IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD LEE WHATLEY, JR.,
Appellant,
v.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK,
Respondent,
and
THE STATE OF NEVADA,
Real Party in Interest.

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Case No. 86185-COA

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(3) because it is a postconviction appeal that involves a challenge to a judgment of conviction or sentence for offenses that are not Category A felonies.

STATEMENT OF THE ISSUES

I. Whether the District Court correctly found that Appellant's Counsel was not ineffective for failing to object to Appellant's prior DUI Convictions.
II. Whether District Court properly found that Appellant suffered no prejudice when his counsel failed to file a timely Notice of Appeal.
III. Whether the District Court properly dismissed Appellant's claims regarding errors in his sentencing.
IV. Whether Appellant has a valid ineffective assistance of counsel claim for his counsel's failure to suppress the officer's declaration when Appellant failed to assert that claim on direct appeal.

STATEMENT OF THE CASE

On August 2, 2021, the State filed an Information charging Gerald Lee Whatley Jr., (hereinafter "Appellant") with one count of Reckless Driving (Category B Felony-NRS 484B.653 – NOC 53896). Volume 1 Record of Appeal for Case # C-21-357412-1 ("C") ("ROA") 1. On August 3, 2021, Appellant was arraigned and pleaded guilty as charged. 1 C ROA 68. The Court accepted the plea and set the case for sentencing. Single Volume Record on Appeal for Case# A-22-861330-W ("A") ("ROA") 101. On that same day, the Guilty Plea Agreement (hereinafter "GPA") was filed, whereby both parties stipulated to probation not exceeding three (3) years; with an underlying sentence of twenty-eight (28) to seventy-two (72) months in the Nevada Department of Corrections (hereinafter "NDOC"). 1 C ROA 68.

On November 30, 2021, the Court declined to accept the negotiated plea agreement without further information from the parties. A ROA 102. On December 16, 2021, the Court stated that it was not inclined to sentence Appellant to probation due to the facts of the case and Appellant's prior record including repeated driving under the influences (hereinafter "DUI"). 1 C ROA 187-190. During that same hearing, the Court allowed Appellant to withdraw his plea and set the case for trial. 1 C ROA 189-90.

On December 29, 2021, the State filed an Amended Information charging Appellant with one count of Driving Under the Influence (Category B Felony – NRS

484C.110, 484C.410, 484C.105 – NOC 53916). 1 C ROA 94. On December 29, 2021, the State filed a Notice of Witnesses and/or Experts listing a forensic scientist who would testify about Appellant's blood alcohol level. 1 C ROA 96-7. On April 25, 2022, the State filed a Second Amended Information charging Appellant with Driving Under the Influence (Category B Felony - NRS 484C.l l0, 14 484C.410, 484C.105). 1 C ROA 105.

The Trial commenced on April 25, 2022. 1 C ROA 200. On April 26, 2022, the jury found Appellant guilty of Driving and/or Being in Actual Physical Control of a Motor Vehicle While Under the Influence of An Intoxicating Liquor or Alcohol. 1 C ROA 135. On May 4, 2022, the State filed a Third Amended Information. 1 C ROA 136-37. On May 5, 2022, the State filed a Fourth Amended Information. 1 C ROA 138-39.

On May 26, 2022, the Court sentenced Appellant to four (4) to fifteen (15) years in the NDOC, with thirty-one days credit for time served. 1 C ROA 198. The Judgment of Conviction was filed on June 1, 2022. 1 C ROA 153. Appellant filed a Notice of Appeal on July 22, 2022. 1 C ROA 178. The Nevada Supreme Court filed an Order Dismissing the Appeal on September 22, 2022. 3 C ROA 495. Remittitur issued on October 17, 2022. 3 C ROA 498.

On November 16, 2022, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"). A ROA 1-9. On that same day, Appellant

filed a Supplemental to Writ of Habeas Corpus (hereinafter "Supplement"). A ROA 102. On January 19, 2023, the Court heard and denied Appellant's Petition and Supplement. A ROA 102.

On February 5, 2023, Appellant filed a Second Supplemental to Writ of Habeas Corpus, even though the Court already decided the matter, and a Motion for Appointment of Attorney. A ROA 39-45. That same day the Court Clerk filed a Notice of Nonconforming document. A ROA 51-53. On February 7, 2023, Appellant filed a Motion Requesting Extension of Time, which again prompted the Court Clerk to file a Notice of Nonconforming Document. A ROA 54-59; A ROA 60-62.

On February 11, 2023, Appellant filed a reply to the State's response to the Original and Supplemental Habeas Petitions. A ROA 63-85.

Appellant filed a Notice of Appeal on February 28, 2023. A ROA 94-98.

STATEMENT OF FACTS

The District Court made the following factual findings on April 21, 2023:

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

> Officer Rainier Frost testified that he was a traffic officer for Las Vegas Metropolitan Police Department (hereinafter "LVMPD"). On November 23, 2019, he responded to the scene on Theme Road and Dessert Inn Road in Las Vegas. While conducting an inventory of the minivan, Officer Rainier saw an open container.
>
> Brian Bounds testified that he was a nurse at Sunrise Hospital. He testified that pursuant to a search warrant, he drew Petitioner's blood at 6:52 p.m., less than two hours after Petitioner's car crash. LVMPD forensic scientist Denise Heineman analyzed Petitioner's blood sample and testified that it had a blood alcohol content of .249 grams of ethanol per 100 milliliters of blood, well above the .08 legal limit.

1 A ROA 103.

SUMMARY OF THE ARGUMENT

The District Court did not err in denying Appellant's Petitions for Writ of Habeas Corpus (Post-Conviction).

The District Court correctly found that Appellant's counsel was not ineffective for failing to object to Appellant's prior DUI convictions. Trial counsel was not ineffective because it was reasonable for trial counsel to rely on Appellant's lack of objection to his prior DUI convictions. In addition, Appellant suffered no prejudice because the State met its burden by providing proof of Appellant's prior conviction, thus, objection to its admission would have been futile and would not have changed the outcome of this case.

The District Court properly found that Appellant suffered no prejudice when his counsel failed to file a timely Notice of Appeal. Although prejudiced may be presumed when an attorney's deficient performance deprives an appellant of an

appeal, the use of the word "may" demonstrates that it is within the District Court's discretion whether to presume prejudice or not, meaning it is a rebuttable presumption. The evidence presented of Appellant's meritless claims and the overwhelming evidence of Appellant's guilt clearly rebutted the presumption of prejudice. Therefore, the District Court properly found Appellant suffered no prejudice in his counsel's failure to file a timely appeal.

The District Court properly dismissed Appellant's claims regarding errors in his sentencing because they were meritless and were waived by Appellant's failure to raise them on appeal.

Appellant's ineffective assistance of counsel claim for his counsel's failure to suppress the officer's declaration is waived and subject only to plain error review. Plain error cannot be demonstrated because Appellant's allegation does not prove any error let alone an error readily apparent and unmistakable from a casual inspection of the record, because there is no evidence in the record to support the allegation.

ARGUMENT

Appellant's pleadings below offered several allegations of his attorney's incompetence and substantive judicial error including, counsel was ineffective for failing to object to his DUI convictions and by failing to challenge whether one was certified. A ROA 6. Counsel was ineffective for failing to file a timely Notice of

Appeal. A ROA 16. 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 ROA 13-17. In the instant Appeal, although hard to understand, it seems that Appellant reasserts those same claims. Appellant's Informal Brief 3-6.

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

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

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

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

A court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose

assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless

charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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

I. DISTRICT COURT CORRECTLY FOUND THAT APPELLANT'S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO APPELLANT'S PRIOR DUI CONVICTION

The District Court correctly found that Appellant had not adequately proven that his counsel was ineffective for failing to challenge or object to Appellant's prior DUI convictions. A ROA 109.

Prior convictions for driving under the influence of alcohol do not have to be evidenced by certified copies of formal, written judgments of conviction to support enhancement of a defendant's present DUI conviction to felony. Pettipas v. State, 106 Nev. 377, 379, 794 P.2d 705, 706. See NRS 484C.400(2). To use a prior felony conviction for enhancement purposes, the state has the initial burden of producing prima facie evidence of the prior conviction. Dressler v State, 107 Nev. 686, 697-

98, 819 P.2d 1288, 1295-96. If the record of the prior conviction, on its face, raises a presumption of constitutional infirmity, then, the state must present evidence to prove by a preponderance that the prior conviction is constitutionally valid; but, if the record raises no such presumption on its face, then the conviction is afforded a presumption of regularity and the defendant must overcome that presumption by presenting evidence to prove by a preponderance that a prior conviction is constitutionally infirm. Id. To rely on a prior misdemeanor judgment of conviction for enhancement purposes, the state only has to show that the defendant was represented by counsel or validly waived that right, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings. Id.

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

informed strategic choices made by the defendant and on information supplied by the defendant).

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

First, prior to jury selection on April 25, 2022, the State introduced into evidence a judgment of conviction of Appellant's prior DUI for felony enhancement purposes. 1 C ROA 203. It was admitted as a court exhibit without Appellant's objection. 1 C ROA 203.

Second, after the State rested, the Court discussed Appellant's right to testify or not testify and his prior record, including the prior conviction that was used to enhance his DUI to felony; Appellant again did not question his prior conviction. A ROA 107.

Third, on April 26, 2022, after receiving the jury's guilty verdict, the State reminded the Court of its intention to ask for sentence enhancement due to Appellant's prior DUI conviction. 3 C ROA 135. The Court also stated that Appellant had a "whole series of DUIs." 3 C ROA 136.

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

> THE COURT: All right. This is then on for sentencing on defendant's guilty verdict to driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicated liquor or alcohol. Turning to the -- the 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.
> THE COURT: Anything in there that you saw that needed to be correct or brought to my attention?
> MS. PARK: No, Your Honor.
> THE COURT: All right. Mr. Whatley, have you read your presentenced investigation report?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: Had a chance to discuss it with your attorney?
> THE DEFENDANT: Yes.
> THE COURT: She answered any questions you had about it?
> THE DEFENDANT: Yes.
> THE COURT: Anything in there you saw that needed to be corrected or brought to my attention?
> THE DEFENDANT: No.

1 C ROA 170-71.

The PSI and Supplemental PSI both show that Appellant had several prior convictions, including DUI convictions in Las Vegas and California. 1 C ROA 76-86. Based on Appellant's lack of objection, trial counsel would not have any reason to believe that she needed to object to the prior DUI convictions. Thus, Appellant failed to show that his counsel was ineffective.

Furthermore, Appellant failed to show that he was prejudiced by counsel's failure to object because the Court would have overruled such objection. As shown,

the State met its burden by providing proof of Appellant's prior conviction, thus, objection to its admission would have been futile and would not have changed the outcome of this case.

Finally, Appellant failed to establish prejudice due to the overwhelming evidence supporting Appellant's Judgment of Conviction of Driving and/or Being in Actual Physical Control of A Motor Vehicle Under the Influence of An Intoxicating Liquor or Alcohol. The Information charged that Appellant 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 more within two hours after driving and/or being in actual physical control of a vehicle. A ROA 94-95. There was no dispute at trial to the fact that Appellant was on a public highway. Eyewitnesses, Skilbred, and Castillo, both testified Appellant drove the minivan over the speed limit, ran a red light and stop sign, drove into oncoming traffic, then crashed into concrete road barriers. 2 C ROA 370; 2 C ROA 383. Castillo said Appellant was very intoxicated, had a strong odor of alcohol, looked disoriented, could not maintain his balance and had very sloppy speech. 2 C ROA 387. Officer Rainier also said he found an open container in Appellant's minivan. 2 C ROA 398. Less than two hours after the crash, Appellant's blood alcohol content was .249 grams of ethanol per 100 milliliters of blood. 2 C

ROA 446-47. Thus, the State provided overwhelming evidence to sustain Appellant's conviction under either theory of liability. Accordingly, the District Court properly found that Appellant failed to establish by a preponderance of the evidence that his Counsel was ineffective for failing to object to the admission of his prior DUI convictions.

II. DISTRICT COURT PROPERLY FOUND THAT APPELLANT SUFFERED NO PREJUDICE WHEN HIS COUNSEL FAILED TO FILE A TIMELY NOTICE OF APPEAL

Appellant asserted in his Supplemental Petition that counsel was ineffective for failing to file a timely Notice of Appeal, but the District Court correctly found no basis for relief because he failed to establish prejudice. A ROA 109-10.

Failure to file a direct appeal when requested to do so and when the defendant expresses dissatisfaction with his conviction is deficient for purposes of proving ineffective assistance of counsel. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (Nev. 1994); Davis v. State, 115 Nev 17, 974 P.2d at 660. When a Petitioner has been deprived of the right to appeal due to counsel's deficient performance prejudice **may** be presumed. Lozada, 110 Nev. at 949.

It is common in the case of untimely legal instruments, such as the case at issue, for presumptions and inferences to arise. For example, the Nevada legislature has used rebuttable presumptions in the case of untimely habeas petitions. Under NRS 34.800(2), when a petition is filed five years after the filing of a judgment of

conviction or a decision on direct appeal of a judgment of conviction, the petition challenging the validity of judgment of conviction creates a rebuttable presumption of prejudice to the state.

In Lozada, the Court uses the word "may" in describing the presumption at issue. 110 Nev. 349, 357, 871 P.2d 944, 949 (1994). The word may's plain meaning suggests that presuming prejudice is left to judicial discretion, or the prejudice is rebuttable. This is evidenced by how the Supreme Court views the word "may," when it is used in statutes. The Supreme court has noted that, "the word 'may' when used in a statute usually implies some degree of discretion. United States v. Rodgers, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983); see also McBryde v. United States, 299 F.3d 1357, 1362 (Fed. Cir. 2002).

Presumptions and inferences are very common in the criminal law context. For instance, there is a discretionary inference of intent in the context of a burglary:

> Every person who unlawfully breaks and enters or unlawfully enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car **may reasonably be inferred** to have broken and entered or entered it with intent to commit grand or petit larceny, assault or battery on any person or a felony therein, unless the unlawful breaking and entering or unlawful entry is explained by evidence satisfactory to the jury to have been made without criminal intent.

NRS 205.065 (emphasis added)

Notice that the Nevada legislature uses the word "may" when describing the inference, suggesting discretion. In contrast, an example of a mandatory presumption is the presumption of intent and knowledge that arises when a defendant issues a check with insufficient funds:

> 1. In a criminal action for issuing a check or draft against insufficient or no funds with intent to defraud, **that intent and the knowledge that the drawer has insufficient money, property or credit with the drawee is presumed to exist if:**
> (a) The instrument is drawn on a purported account which does not exist.
> (b) Payment of the instrument is refused by the drawee when it is presented in the usual course of business, unless within 5 days after receiving notice of this fact from the drawee or the holder, the drawer pays the holder of the instrument the full amount due plus any handling charges.
> (c) Notice of refusal of payment, sent to the drawer by registered or certified mail at an address printed or written on the instrument, is returned because of nondelivery.
> 2. If a complainant causes a criminal action to be commenced for issuing a check or draft with intent to defraud and refuses to testify in the action, the complainant is presumed to have acted maliciously and without probable cause.

NRS 205.132 (emphasis added)

It is important to note, in the context of issuing a check with insufficient funds, the Nevada legislature purposely omitted the word "may." Instead, it explicitly states that intent and knowledge is presumed to exist if the factors are met. Thus, the word "may" clearly indicates discretion.

Therefore, although Lozada states that prejudice **may** be presumed when a petitioner has been deprived of the right to appeal due to counsel's deficient

performance, the use of the word "may" should be construed to imply either a rebuttable presumption or a discretionary decision. If the Nevada Supreme Court wished to create a mandatory presumption with no discretion, it is more likely the Court would have omitted the word may or used the word, "shall" based on how the Supreme Court has interpreted the word in statutes. The United States Supreme Court in Kindomware Technologies, Inc. v. United States, 579 U.S. 162, 136 S. Ct. 1969 (2016) noted that unlike the word "may" which implies discretion, the word 'shall' usually connotes a requirement. 136 S. Ct. 1969 at 172; see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998); See Butler v. State. 120 Nev. 879, 102 P.3d 71 (Nev. 2004) (The word, "may" as it is used in legislative enactments, is often construed as a permissive grant of authority).

In the case at bar, it was within the District Court's discretion whether prejudice should be found or whether the presumption had been rebutted. The Court found no prejudice based on many factors presented before it in the Petitions. For instance, the District Court noted that, Appellant failed to identify any error by the trial court that would have succeeded on appeal. A ROA 109. The Court also noted that all the claims Appellant alleged were meritless and suitable only for summary denial. A ROA 109. Additionally, the Court found that any error alleged would be harmless due to the overwhelming evidence supporting Appellant's judgment of

conviction. A ROA 109. The Court also made a factual finding that Appellant's conduct in the case and his extensive DUI history demonstrated that his sentence was appropriate. A ROA 109.

The Court found that even had trial counsel filed a timely Notice of Appeal and challenged Appellant's sentence, the outcome of the case would have been the same. A ROA 110. Thus, the Court properly found that Appellant could not demonstrate prejudice. The overwhelming evidence against Appellant, his meritless claims, and his extensive DUI history clearly support the Court's decision that the presumption was clearly rebutted under the facts of this case.

Additionally, if Appellant is granted the direct appeal that he was deprived of and raises the issues he argued below he would not secure relief. The issues he alleges are meritless and if the Court finds error with the District Court's denial of Appellant's Petition, it should be considered a harmless error.

NRS 178.598 provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Constitutional error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Tavares v. State, 117 Nev. 725, 732 n.14, 30 P.3d 1128, 1132 n. 14 (2001) (quoting Neder v. United States, 527 U.S. 1, 3, 119 S. Ct. 1827, 1830 (1999)). Non-constitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in

determining the jury's verdict. Knipes v. State, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008).

As explained and demonstrated above, there was overwhelming evidence that supported the Appellant's conviction. There were two eyewitnesses that testified to observing Appellant's erratic driving and one of the witnesses even testified about Appellant reeking of alcohol. 2 C ROA 365; 2 C ROA 382- 389. Two police officers also testified, and one found an open container of alcohol in Appellant's vehicle. 2 C ROA 398. A nurse, and a forensic scientist also testified to Appellant's guilt, and the forensic scientist testified that the Appellant had a blood alcohol content of 2.49 grams of ethanol per 100 milliliters of blood. 2 C ROA 447. In addition, all of Appellant's claims raised in the petition, and presumably the same claims he would raise in an appeal are meritless and suitable for summary denial. See Section I, III, IV. The overwhelming evidence of Appellant's guilt renders any error harmless.

III. DISTRICT COURT PROPERLY DISMISSED APPELLANT'S CLAIMS REGARDING ERRORS IN HIS SENTENCING BECAUSE THEY WERE MERITLESS AND WERE WAIVED BY APPELLANT'S FAILURE TO RAISE THEM ON APPEAL

The District Court did not err when it dismissed Appellant's claims regarding alleged errors with Appellant's sentence. Appellant complained 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 ROA 80-81.

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.

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

Here, Appellant's three (3) claims were waived. The claims were allegations of sentencing errors that could have been raised on direct appeal. A ROA 111. Appellant did not address good cause and failed to identify any impediment external to the defense that prevented him from raising these claims on direct appeal. A ROA 111. Regardless, all facts and law necessary to raise these complaints were available to him.

Appellant failed to establish prejudice to overcome the procedural bar because the underlying three (3) complaints were meritless. A ROA 111. First, Appellant had no statutory right to treatment. Appellant cited NRS 484C.320, but it does not support his claim. A ROA 111. NRS 484C.320(1) does not apply to an offender who was found to have a concentration of alcohol of 0.18 or more in his blood:

> An offender who is found guilty of a violation of NRS 484C.110 or 484C.120 that is punishable pursuant to paragraph (a) of subsection 1 of NRS 484C.400, other than an offender who is found to have a concentration of alcohol of 0.18 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.

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

Second, Appellant did not provide a coherent factual or legal analysis to support his claim that 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**.** A ROA 80-81. Thus, the claims were bare and naked assertions suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

The last claim Appellant raised in his Petition that the Court punished him for exercising his right to a jury trial, was meritless. A ROA 111. In fact, Appellant pled guilty to Reckless Driving on August 3, 2021. 1 C ROA 68. On December 16, 2021, the Court stated that it was not inclined to sentence Appellant to probation due to the facts of the case and Appellant's prior record including repeated DUIs. 1 C ROA 187-190. During that same hearing, the Court allowed Appellant to withdraw his plea and set the case for trial. 1 C ROA 189-90. At the sentencing hearing on May 26, 2022, the Court stated its reasoning for the prison sentence, including Appellant's numerous DUI convictions and danger to the community. 1 C ROA 175-76. Thus, Appellant's assertion that his sentence was a punishment for exercising his right to trial was belied by the record, and only suitable for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

In summary, Appellant's claims were waived by his failure to raise them on direct appeal; Appellant failed to show good cause for such failure; and there was

no actual prejudice to Appellant because his claims were meritless. Therefore, the District Court properly dismissed Appellant's claims regarding errors in his sentencing.

IV. APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FOR COUNSEL'S FAILURE TO SUPPRESS THE OFFICER'S DECLARATION IS WAIVED AND MERITLESS

Appellant asserts that his counsel was ineffective for failing to suppress the officer's declaration that was used to obtain the search warrant for the blood sample. Appellant's informal brief 3.

On November 16, 2022, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction). A ROA 1-9. On that same day, Appellant filed a Supplemental to Writ of Habeas Corpus. A ROA 102. On January 19, 2023, the Court heard and denied Appellant's Petition and Supplement. A ROA 102. On February 5, 2023, Appellant filed a Second Supplemental to Writ of Habeas (Brook v. State, 22285 Nev. Sup. Ct.) Corpus, raising this ineffective assistance of counsel claim. A ROA 39-45. This Second Supplemental was never responded to nor did the court issue a ruling because the Second Supplemental was improperly filed after the court already ruled on Appellant's Petition for Writ of Habeas Corpus. Thus, Appellant's Second Supplemental failed to comply with NRS 34.750(5) and as such, the issue the Appellant now raises on appeal was never litigated below.

Issues not raised in the district court are waived on appeal. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 58 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991). They may only be reviewed, if at all, for plain error. Martinorellan v. State, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015); Maestas v. State, 128 Nev. 124, 146, 275 P.3d 74, 89 (2012); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 948, 987 (1995); Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995). Plain error review asks:

> To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record. In addition, the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing actual prejudice or a miscarriage of justice. Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan, 131 Nev. at 49, 343 P.3d at 594 (internal citations omitted).

Appellant's allegation does not prove any error let alone an error readily apparent and unmistakable from a casual inspection of the record. Appellant alleges that the officer perjured himself by saying that there was a victim involved with great bodily harm. Appellant's informal brief 3. However, there is no evidence of that allegation in the record. Appellant has the "responsibility to provide the materials necessary for this court's review." Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034,

1036 (1975). Under NRAP 30(d), the required appendix should include "[c]opies of relevant and necessary exhibits." See also Thomas v. State, 120 Nev. 37, 43 & n. 4, 83 P.3d 818, 822 & n. 4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3)); Fields v. State, 125 Nev. 785, 220 P.3d 709 (2009) (appellant's burden to provide complete record on appeal). "When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision." Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

Additionally, if this Court does want to hear this issue, the only remedy available would be to remand this case for litigation of this issue. An appellate court is not particularly well-suited to make factual determinations in the first instance. *Zugel*, 99 Nev. at 101, 659 P.2d at 297; 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure §* 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); see also Anderson v. Bessemer City, 470 U.S. 564, 575, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact); Alburquerque v. Bara, 628 F.2d 767, 775 (2d Cir.1980) (remanding habeas petition to district court for additional

fact findings because Court of Appeals was not well-suited to make factual findings). An appellate court's ability to make factual determinations is hampered by the rules of appellate procedure, the limited ability to take oral testimony, and its panel or en banc nature. See Ryan's Express v. Amador Stage Lines, 128 Nev. 289 at 300.

Appellant's allegation does not prove any error let alone an error readily apparent and unmistakable from a casual inspection of the record, because there is no evidence in the record to support his allegation. Thus, Appellant's claim is waived as it was not litigated below, and he has failed to demonstrate plain error.

CONCLUSION

The State respectfully requests that this Court AFFIRM the District Court's decision below.

Dated this 20th day of November, 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 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,756 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of November, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 20, 2023. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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