detected ☒

FIELD SOBRIETY WORKSHEET

Field Sobriety Worksheet ☒
Not Completed ☒

VEHICLE IMPOUND

Vehicle Impound ☒
Vehicle Described in Other Report ☒

PRIORS

Number Of Local Priors
Number Of Other Jurisdiction Priors CW

INVESTIGATION NOTES

C-12-279225-1

Requesting Felony Upgrade

"Date Submitted"

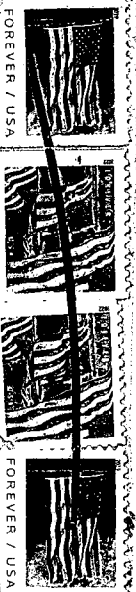
MAR 26 2020

TARGET DUI INVESTIGATION FORM

Cecilia Wmattay #48057
High Desert State Prison
P.O. Box 650
Indian Springs Nevada 89070

POSTNET

Steven D. Grierson
200 Lewis Ave 3rd floor
Las Vegas Nevada 89155-1160



Steven D. Grierson

1. GERALD Whatley JR #48057

2. P.O. Box 650 H.D. S.P.

3. Indian Springs, NV 89078

4.

5.

District Court

6.

Clark County, Nevada

7.

8. GERALD Whatley JR

9.

Petitioner

Case no. A-22-861330-W

10.

-v-

Dept no. 20

11. CALVIN JOHNSON et al

Date 2-23-2023

12.

Respondents

13.

14.

Notice of Appeal

15. Notice is hereby given that the Appellate,

16. GERALD Whatley JR, by and through himself in

17. proper person, does now appeal to the Supreme

18. Court of the State of Nevada, the decision of

19. the District court denial of Habeas petition

20. that contained the following Constitutional

21. Raised Grounds

22. 1) Ground One: Nevada's Constitution art. 4, sec. 6,

23. and Sec. 8 in Due Process was violated due to

24. ineffective assistance of counsel prior to and

25. during trial court proceedings et seq. Ineffective

26. Assistance of Appellate/appeal Counsel in

27. Violation of the petitioner's 6th Amendment

28.

CLERK OF THE COURT

FEB 21 2023

RECEIVED

1. Right 45 Const, Violation
2. Grounds two: Counsel for the Petitioner during
3. the pre-trial Phase was ineffective when
4. Counsel did not suppress officer Polion
5. Perjured Declaration to obtain a search
6. warrant to abstract Blood Sample violating
7. the 4th (illegal Search and Seizure) 6th
8. (effective counsel) and the 14th Amendment
9. (denial of substantive procedural due
10. process) of the U.S. Const.
11. Grounds Three: That the sentencing court lacked
12. a disregard for the state statutory entitlements
13. afforded to Petitioner under Chapter 484C.320
14. of the Nevada Revised Statutes et seq., deprived
15. the sentencing court actual jurisdiction
16. absent the sentencing court, aided in programs
17. of treatment upon the Petitioner's request
18. prior to sentencing, Violation Const. 14th Amend.
19. Ground four: The Petitioner's sentence phase
20. demonstrated because a jury trial occurred,
21. the sentencing court relied on a 2016 citation,
22. to justify subject the Petitioner to 157 Prison
23. term, Violation Const. 14th Amend.
24. Ground five: Petitioner believes he was re-
25. taliated against when the sentencing court
26. arbitrarily violated the Petitioner's first Amend.
27. Rights (Retaliation/Imprisonment for seeking a
- 28.

1. Jury trial) Upon Seeking the imprisonment
2. of a prison term without jurisdiction
3. Ground Six: Petitioner believes Counsel
4. was Ineffective when it created a jurisdictional
5. defect during the appellate process the
6. appellant A Statutory Right to a Direct
7. Appeal and effective Counsel on Direct Appeal
8. Review. A violation of the 6th and the 14th
9. Amend. of the U.S. Const.
10. Ground Seven: The Trial-Sentencing Court
11. deprived to the Petitioner Compulsory
12. process of the 6th Amend. of the US.
13. Const. The judicial office of the Eighth
14. Judicial District Court Abused its discretion
15. When the judicial record of the Court
16. Demonstrates this Petitioner's pleadings
17. Before (Habeas Petition, its Supplement and
18. 2nd Supplemental) was denied for judicial
19. Review when the Court entered judgement in
20. favor of respondents Prior to the Order
21. Date for Appellants Reply Due date.

22.

23. Date: 2-23-2023

24.

25. Petitioner does not have access to electronic
26. transmission, mailing system is only process.

27.

28.

Certificate Of Service By Mailing

I, Gerald Whatley, hereby certify pursuant to NRC P 5(b) that on this February day of 23, 2023, I mailed a true and correct copy of the foregoing "Notice of Appeal" by depositing it in the High Desert State Prison, Legal Library, first-class Postage, fully prepaid address as follows:

8.

9. Steven D. Grierson

Steven Wolfson

10. 200 Lewis Avenue 3rd floor

200 Lewis Ave 3rd fl

11. Las Vegas NV 89155-1160

Las Vegas NV 89101

12.

13.

14.

15.

16.

17.

18.

Gerald Whatley Jr
Gerald Whatley Jr

19.

20.

21.

22.

23.

24.

25.

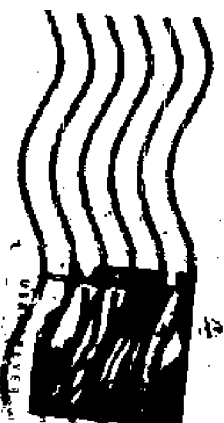
26.

27.

28.

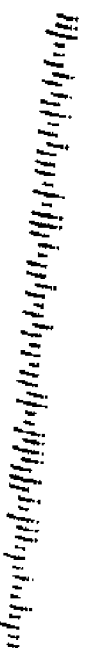
Greata Whittier #48057
High Desert State Prison
P.O. Box 1050
Indian Springs NV 89070

LAS VEGAS NV 890
23 FEB 2023 PM 3 L



Steven D. Belkerson
200 Lewis Avenue 3rd Fl
Las Vegas Nevada 89155-1160

89101-830000





1 ASTA

2
3
4
5
6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**
9

10 GERALD LEE WHATLEY, JR.,

11 Plaintiff(s),

12 vs.

13 THE EIGHTH JUDICIAL DISTRICT COURT,

14 Defendant(s),
15

Case No: A-22-861330-W

Dept No: XX

16
17 **CASE APPEAL STATEMENT**
18

19 1. Appellant(s): Gerald Whatley, Jr.

20 2. Judge: Eric Johnson

21 3. Appellant(s): Gerald Whatley, Jr.

22 Counsel:

23 Gerald Whatley, Jr. #48057
24 P.O. Box 650
Indian Springs, NV 89070

25 4. Respondent (s): The Eighth Judicial District Court

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89155-2212

1 5. Appellant(s)'s Attorney Licensed in Nevada: N/A
2 Permission Granted: N/A

3 Respondent(s)'s Attorney Licensed in Nevada: Yes
4 Permission Granted: N/A

5 6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

6 7. Appellant Represented by Appointed Counsel On Appeal: N/A

7 8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
8 ***Expires 1 year from date filed*
9 Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

10 9. Date Commenced in District Court: November 16, 2022

11 10. Brief Description of the Nature of the Action: Civil Writ

12 Type of Judgment or Order Being Appealed: Civil Writ of Habeas Corpus

13 11. Previous Appeal: No

14 Supreme Court Docket Number(s): N/A

15 12. Child Custody or Visitation: N/A

16 13. Possibility of Settlement: Unknown

17 Dated This 2 day of March 2023.

18 Steven D. Grierson, Clerk of the Court

19
20
21 /s/ Amanda Hampton

22 Amanda Hampton, Deputy Clerk
23 200 Lewis Ave
24 PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

25 cc: Gerald Whatley, Jr.
26
27
28

Alvin S. Hume
CLERK OF THE COURT

FOFCL

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**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 red 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 Desert 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.

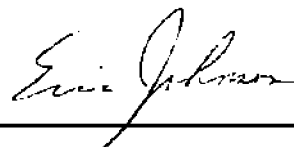
21 Second, there has been no indication that Petitioner is unable to comprehend the
22 proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the
23 English language, Petitioner has failed to demonstrate any inability to understand these
24 proceedings.

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



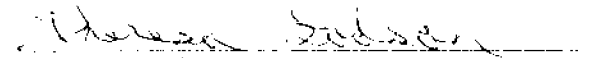
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th 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

jc/JEV/ad/veu

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@clarkcountyda.com
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1 NEFF

2 **DISTRICT COURT**
3 **CLARK COUNTY, NEVADA**

4
5 GERALD WHATLEY,

6 Petitioner,

Case No: A-22-861330-W

Dept No: XX

7 vs.

8 EIGHTH JUDICIAL DISTRICT COURT,

9 Respondent,

**NOTICE OF ENTRY OF FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

10
11 **PLEASE TAKE NOTICE** that on April 21, 2023, the court entered a decision or order in this matter, a
12 true and correct copy of which is attached to this notice.

13 You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you
14 must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed
15 to you. This notice was mailed on April 24, 2023.

16 STEVEN D. GRIERSON, CLERK OF THE COURT

17 /s/ Amanda Hampton

18 Amanda Hampton, Deputy Clerk

19 **CERTIFICATE OF E-SERVICE / MAILING**

20 I hereby certify that on this 24 day of April 2023, I served a copy of this Notice of Entry on the following:

21 ☒ By e-mail:

22 Clark County District Attorney's Office
23 Attorney General's Office – Appellate Division-

24 ☒ The United States mail addressed as follows:

25 Gerald Whatley # 48057
26 P.O. Box 208
27 Indian Springs, NV 89070

28 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

Alvin S. Smith
CLERK OF THE COURT

FOFCL

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #1565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

**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 red 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 Desert 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.

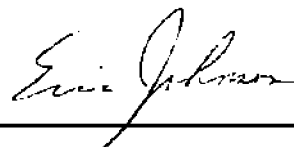
21 Second, there has been no indication that Petitioner is unable to comprehend the
22 proceedings. Unlike the petitioner in Renteria-Novoa who faced difficulties understanding the
23 English language, Petitioner has failed to demonstrate any inability to understand these
24 proceedings.

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



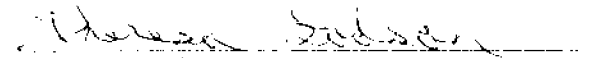
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 20th 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

jc/JEV/ad/veu

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

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	motions@clarkcountyda.com
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Writ of Habeas Corpus

COURT MINUTES

January 19, 2023

A-22-861330-W	Gerald Whatley, Jr., Plaintiff(s) vs. Eighth Judicial District Court, Defendant(s)
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January 19, 2023	8:30 AM	Petition for Writ of Habeas Corpus
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HEARD BY: Johnson, Eric **COURTROOM:** RJC Courtroom 12A

COURT CLERK: Kathryn Hansen-McDowell

RECORDER: Angie Calvillo

REPORTER:

PARTIES

PRESENT:	Griffith, Brittni Nevada, State Of	Attorney Other
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JOURNAL ENTRIES

- Upon Court's inquiry, Ms. Griffith advised the State filed an opposition to the petition. COURT stated its FINDINGS, and ORDERED, Petition for Writ of Habeas Corpus DENIED.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Gerald Whatley, Jr. #48057, HDSP, PO Box 650, Indian Springs, NV 89070. 1.24.23khn

Certification of Copy and Transmittal of Record

State of Nevada }
County of Clark } SS:

Pursuant to the Supreme Court order dated April 25, 2023, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 132.

GERALD LEE WHATLEY, JR.,

Plaintiff(s),

vs.

THE EIGHTH JUDICIAL DISTRICT COURT,

Defendant(s),

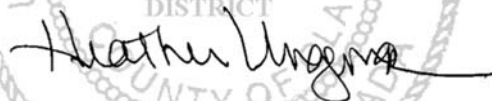
Case No: A-22-861330-W

Dept. No: XX

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 2 day of May 2023.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk

