IN THE SUPREME COURT OF THE STATE OF NEVADA

OSCAR GOMEZ, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 86247

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is not presumptively assigned to the Court of Appeals because it is a postconviction appeal involving a challenge to a conviction for a category A felony. NRAP 17.

STATEMENT OF THE ISSUES

1. Whether the district court properly found counsel was effective for fully explaining to Appellant the consequences of his guilty plea and the potential sentencing ranges.
2. Whether the district court properly found counsel was not ineffective for not performing certain investigations and not filing futile motions.

3. Whether the district court properly found counsel was not ineffective for not filing a presentence motion to withdraw Appellant's guilty plea.
4. Whether the district court properly denied Appellant's constitutional claim concerning the deadly weapon enhancement as not cognizable on habeas review.

STATEMENT OF THE CASE

On August 3, 2016, Appellant Oscar Gomez, Jr. was charged by way of Information with one count of Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030, 193.165). Volume 1 Appellant's Appendix ("AA") 03-04.

On April 19, 2018, pursuant to negotiations with the State, Appellant pled guilty to one count of Second Degree Murder With Use of a Deadly Weapon (Category A Felony – NRS 200.010, 200.030.2, 193.165); a signed Guilty Plea Agreement was filed in open court. 1 AA 05-12. In so doing, Appellant acknowledged:

> I have discussed with my attorney any possible defenses, defense strategies and circumstances which might be in my favor.
> …
> I believe that pleading guilty and accepting this plea bargain is in my best interest, and that a trial would be contrary to my best interest.
> …

> My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

1 AA 08-09.

Appellant was also canvassed by the district court regarding the voluntariness of Appellant's plea, during which Appellant affirmed:

> THE COURT: …you had a full and ample opportunity to discuss your plea of guilty and the charge of second degree murder with use of a deadly weapon that you're going to be pleading to. Is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> THE COURT: Okay. And did your lawyers answer all your questions to your satisfaction?
>
> DEFENDANT GOMEZ: They did.
>
> THE COURT: Okay. Do you feel like [your lawyers] have spent enough time with you explaining the discovery and going over the evidence and everything like that in this case?
>
> DEFENDANT GOMEZ: Yeah.

1 AA 21. The court further asked:

> THE COURT: …Did you have a full and ample opportunity to discuss your plea of guilty as well as the charge to which you are pleading guilty with your attorneys?
>
> DEFENDANT GOMEZ: I did.
>
> THE COURT: All right. And we've already discussed that your counsel, Ms. Levy, has answered all your questions to your satisfaction, is that right?
>
> DEFENDANT GOMEZ: That's right.
>
> …
>
> THE COURT: All right. Now before I proceed with your plea do you have any questions you would like to ask me the Court?
>
> DEFENDANT GOMEZ: No, no questions.

1 AA 23-24.

On June 14, 2018, Appellant was sentenced to a minimum term of ten years and a maximum term of life in the Nevada Department of Corrections, with a consecutive term of 96 to 240 months for deadly weapon enhancement. 1 AA 48. The Judgment of Conviction was filed on June 22, 2018. 1 AA 47-48.

On July 18, 2018, Appellant filed a Notice of Appeal. 1 AA 49. On May 15, 2019, the Nevada Court of Appeals affirmed Appellant's conviction. 1 AA 51-54.

On May 14, 2020, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction). 1 AA 55-124. On June 23, 2020, the State filed its Response. 1 AA 125-41. On September 14, 2020, Appellant filed a substantially similar Petition for Writ of Habeas Corpus (Post-Conviction). 1 AA 142-57.

On September 22, 2020, the district court considered the matter on the briefings, and stated that it rejected all of Appellant's arguments, with the exception of his claim that counsel inadequately discussed concurrent or consecutive prison time with Appellant. 1 AA 159. On October 13, 2020, the court issued a minute order stating it would hold an evidentiary hearing "on the sole issue of whether counsel informed [Appellant] that he faced consecutive time for the deadly weapon enhancement." Respondent's Appendix ("RA") at 01.

On February 4, 2021, Appellant filed an "Original" Petition for Writ of Habeas Corpus (Post-Conviction). 1 AA 160-87. The State construed the filing as a

supplement to the pending petition, and filed its Response on March 23, 2021. 1 AA 195-206.

On August 20, 2021, the court held an evidentiary hearing on Appellant's claim that he did not understand the consequences of his plea. 1 AA 208-47; 2 AA 248-69. On September 17, 2021, the court denied Appellant's postconviction claims. 2 AA 270. The court's order denying Appellant's claims was filed on December 6, 2021. 2 AA 273-86.

On October 21, 2021, Appellant filed a Notice of Appeal. 2 AA 271. On September 21, 2022, the Nevada Court of Appeals dismissed the appeal due to finding that the district court's December 6, 2021 decision did not resolve all of Appellant's postconviction claims. RA 02-03. Specifically, the Court found that the decision did not resolve claims four through six raised in Appellant's "Original Petition for Writ of Habeas Corpus" filed on February 4, 2021. RA 02.

On October 20, 2022, the State filed a Response addressing claims four through six of the "Original Petition". 2 AA 288-93. The district court denied claims four through six, and the Findings of Fact, Conclusions of Law, and Order were filed on March 7, 2023. 2 AA 294-99.

On March 9, 2023, Appellant filed a Notice of Appeal. 2 AA 301.

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STATEMENT OF THE FACTS

Facts of the Offense

On June 24, 2016, Jonathan Coleman and his friend Shawn Manemules left work together and went to the mini-mart to buy alcoholic beverages. RA 04-05. Jonathan observed Appellant inside the mini-mart. RA 05. Appellant said something to Shawn while they were outside the store. RA 06. Jonathan and Shawn left the store after purchasing drinks and ice cream. RA 06.

As they were leaving the store, Jonathan saw Appellant standing outside the store near the door; Appellant was with another male individual. RA 06. Appellant told Shawn "[y]ou got a nice tattoo on your face." RA 06. Shawn did not say anything; Appellant then said "[l]et's go fight." RA 06. Appellant then pulled a gun out of his pants. RA 07. Shawn and the male individual that was with Appellant began throwing punches at each other; the fight lasted about five minutes. RA 07. They stopped punching each other when someone said 911 had been called. RA 07.

After the fight, Jonathan and Shawn headed to an alley; Appellant followed them. RA 08. Appellant, who was holding the gun, approached Jonathan and asked him if he "gang banged." RA 08. Shawn said to Appellant "[y]ou're not going to use it." RA 08-09. Appellant then shot Shawn in the stomach. RA 09.

Shawn ran away, but only managed to get a few feet away before he fell down. RA 09. Jonathan tried calling 911 from Shawn's cellphone, but wasn't able to. RA

09. Jonathan then ran back to the store and told the people inside to call 911. RA 09.

Postconviction Evidentiary Hearing

In 2016, defense attorney Monti Levy was appointed to represent Appellant in this case. 1 AA 214. After Appellant's preliminary hearing was held, and the case was bound up to district court, Ms. Levy visited Appellant multiple times to discuss the case. 1 AA 215.

At a hearing in October of 2017, the State made a record of relaying an offer to Appellant for him to plead guilty to Second Degree Murder With Use of a Deadly Weapon. 1 AA 217. Ms. Levy spoke with Appellant about this offer multiple times. 1 AA 217. When she spoke with Appellant about the offer, she talked to him about the sentencing range for Second Degree Murder With Use of a Deadly Weapon. 1 AA 217. Even prior to the offer, Ms. Levy on multiple occasions explained to Appellant the sentencing ranges he was facing. 1 AA 217. She explained to him the sentencing ranges for First Degree Murder With Use of a Deadly Weapon, Second Degree Murder With a Deadly Weapon, and Voluntary Manslaughter; she also wrote down the sentencing ranges for Appellant. 1 AA 217.

Ms. Levy explained to Appellant that the minimum he would receive for First Degree Murder With Use of a Deadly Weapon would be 21 years, because 20 years was the minimum for First Degree Murder, and the deadly weapon enhancement was 1 to 20 years. 1 AA 217-18. She also explained that even if he received the

maximum sentence for First Degree Murder—life without the possibility of parole—he would still receive the deadly weapon enhancement for an additional 1 to 20 years, which was mandatory consecutive. 1 AA 218.

Multiple times Ms. Levy went through the sentencing ranges with Appellant for First and Second Degree Murder, and Manslaughter; she went through these sentencing ranges again with him after receiving the State's offer. 1 AA 218. Ms. Levy explained to Appellant that at trial if he was convicted of any of the charged theories of Murder, the jury would also find that he used a deadly weapon, because the jury would be instructed that a firearm is a deadly weapon. 1 AA 220. She explained to him that the deadly weapon enhancement would be imposed consecutively and would be 1 to 20 years, unless he was convicted of Manslaughter, which would be 1 to 10 years. 1 AA 221-22.

In October of 2017, after the State made Appellant the offer to plead to Second Degree Murder, multiple times Ms. Levy reviewed with Appellant the sentencing ranges specifically based on that offer. 1 AA 222. Then at calendar call in April of 2018, Ms. Levy again explained to him the State's offer and explained that if he did not accept it, then he was going to trial, and reviewed with him the sentencing ranges he was facing. 1 AA 222, 226.

When Ms. Levy would discuss the sentencing ranges with Appellant, he appeared to understand them. 1 AA 225. To make sure Appellant understood, Ms.

Levy would quiz him by asking him questions like "if you got four on the bottom for the deadly weapon enhancement, what would you get, you know, on the top and so what would your total sentence be?" 1 AA 225. She would quiz him like this multiple times because she wanted to ensure Appellant understood the risks of going to trial and what penalties he was facing if he went to trial versus the penalties he was facing if he accepted the State's offer. 1 AA 225.

By the time Appellant accepted the State's offer to plead guilty to Second Degree Murder, Ms. Levy had fully explained to Appellant the consequences of accepting the offer. 1 AA 229. By that time, Ms. Levy had explained to him multiple times the sentencing range for Second Degree Murder, as well as the range for the mandatory consecutive deadly weapon enhancement. 1 AA 229-30. Ms. Levy reviewed the range of penalties Appellant was facing more times than she had with any other defendant in the course of her 19-year career as a criminal defense attorney. 1 AA 230-31. Appellant "absolutely understood the offer. 1 AA 230.

At the evidentiary hearing, Appellant testified that Ms. Levy visited him multiple times during his pretrial incarceration. 1 AA 240. During those visits, Ms. Levy discussed the possible sentences he could receive. 1 AA 240-41. Appellant claimed that Ms. Levy told him the deadly weapon enhancement would be 1 to 20, but did not really discuss concurrent or consecutive with him. 1 AA 241. Appellant stated that Ms. Levy never quizzed him. 1 AA 243. Appellant claimed that the only

reason he accepted the State's offer is because he thought he would be released after 10 years. 1 AA 242, 244. Appellant acknowledged that when he entered his plea the court explained to him that the minimum time he could receive on the bottom was 11 years, with 18 being the maximum he could receive on the bottom. 1 AA 244-45.

Appellant's mother and two of his sisters also testified at the evidentiary hearing about having a difficult relationship with Ms. Levy, as well as their understanding of the potential sentence Appellant could receive. 1 AA 247; 2 AA 248-63.

SUMMARY OF THE ARGUMENT

The district court did not err in finding Appellant received effective assistance of counsel. Appellant's claim that counsel was ineffective for not explaining the applicable sentencing range is contradicted by the testimony of Appellant's counsel, as well as the transcript of Appellant's entry of plea. Appellant's counsel testified that she fully explained the consecutive nature of the deadly weapon enhancement, wrote down the possible sentencing ranges he could receive, and questioned him to ensure that he fully understood the potential sentence. During Appellant's plea canvass, Appellant was expressly and accurately informed by the court of his minimum and maximum potential sentence.

The district court also did not err in finding counsel was not ineffective for not investigating certain matters or filing certain pretrial motions to suppress

evidence. Appellant fails to demonstrate that such investigations or motions would have benefited the defense. Further, the testimony of Appellants counsel makes clear that, based on Appellant's statements to counsel, it was not unreasonable for counsel not to pursue such lines of inquiry. Appellant also fails to demonstrate prejudice, as he fails to show had counsel done such investigation, or filed such motions, Appellant would not have entered his guilty plea.

The district court also did not err in finding counsel was not ineffective for not filing a presentence motion to withdraw plea. Appellant fails to present any support for this claim, and thus it must be summarily denied. Further, the district court properly found Appellant failed to demonstrate he requested counsel file such a motion, as the letter he provided clearly appeared to be addressed to someone other than counsel, and to be written after Appellant had been sentenced.

Finally, Appellant fails to demonstrate the district court erred by denying his claim that the deadly weapon enhancement is unconstitutional. This claim is clearly outside the parameters of NRS 34.810(1)(a), which restricts a habeas petitioner whose convictions are the result of a guilty plea to only raising postconviction claims concerning the voluntariness of the plea or ineffectiveness of counsel. Furthermore, this Court has previously upheld the constitutionality of the deadly weapon enhancement.

/ / /

ARGUMENT

III. THE DISTRICT COURT PROPERLY FOUND APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

Appellant alleges counsel was ineffective for (1) not adequately explaining the sentencing ranges he was facing; (2) failing to investigate and obtain pretrial evidentiary hearings; (3) filing to file a motion to withdraw Appellant's guilty plea. Appellant's Opening Brief ("AOB") at 04-13.

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). Postconviction petitions for writ of habeas corpus "…[present] mixed question[s] of law and fact, subject to independent review [*de novo*]." Evans v. State, 117 Nev. 609, 622, 28 P.2d 498, 508 (2001); Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1996); Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). "However, the district court's purely factual findings regarding a claim of ineffective assistance of counsel are entitled to deference on subsequent review by this court." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 530 (2004); Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994) (a district court's factual findings will be given deference by this court on appeal, unless they are clearly wrong and not supported by substantial evidence).

The United States Supreme Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063 (1984). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, wherein the defendant must show: 1) that counsel's performance was deficient, and 2) that the deficient performance prejudiced the defense. Id. at 687, 104 S. Ct. at 2064. Nevada adopted this standard in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984). To prove deficient performance, a defendant must show that counsel's representation fell below an objective standard of reasonableness. 466 U.S. at 687-88, 104 S.Ct. at 2064. To demonstrate prejudice, a defendant must show that, but for counsel's errors there is a reasonable probability that the result of the proceedings would have been different. Id. at 694, 104 S.Ct. at 2068. "A court may consider the two test elements in any order and need not consider both prongs if the defendant makes an insufficient showing on either one." Kirksey v. State, 112 Nev. 980, 987, 923 P.2d 1102, 1107 (1997).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011).

Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)). "Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004). The role of a court in considering alleged ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

This analysis does not indicate that the court should "second guess reasoned choices between trial tactics, nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). In essence, the court

must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. However, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or for failing to make futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

In order to meet the second "prejudice" prong of the test, the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

To demonstrate ineffective assistance of defense counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted that, but for counsel's errors, there is a reasonable probability petitioner would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S.Ct. 366, 370 (1985); Kirksey, 112 Nev. at 987-88, 923 P.2d at 1107.

Importantly, when raising a Strickland claim, the defendant bears the burden to demonstrate the underlying facts by a preponderance of the evidence. Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). "Bare" or "naked" allegations

are not sufficient to show ineffectiveness of counsel; claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which if true would entitle petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

As explained in detail below, Appellant fails to demonstrate that he was denied constitutionally effective assistance of trial counsel. Therefore, this Court should affirm the district court's denial of Appellant's Petition.

A. The District Court Correctly Found Counsel Was Not Ineffective in Explaining the Potential Sentencing Ranges to Appellant

Appellant claims that counsel was ineffective for not explaining to him that the deadly weapon enhancement would be imposed consecutively to his sentence for Second Degree Murder. AOB, at 08. The district court did not err in denying this claim, as it was directly contradicted by the record, specifically the evidentiary hearing testimony, and the transcript of Appellant's plea canvass. A petitioner is not entitled to postconviction relief on claims that are belied by the record. Hargrove, 100 Nev at 502, 686 P.2d at 225.

Ms. Levy's testimony established that she fully explained to Appellant how the sentencing ranges would be imposed in this case, and informed him that the deadly weapon enhancement was "mandatory consecutive". 1 AA 218. The district court found this testimony credible, as it was entitled to do. "The district court's factual findings regarding a claim of ineffective assistance of counsel are entitled to deference when reviewed on appeal." Barnhart v. State, 122 Nev. 301, 304, 130 P.3d 650, 652 (2006). This Court defers to the district court's credibility determination when it is supported by substantial evidence. See Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). See also Rincon v. State, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006) (noting that the district court is in the best position to evaluate the credibility of witnesses).

The record blatantly contradicts Appellant's assertion that counsel "never adequately made sure that [Appellant] did in fact understand the situation." AOB, at 09. Ms. Levy fully explained the sentencing ranges to him, including the fact that the deadly weapon enhancement would be imposed consecutively, and she also questioned Appellant to make sure that he understood the sentencing ranges:

> Q When you spoke to him [Appellant] about the offer, did you talk to him about the sentencing ranges?
>
> A Yes, multiple times.
>
> Q And how did you explain what the sentencing range was on a second degree murder with use of a deadly weapon?

> A So even prior to the offer, I went over with Mr. Gomez multiple times at the jail what he was facing. If he was convicted of a first degree with a deadly weapon, second degree with a deadly weapon, voluntary manslaughter, and I went through the whole range and I would write it down for him.
>
> And I would go through, you know, that the minimum that you can get is always on a first would be 21 years because you would have 20 on bottom, plus the enhancement, which was 1 to 20 years. I explained to him he could get life without, I didn't think he would get life without. But even if he got life without, *it would also include the deadly weapon enhancement for an additional 1 to 20 years, so it was mandatory consecutive*.

1 AA 217-18 (emphasis added).

Ms. Levy testified that she wrote down the sentencing ranges for Appellant and left those papers with him for him to review. 1 AA 218. She reviewed the potential sentencing ranges with Appellant, and explained the definition of a deadly weapon. 1 AA 220. She explained that the deadly weapon enhancement would be imposed consecutively. 1 AA 221, 230. Other individuals from Ms. Levy's office also explained this to Appellant. 1 AA 222. She reviewed the possible sentencing ranges with Appellant even before receiving the State's offer in October of 2017. 1 AA 216-17.

After receiving the State's offer, Ms. Levy reviewed with Appellant the possible sentences he could receive if he accepted the offer versus proceeding to trial. 1 AA 222, 225. When Ms. Levy went through the potential sentences with Appellant, he indicated to her that he understood them. 1 AA 224-25. Ms. Levy also

would "quiz" him on the sentencing ranges to ensure that Appellant understood. 1 AA 225. Between the six months when the State relayed the offer and when Appellant ultimately accepted the offer and pled guilty, multiple times Ms. Levy reviewed with Appellant the sentence he could receive if he accepted the offer. 1 AA 222, 226. Ms. Levy was adamant that when Appellant entered his plea "he absolutely understood the offer." 1 AA 230.

Furthermore, the witnesses Appellant called at the evidentiary hearing supported Ms. Levy's testimony, as they testified that they believed the deadly weapon enhancement would be imposed in addition to the murder sentence. Appellant's sister Isabel Gomez testified that, based on conversations she had with Ms. Levy, she believed Appellant would receive a 10-year sentence, with an additional 2 to 4 year sentence for the gun enhancement. 2 AA 253-54. Isabel also testified that during conversations she had with Appellant, he told her that his sentence would be 10 years, plus and additional sentence of 2 years, for a total of 12 years. 2 AA 256. Isabel also acknowledged that she had expressed the same belief in a letter that she wrote on her brother's behalf, which was attached as Exhibit C to Appellant's Petition filed on May 14, 2020. 1 AA 118; 2 AA 254-255.[1]

[1]This letter was admitted at the evidentiary hearing as State's Exhibit 1. 2 AA 255. In the letter, Isabel states "His [Appellant's] understanding, as was ours, was that he would be sentenced for ten years plus and [sic] added two for gun enhancement charges; which would then grant him eligibility for parole." 1 AA 118.

Similarly, Appellant's sister Maria Gomez testified that from talking to Ms. Levy, her understanding was that she believed the murder sentence would be 10 to 25 years, with a possibility of parole after 10 years. 2 AA 258-59. Her understanding was that there was an additional sentence of 2 to 4 years for the gun enhancement, and therefore she believed Appellant was facing a total maximum sentence of 12 to 14 years. 2 AA 259.

Additionally, the transcript of Appellant's plea canvass makes clear that he understood the potential sentence he could receive. 1 AA 17-27. During Appellant's plea canvass, the district court explicitly explained to Appellant "[t]he least amount of time the very least amount of time I could give you on the bottom end is 11 years. Do you understand that?" 1 AA 19. Appellant responded "I understand." 1 AA 19. Shortly thereafter, the court repeated this information, stating "the best you're going to do is 11 years. That's the very best you can do. You understand that?" 1 AA 20. Appellant responded "I understand." 1 AA 20. The State also stated the penalty range: "It would be either 10 to 25 or 10 to life on the underlying sentence with a *consecutive 2 to 20 for the deadly weapon enhancement*." 1 AA 18 (emphasis added).

The court also gave Appellant the opportunity to ask questions "about the plea or about anything?" and Appellant declined. 1 AA 21. Appellant also affirmed that

he had a full and ample opportunity to discuss his plea and the charges to which he was pleading guilty. 1 AA 21.

Appellant asks this Court to ignore the record in this case, and find that he did not understand that the deadly weapon enhancement would be imposed consecutively instead of concurrently. He gives this Court no basis for doing so. While he contends on appeal that counsel told him the sentence and the enhancement would be imposed "together," this contradicts his own testimony at the evidentiary hearing. AOB, at 08. Appellant testified that "she didn't tell me if they were going to run together or apart. She never really discussed the concurrent or consecutive to me that well. I didn't understand it." 1 AA 241.

While Appellant emphasizes that he had no legal experience and little education at the time of his plea, this does not warrant a presumption that he did not understand that the deadly weapon enhancement would be imposed consecutively and believed that he would only serve 10 years. This claim is contradicted by Ms. Levy's testimony, the testimony of his own sisters, and the transcript of the plea canvass.

Appellant fails to demonstrate any deficient performance by counsel. It is difficult to imagine what more counsel could have done to ensure that Appellant understood the terms and consequences of accepting the State's offer. She not only explained the sentencing structure and the deadly weapon enhancement multiple

times, she wrote down the potential sentencing ranges for him and asked him questions about the sentencing structure to ensure his understanding. Ms. Levy's testimony that Appellant understood the sentencing ranges is supported by the transcript of Appellant's entry of plea and the evidentiary hearing testimony of his sisters. Therefore, the district court did not err in finding that Appellant's claim was contradicted by the record and denying relief on this claim.

B. The District Court Correctly Found Counsel Did Not Perform a Deficient Investigation and Was Not Ineffective for Not Filing Certain Pretrial Motions

Appellant claims counsel was ineffective for not investigating an individual seen on the surveillance video of the shooting or an eyewitness who described the shooter as wearing clothing that differed from that of Appellant, as well as for not moving to suppress the photographic lineup or the shell casing recovered from Appellant's house. Appellant fails to demonstrate that such motions would have had merit or that investigating these matters would have yielded beneficial information. He also fails to specifically explain how not taking these actions amounted to deficient performance or caused him prejudice.

1. Counsel Was Not Ineffective For Not Investigating These Matters Because There is No Reason to Believe that Such Investigation Would Have Benefited the Defense

Appellant contends that the video of the shooting shows another individual being present and walking away from the scene, and that this fact should have been

investigated by counsel. AOB, at 11. He also claims counsel should have interviewed an eyewitness who gave a voluntary statement describing the shooter as wearing clothing different from what Appellant was wearing on the night of the shooting. AOB, at 11-12.

A defendant who contends his attorney was ineffective because due to inadequate investigation must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Appellant fails to meet this burden entirely.

As for his contention that counsel should have investigated the individual walking away from the scene, Appellant fails to identify *any* beneficial information that counsel could have obtained by further investigation into this matter, let alone information likely to render a more favorable outcome. Thus, he fails to demonstrate that not investigating this matter fell below an objective standard of reasonableness. Notably, in his Petition Appellant admitted to being at the scene of the shooting, which was on video. 1 AA 80. Further, at the evidentiary hearing Ms. Levy testified that Appellant told her he had "snapped" and shot the victim in response to the victim saying something about Appellant's mother, who had a history of suicide attempts. 1 AA 228. Based on this information, Ms. Levy discussed with Appellant a possible trial strategy of arguing his actions were voluntary manslaughter. 1 AA 228. Given the information Appellant gave his counsel, that he actually had shot the victim, it

would have been perfectly reasonable for Ms. Levy not to further investigate another individual who was at the scene, as she would have no reason to believe that pursuing this line of inquiry would yield helpful information.

Appellant also claims counsel should have interviewed an eyewitness to the shooting, who described the shooter as wearing clothing different from what Appellant was wearing. AOB, at 11-12. Again, Appellant fails to explain how not interviewing this person amounted to deficient performance or what would have been gained by counsel interviewing this individual. Appellant indicates that this individual completed a voluntary statement, which means this individual most likely would have been called by the State at trial, or Appellant's counsel would have been able to subpoena the witness. Counsel then would have been able to present the allegedly inconsistent clothing description through the individual's testimony; the voluntary statement could be used to impeach the witness if he or she testified differently regarding the clothing description.[2] Given that this eyewitness was identified and had provided a written statement of the shooter's clothing description

[2]Based on Appellant's argument in his Petition, the impact of this testimony would have been minimal; Appellant alleged that this individual identified the shooter as wearing a tank top, while Appellant was actually wearing a t-shirt. 1 AA 80. Appellant does not identify this witness by name, but he may be referring to Jonathan Coleman, who witnessed the shooting and at the preliminary hearing testified Appellant was wearing a tank top on the date of the shooting. RA 05, 09.

prior to trial, it is unclear what would have been gained from counsel contacting this individual prior to trial.

Appellant fails to demonstrate that counsel performed deficiently by not investigating these matters and instead pursuing a potential defense based on what Appellant told counsel. Thus, he fails to overcome the presumption that counsel performed effectively. "Judicial review of a lawyer's representation is highly deferential, and the claimant must overcome the presumption that a challenged action might be considered sound strategy." Browning v. State, 120 Nev. 347, 354, 91 P.3d 39, 45 (2004). See also Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (noting trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop.").

Additionally, to show prejudice Appellant must demonstrate that, had counsel investigated these matters, he would not have entered a guilty plea and instead would have chosen to proceed to trial. Kirksey, 112 Nev. at 988, 923 P.2d at 1107. He has not done so. He provides no explanation as to how not investigating these matters caused him to decide to plead guilty. Nor is there a clear logical connection between counsel not performing such investigation and Appellant's decision to enter a guilty plea, as Appellant fails to demonstrate that such investigation would have benefited the defense.

2. Counsel Was Not Ineffective For Not Filing Motions to Suppress the Photographic Lineup or the Bullet/Shell Casing Recovered From Appellant's Residence

Appellant claims counsel was ineffective for not filing a motion to suppress the photographic lineup or a motion to suppress the shell casing[3] recovered from Appellant's residence. AOB, at 12. As Appellant fails to demonstrate that either motion had merit, Appellant fails to show counsel performed deficiently or that he was prejudiced due to counsel not filing these motions. See Ennis, 122 Nev. at 706, 137 P.3d at 1103 (finding effectiveness does not require the raising of futile arguments).

Notably, Appellant alleges counsel should have moved to suppress the shell casing on the grounds that it was irrelevant. AOB, at 12. Considering that the discovery of a shell casing in Appellant's home would tend to support the State's charge that he fatally shot the victim, it is highly unlikely such a motion would have been successful. See NRS 48.015 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."). Moreover, assuming arguendo that Appellant's claim that no shell casing or bullet was recovered from the scene of the shooting is true, then counsel

[3] Appellant refers to this item as both a bullet and a shell casing, despite the fact that these terms refer to different things. AOB, at 12.

could simply have argued at trial that the State failed to demonstrate the shell casing recovered from Appellant's home was connected to the shooting. Accordingly, Appellant fails to demonstrate he was prejudiced because his counsel did not move to exclude this evidence prior to trial.

Most fatal to Appellant's claims that counsel was ineffective for not filing these motions or not investigating the matters discussed above, is his failure to specifically detail how not taking such actions amounted to ineffectiveness. Instead, he offers a mere conclusory assertion that "[f]ailure to investigate these issues and file these motions was error." AOB, at 12. This unsupported assertion is woefully inadequate when seeking postconviction relief. See Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 467 (2002) (finding that a habeas petitioner may not rely on conclusory assertions for relief).

Appellant's conclusory assertion of ineffectiveness must be denied. This Court has previously emphasized a habeas petitioner's burden to demonstrate deficient performance and prejudice with specificity:

> A reviewing court begins with the presumption that counsel performed effectively. To overcome this presumption, a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently. Instead, he must *specifically explain* how his attorney's performance was objectively unreasonable and how that deficient performance undermines confidence in the outcome of the proceeding sufficient to establish prejudice.

Johnson v. State, 133 Nev. 571, 577, 402 P.3d 1266, 1274 (2017) (internal citations omitted) (emphasis added). More recently, this Court emphasized that "a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just 'in a *pro forma,* perfunctory way' or with a 'conclusory[ ] catchall' statement that counsel provided ineffective assistance." Chappell v. State, 137 Nev. 780, 788, 501 P.3d 935, 950 (2021) (quoting Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001)).

Furthermore, ineffectiveness cannot be demonstrated simply by a hindsight identification of another line of argument or investigation that counsel could theoretically have pursued. The Strickland court cautioned that "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S. at 689, 104 S. Ct. at 2065. "[A]n attorney is not constitutionally deficient simply because another attorney would have taken a different approach." Johnson v. State, 133 Nev. 571, 576, 402 P.3d 1266, 1273–74 (2017) (citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065).

"[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

unreasonable." 466 U.S. at 689, 104 S.Ct. at 2065. This is precisely why "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. Ultimately, Appellant fails to overcome this presumption, as he fails to demonstrate that counsel's conduct was objectively unreasonable or that he was prejudiced. Accordingly, the district court did not err in denying this claim.

C. The District Court Correctly Found Counsel Was Not Ineffective For Not Filing a Motion to Withdraw Guilty Plea

This claim is inadequately briefed. Appellant presents this Court with a mere two paragraphs asserting counsel not filing a motion to withdraw Appellant's guilty plea was a prejudicial error; he cites no law in support other than NRS 176.165, which grants the district court's the authority to consider such motions, but in no way establishes that such a motion would have been meritorious in this case. AOB, at 13. As discussed above, this *pro forma*, conclusory pleading is insufficient to warrant postconviction relief. See, e.g., Chappell, 137 Nev. at 788, 501 P.3d at 950.

Furthermore, "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court." Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). See also Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330, n. 38, 130 P.3d 1280, n. 38 (2006) (court need not consider claims unsupported by relevant authority); State, Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83

(1991) (unsupported arguments are summarily rejected on appeal); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority).

Appellant also ignores the fact that the district court specifically found there was no evidence Appellant requested counsel file a presentence motion to withdraw his plea[4]. 2 AA 285. The letter attached to his Petition was unaddressed, undated, and unsigned. 1 AA 120. It stated Appellant had been transferred to Arizona, which indicates the letter was written after Appellant had been sentenced to prison. 1 AA 120. The letter does not appear to be addressed to Ms. Levy, as Appellant refers to Ms. Levy in the third person, and appears to be describing her actions to another person. 1 AA 120. For example, he states "[m]y attorney was telling me to hurry…she scared me saying that." 1 AA 120. Given these facts, the district court's factual finding that the letter was not credible is not clearly wrong and is entitled to deference. Lara, 120 Nev. at 179, 87 P.3d at 530.

Given Appellant's complete failure to demonstrate that counsel was deficient for not filing such a motion, that he even requested counsel file such a motion, or that he was prejudiced as a result of such a motion not being filed, he fails to show that the district court erred in denying relief on this claim.

[4]While on appeal he does not specify if he made a presentence or postsentence request to withdraw his plea, before the district court he clearly alleged the request was made prior to sentencing. 1 AA 99.

IV. THE DISTRICT COURT PROPERLY FOUND APPELLANT'S CLAIM CHALLENGING THE CONSTITUTIONALITY OF THE DEADLY WEAPON ENHANCEMENT WAS BARRED FROM CONSIDERATION DUE TO APPELLANT'S GUILTY PLEA

Appellant alleges, in a conclusory manner, that the imposition of the deadly weapon enhancement in this case violated his constitutional rights. AOB, at 13. He fails to address the fact that, as the district court properly found, this claim was improperly raised in Appellant's postconviction petition for writ of habeas corpus. Dismissal of a postconviction petition for writ of habeas corpus is mandatory when "[t]he petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). His claim that NRS 193.165 is unconstitutional does not concern the voluntariness of his plea or the effectiveness of his counsel. Accordingly, the district court correctly denied this claim for falling outside the parameters of NRS 34.810(1)(a). 2 AA 296-97.

Furthermore, even if this claim were properly raised, Appellant would not be entitled to relief because he fails to cite any legal support for his claim. See Maresca, 103 Nev. at 673, 748 P.2d at 6. In fact, the only legal citation in his argument is to this Court's precedent upholding the constitutionality of the deadly weapon

enhancement. AOB, at 14 n.3.[5] Appellant presents this Court with no compelling reason to overrule this case law. See Armenta-Carpio v. State, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) (noting that this Court does not overturn precedent without compelling reasons for doing so).

Finally, by entering into the Guilty Plea Agreement, Appellant agreed to imposition of the deadly weapon enhancement. See Breault v. State, 116 Nev. 311, 313, 996 P.2d 888, 889 (2000) (stating that where a defendant enters a knowing and voluntary guilty plea, the Court "will not permit the defendant to manipulate the judicial system" by alleging error in the sentence imposed pursuant to the guilty plea agreement).

The district court properly denied this claim for falling outside the parameters of NRS 34.810(1)(a), and Appellant fails to provide any legal support for this claim, even if it were cognizable. Accordingly, the district court did not err in denying relief, and this claim must be summarily denied.

CONCLUSION

Appellant fails to demonstrate any error by the district court in denying his request for postconviction relief. Accordingly, the State respectfully requests that

[5]This Court has previously found that the deadly weapon statute is not unconstitutionally vague and does not violate double jeopardy. Nevada Dep't Prisons v. Bowen, 103 Nev. 477, 479–81, 745 P.2d 697, 698–99 (1987); Woofter v. O'Donnell, 91 Nev. 756, 762, 542 P.2d 1396, 1400 (1975).

the district court's denial of Appellant's Petition be AFFIRMED.

Dated this 14th day of August, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points of more, contains 7,506 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of August, 2023.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 14th day of August, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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