NOASC
Glenford Anthony Budd (#90043)
Southern Desert Correction Center
P.O. Box 208
Indian Springs, NV 89070-0208
Petitioner

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * * *

GLENFORD BUDD,
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

Case No.: A-21-835835-W
Dept. No.: III

NOTICE OF APPEAL

TO: THE STATE OF NEVADA

STEVEN B. WOLFSON, DISTRICT ATTORNEY, CLARK COUNTY, NEVADA and DEPARTMENT III OF THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK.

NOTICE is hereby given that GLENFORD BUDD, presently incarcerated at Southern Desert Correciton Facility, Indian Springs, Nevada, appeals to the Supreme Court of the State of Nevada from the Findings of Fact, Conclusions of Law and Order denying his Petition for a Writ of Habeas Corpus (Post-Conviction) entered on or about January 27, 2022.

DATED 3-24, 2022.

Glenford Anthony Budd (#90043)
Petitioner

DECLARATION OF MAILING

Glenford Budd hereby declares that he is, and was when the herein described mailing took place over 21 years of age; that on 3-24, 2022, Declarant deposited in the United States mail at Indian Springs, Nevada, a copy of the Notice of Appeal in the above-mention case, enclosed in a sealed envelope upon which first class postage was fully prepaid, addressed to the following:

STEVEN B. WOLFSON, ESQ.
CLARK COUNT DISTRICT ATTORNEY
200 LEWIS AVENUE
LAS VEGAS, NEVADA 89101

I declare under penalty of perjury that the foregoing is true and correct.

Executed 3-24, 2022.

Glenford Budd

Glenford Anthony Budd (#90043)
Petitioner

MWCN
MATTHEW D. CARLING, ESQ.
Nevada Bar No.: 007302
703 S. 8th Street
Las Vegas, NV 89101
(702) 419-7330 (Office)
(702) 446-8065 (Fax)
CedarLegal@gmail.com
Court-Appointed Attorney for Defendant,
GLENFORD BUDD

DISTRICT COURT
CLARK COUNTY, NEVADA

GLENFORD BUDD,

Petitioner,

vs.

STATE OF NEVADA,

Respondent.

Case No.: A-21-835835-W
Dept. No.: III

MOTION TO WITHDRAW AS COUNSEL

COMES NOW, MATTHEW D. CARLING, ESQ., of the Carling Law Office, PC, and move this Honorable court for an order allowing counsel to withdraw as attorney of record for the Defendant, GLENFORD BUDD, in the above-captioned matter.

This motion is made and based on the pleadings and papers on file herein, the attached Affidavit of Matthew D. Carling, Esq., in support thereof, and any oral arguments as may be presented at the hearing in this matter.

CARLING LAW OFFICE, PC

Matthew D. Carling, Esq.

MATTHEW D. CARLING, ESQ.
Court-Appointed Attorney for Defendant,
GLENFORD BUDD

Jonathan.vnaboskerck@clarkcountyda.com
Attorney for Respondent

Clark County District Attorney's Office
motions@clarkcountyda.com
~~*Counsel for the Respondent*~~

Matthew D. Carling, Esq.
MATTHEW D. CARLING, ESQ.

Dear Justice, 3-24-2022

I would like to start off by apologizing for the late submission of these documents. My Lawyer, Mr. Matthew Carling mailed me a letter written on March 17th, 2022 stating what the next steps are and how to submit these documentations. He also stated the DA's office mailed the hard copy to his Las Vegas office which is really just a place he receive mail. He said he didn't get an electronic notice of the filing as he normally receive. And so he was not able to file a notice of appeal within the statutory timeframe. I received this letter at Southern Desert correctional center on March 23rd, 2022. Please see the attached copy of Mr. Carling's letter. Thank you for your time.

Respectfully
Mr. Budd
#90043

CARLING LAW OFFICE, PC*

Nevada
703 S. 8th Street
Las Vegas, NV 89101
Phone: (702) 419-7330
Fax: (702) 446-8065
MatthewCarling@gmail.com

Utah
2522 West 5550 North
Cedar City, Utah 84721
Phone: (702) 419-7330
Fax: (702) 446-8065
CedarLegal@gmail.com

*Licensed in Nevada & Utah

March 17, 2022

PRIVILEGED AND CONFIDENTIAL

Glenford Anthony Budd (#90043)
Southern Desert Correction Center
P.O. Box 208
Indian Springs, NV 89070-0208

Glenford Budd v. William Hutchings
Case No.: A-21-835835-W
Dept. No.: III (Trujillo)

Dear Mr. Budd:

I am in receipt of the District Court's Findings of Fact, Conclusions of Law and Order dated January 21, 2022. At this point it is in your best interested to file a Notice of Appeal in the Nevada Supreme Court. I have provided you with a form as I am currently unable to file the Notice on your behalf. I have enclosed a copy of a Motion to Withdraw as Counsel that explains my situation.

State Habeas Corpus

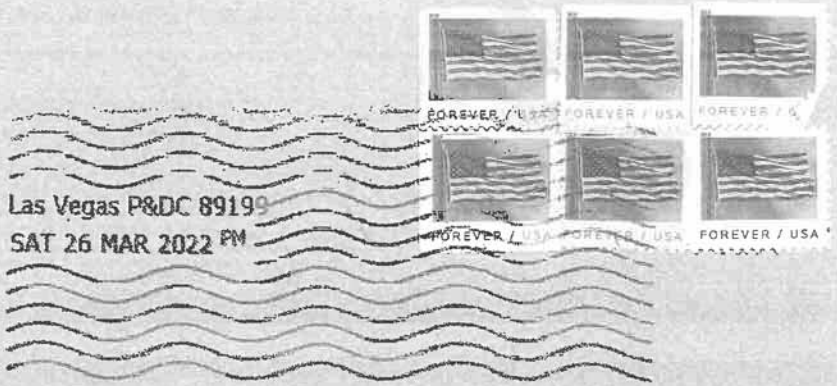
A petition must be filed within 1 year after entry of the Judgment of Conviction (JOC) or, if an appeal was taken form the JOC, within 1 year after the Nevada Supreme Court issues its Remittitur. (NRS 34.726(1)) The 1 year period begins to run from the entry of the JOC unless you file a timely direct appeal. Dickerson v. State, 114 Nev. 1084 (1998). All petitions must be timely filed, including second or successive petitions pursuant to NRS 34.810. Pellegrini v. State, 117 Nev. 860 (2001). A supplemental petition relates back to the date of filing of the original petition for purposes of NRS 34.726. State v. Powell, 122 Nev. 751, 138 P.3d 453 (2006).

Federal Habeas Corpus

The federal clock is the same clock as the state clock. There is NOT an additional year to file a federal habeas corpus petition. *See* Frye v. Hickman, 273 F.3d 1144 (9th Cir. 2001). A petition must be dismissed if delay in filing the petition prejudices the State in responding to the petition or in its ability to retry the petitioner. (NRS 34.800(1))

Habeas Corpus Timeline

Glenford A. Budd Jr.
#90043
S.C.C.C
P.O. Box 208
Indian Springs, NV, 89070



TO BE FILED

Steven D. Grierson, clerk of the courts
200, Lewis Avenue, 3rd Floor
Las Vegas, NV. 89155-1160

Electronically Filed
4/5/2022 12:58 PM
Steven D. Grierson
CLERK OF THE COURT

ASTA

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

GLENFORD BUDD,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS, WARDEN,

Defendant(s),

Case No: A-21-835835-W

Dept No: III

CASE APPEAL STATEMENT

1. Appellant(s): Glenford Anthony Budd

2. Judge: Michael A. Cherry

3. Appellant(s): Glenford Anthony Budd

Counsel:

Glenford Anthony Budd #90043
P.O. Box 208
Indian Springs, NV 89070-0208

4. Respondent (s): William Hutchings, Warden

Counsel:

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

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

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

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
***Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: Yes,
Date Application(s) filed: June 7, 2021

9. Date Commenced in District Court: June 7, 2021

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

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 5 day of April 2022.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Glenford Anthony Budd

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. A-21-835835-W

Glenford Budd, Plaintiff(s)	§	Location:	**Department 3**
vs.	§	Judicial Officer:	**Trujillo, Monica**
William Hutchings, Defendant(s)	§	Filed on:	**06/07/2021**
	§	Cross-Reference Case Number:	**A835835**

CASE INFORMATION

Related Cases
03C193182 (Writ Related Case)

Statistical Closures
01/21/2022 Other Manner of Disposition

Case Type: **Writ of Habeas Corpus**

Case Status: **01/21/2022 Closed**

DATE	CASE ASSIGNMENT

Current Case Assignment

Case Number	A-21-835835-W
Court	Department 3
Date Assigned	06/07/2021
Judicial Officer	Trujillo, Monica

PARTY INFORMATION

		Lead Attorneys
Plaintiff	**Budd, Glenford**	**Pro Se**
Defendant	**William Hutchings**	
Other	**State of Nevada**	**Wolfson, Steven B** *Retained* 702-671-2700(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX

EVENTS

06/07/2021 Inmate Filed - Petition for Writ of Habeas Corpus
Party: Plaintiff Budd, Glenford
[1] Post Conviction

06/07/2021 Motion for Appointment of Attorney
Filed By: Plaintiff Budd, Glenford
[2] Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing

06/07/2021 Application to Proceed in Forma Pauperis
Filed By: Plaintiff Budd, Glenford
[3]

06/07/2021 Affidavit in Support of Application Proceed Forma Pauperis
Filed By: Plaintiff Budd, Glenford
[4] Affidavit in Support of Application to Proceed in Forma Pauperis

06/08/2021 Order for Petition for Writ of Habeas Corpus
[5] Order for Petition for Writ of Habeas Corpus

06/16/2021	Clerk's Notice of Hearing *[6] Notice of Hearing*
07/22/2021	Response Filed by: Other State of Nevada *[7] State's Response to Defendant's Petition for Writ Of Habeas Corpus (Post-Conviction) (Non Death) and Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing*
09/07/2021	Order Filed By: Plaintiff Budd, Glenford *[8] Order of Appointment*
11/16/2021	Stipulation and Order Filed by: Plaintiff Budd, Glenford *[9] Stipulation to Enlarge Briefing Schedule and Order*
12/01/2021	Supplement *[10] 5th Supplemental Petition for Writ of Habeas Corpus*
12/28/2021	Response *[11] State's Response to Petitioner's Fifth Supplemental Petition for Writ of Habeas Corpus*
01/18/2022	Reply Filed by: Plaintiff Budd, Glenford *[12] Petitioner's Reply to 5th Supplmental Petition for Writ of Habeas Corpus (Post onviction)*
01/21/2022	Findings of Fact, Conclusions of Law and Order *[13] Findings of Fact, Conclusions of Law and Order*
01/27/2022	Notice of Entry of Findings of Fact, Conclusions of Law *[14] Notice of Entry of Findings of Fact, Conclusions of Law and Order*
03/16/2022	Motion to Withdraw As Counsel Filed By: Defendant William Hutchings *[15] Motion to Withdraw as Counsel*
03/17/2022	Clerk's Notice of Hearing Party: Plaintiff Budd, Glenford *[16] Notice of Hearing*
03/29/2022	Order *[17] Order of Withdrawal*
03/29/2022	Notice of Entry of Order *[18] Notice of Entry of Order*
04/01/2022	Notice of Appeal *[19] Notice of Appeal*
04/05/2022	Case Appeal Statement *Case Appeal Statement*

HEARINGS

08/04/2021 **Petition for Writ of Habeas Corpus** (8:30 AM) (Judicial Officer: Cherry, Michael A.)
08/04/2021, 08/11/2021, 08/18/2021, 01/19/2022
12/08/2021 Continued to 01/19/2022 - Stipulation and Order - Budd, Glenford
Matter Continued;
Matter Continued;
Matter Continued;
Petition for Writ of Habeas Corpus
Denied;
Journal Entry Details:
Parties submitted. COURT ORDERED, petition DENIED. Court FINDS the petition was procedurally barred. State to prepare the Order. NDC;
Matter Continued;
Matter Continued;
Matter Continued;
Petition for Writ of Habeas Corpus
Denied;
Journal Entry Details:
COURT ORDERED, Mr. Carling's Supplemental DUE 10/20/21; State's Response DUE 11/17/21; Mr. Carling's Reply, if any, DUE 12/1/21; matter CONTINUED. NDC 12/8/21 8:30 AM - PETITION FOR WRIT OF HABEAS CORPUS;
Matter Continued;
Matter Continued;
Matter Continued;
Petition for Writ of Habeas Corpus
Denied;
Matter Continued;
Matter Continued;
Matter Continued;
Petition for Writ of Habeas Corpus
Denied;

08/04/2021 **Motion for Appointment of Attorney** (8:30 AM) (Judicial Officer: Trujillo, Monica)
Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing
Granted;

08/04/2021 **All Pending Motions** (8:30 AM) (Judicial Officer: Trujillo, Monica)
Matter Heard;
Journal Entry Details:
PETITION FOR WRIT OF HABEAS CORPUS...EX PARTE MOTION FOR APPOINTMENT OF ATTORNEY AND REQUEST FOR EVIDENTIARY HEARING COURT ORDERED, motion GRANTED; chambers to reach out to Drew Christensen to appoint new counsel. COURT FURTHER ORDERED, petition CONTINUED; matter SET for confirmation of counsel. NDC 8/11/21 8:30 AM - CONFIRMATION OF COUNSEL / PETITION FOR WRIT OF HABEAS CORPUS ;

08/11/2021 **Confirmation of Counsel** (8:30 AM) (Judicial Officer: Trujillo, Monica)
Confirmed;

08/11/2021 **All Pending Motions** (8:30 AM) (Judicial Officer: Trujillo, Monica)
Matter Heard;
Journal Entry Details:
CONFIRMATION OF COUNSEL...PETITION FOR WRIT OF HABEAS CORPUS Matthew Carling Esq., CONFIRMED as counsel. COURT ORDERED, petition CONTINUED for Mr. Carling to review the pleadings and to determine how long it would take to file a supplement. NDC 8/18/21 8:30 AM - PETITION FOR WRIT OF HABEAS CORPUS;

03/28/2022 **Motion to Withdraw as Counsel** (8:30 AM) (Judicial Officer: Trujillo, Monica)
Defendant's Motion to Withdraw as Counsel
Motion Granted;

DISTRICT COURT CIVIL COVER SHEET

A-21-835835-W
Dept. 3

County, Nevada

Case No. .....
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Glenford Budd	William Hutchings
Attorney (name/address/phone):	Attorney (name/address/phone):

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Probate

Probate *(select case type and estate value)*
- ☐ Summary Administration
- ☐ General Administration
- ☐ Special Administration
- ☐ Set Aside
- ☐ Trust/Conservatorship
- ☐ Other Probate

Estate Value
- ☐ Over $200,000
- ☐ Between $100,000 and $200,000
- ☐ Under $100,000 or Unknown
- ☐ Under $2,500

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Judicial Review/Appeal

Judicial Review
- ☐ Foreclosure Mediation Case
- ☐ Petition to Seal Records
- ☐ Mental Competency

Nevada State Agency Appeal
- ☐ Department of Motor Vehicle
- ☐ Worker's Compensation
- ☐ Other Nevada State Agency

Appeal Other
- ☐ Appeal from Lower Court
- ☐ Other Judicial Review/Appeal

Civil Writ

Civil Writ
- ■ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Other Civil Filing

Other Civil Filing
- ☐ Compromise of Minor's Claim
- ☐ Foreign Judgment
- ☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

June 7, 2021
Date

PREPARED BY CLERK
Signature of initiating party or representative

See other side for family-related case filings.

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Respondent,

-vs-

GLENFORD BUDD,
#1900089

Petitioner,

CASE NO: A-21-835835-W
03C193182

DEPT NO: III

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 01/19/2022
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable MONICA TRUJILLO, District Judge, on the 19th day of January, 2022, the Petitioner not being present, but represented by MATTHEW CARLING, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

On May 29, 2003, the State charged Glenford Budd (hereinafter "Petitioner") with three counts of Murder with Use of a Deadly Weapon. The State subsequently filed an Information reflecting these charges on June 26, 2003.

On July 25, 2003, the State filed its Notice of Intent to Seek Death Penalty.[1]

On December 5, 2005, Petitioner's jury trial began. On December 13, 2005, the jury found Petitioner guilty of all charges. On December 14, 2005, the penalty phase of Petitioner's jury trial began. On December 16, 2005, the jury returned a penalty verdict of life in prison without the possibility of parole on each of the three counts.

On February 22, 2006, the District Court sentenced Petitioner as follows: Count 1 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon; Count 2 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 1; and Count 3 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 2, with 995 days credit for time served. Petitioner's Judgment of Conviction was filed on March 1, 2006.

On January 9, 2007, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on February 6, 2007.

On September 21, 2007, Petitioner filed a pro per post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed a Response to Petitioner's First Petition on November 27, 2007. On November 30, 2007, the District Court denied Petitioner's First Petition and filed its Findings of Fact, Conclusions of Law and Order on January 7, 2008.

On September 25, 2009, the Nevada Supreme Court reversed this Court's denial of Petitioner's First Petition on grounds that he should have been appointed post-conviction counsel, and remanded the case to the District Court. Remittitur issued on October 20, 2009. Represented by counsel, Petitioner filed a First Supplemental Post-Conviction Petition for

[1] The State subsequently filed an Amended Notice of Intent to Seek Death Penalty on October 8, 2004.

Writ of Habeas Corpus ("First Supplemental Petition") on May 23, 2013, Petitioner filed a First Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("First Supplement"). On October 25, 2013, Petitioner filed a Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Supplement"). On November 6, 2013, the State filed a Response to Petitioner's First and Second Supplements. On November 20, 2013, Petitioner filed a Reply to the State's Response to Petitioner's First and Second Supplements. On December 12, 2013, Petitioner filed a Third Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Supplement"), and Memorandum Regarding Petitioner's Exhibits (In *Camera* Review). On December 17, 2013, the State filed a Response to Petitioner's Memorandum Regarding Petitioner's Exhibits (In *Camera* Review). On December 26, 2013, Petitioner filed a Fourth Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Fourth Supplement").

On January 31, 2014, heard argument from counsels and ordered a limited evidentiary hearing on Grounds B and C. At the evidentiary hearing on August 22, 2014, Petitioner's prior counsel, Howard Brooks, Esq., testified. Ultimately, the District Court found that Mr. Brooks was not ineffective and denied Petitioner First and Supplemental Petitions. The District Court filed its Findings of Fact, Conclusions of Law and Order on October 17, 2014.

On December 18, 2015, the Nevada Supreme Court affirmed the District Court's denial of Petitioner's First and Supplemental Petitions. Remittitur issued on January 12, 2018.

On June 7, 2021, Petitioner a Petition for Writ of Habeas Corpus (Post-Conviction) (Non-Death) ("Second Petition") and Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing. On July 22, 2021, the State filed a Response to Petitioner's Second Petition. On August 4, 2021, this Court granted Petitioner's request for counsel. On September 7, 2021, this Court filed an Order of Appointment appointing Matthew D. Carling, Esq., to represent Petitioner.

On December 1, 2021, Petitioner filed the instant Supplemental Petition. On December 28, 2021, the State filed its Response. On January 18, 2022, Petitioner filed his Reply.

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FACTUAL BACKGROUND

At approximately midnight on May 26, 2003, detectives from the Las Vegas Metropolitan Police Department were on patrol in the Saratoga Palms East Apartments in Las Vegas, Clark County, Nevada. The apartment complex has been plagued with high levels of drug and gang activity. Thus, police drove through the complex slowly, with their windows down, to detect the sounds of gunshots or other criminal activity.

Detectives heard three gunshots. Within minutes, police were able to determine that the shots had come from Apartment 2068. Detectives climbed the stairs to find the first of three victims, Jason Moore, lying dead on the front doorstep. Detectives later found Dajon Jones dead in a front bedroom. Finally, detectives found the third victim, Derrick Jones, lying in the hallway clinging for life. Derrick was transported to the hospital where he later died. Following a search of the house, described as smoked-filled and having the smell of a shooting range, police secured the crime scene. A short time later, police were able to identify Petitioner as the shooter.

At the scene, crime scene analysts found eleven (11) bullet casings from a single nine-millimeter (9mm) semi-automatic handgun. The bullets from this gun either remained in, or passed through, the three victims. On May 28, 2003, autopsies were performed on all three victims. The medical examiner found that Dajon Jones suffered from two fatal gunshot wounds to the neck.[2] Derrick Jones suffered from seven wounds, including four to the back. Two of these wounds, both to the head, were fatal. Jason Moore suffered from three gunshot wounds, including a head wound and a neck wound. Two of the wounds were fatal. Evidence of marijuana usage was found during the autopsies of Derrick and Dajon Jones.

Petitioner fled the scene of the attack and went into hiding. During that time, he cut his hair. Petitioner initially told police that he went to the apartment to inquire about his stolen one-half pound of marijuana. He told police that he heard a gunshot and fled the apartment along with Lazon Jones. This statement was contradicted by Lazon Jones.

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[2] A third shot missed. The bullet was found in a closet near where Dajon's body was found.

Lazon Jones testified that he, Derrick, Dajon, and Jason were with Petitioner all day on May 26. During the day, Petitioner, known by Lazon as "A.I."[3] was involved in altercations with both Derrick and Jason. That night, the group was in Apartment 2068. Petitioner went to the store to get alcohol. He came back with a single can. Petitioner went into the room where Dajon had been lying down. Lazon heard Petitioner say "Where's my stuff at?" He then heard three gunshots. Lazon fled the apartment and called 911. After shooting Jason Moore on the front doorstep, Petitioner fled the scene. In the interim, Derrick Jones was shot and killed. As Petitioner ran from the scene, Lazon saw that he still held a gun in his hand.

While on the run, Petitioner admitted to his uncle, Winston Budd that he had shot three people. Petitioner had cut his distinctive braids after the Memorial Day shooting. his uncle told Petitioner to turn himself in, Petitioner said that he "preferred to run." Petitioner was eventually arrested.

After being booked into the Clark County Detention Center to await trial, Petitioner made contact with another inmate, Greg Lewis. Petitioner and Lewis knew each other before the incident. During Petitioner's incarceration at the Detention Center, Petitioner confided to Lewis that he had shot and killed the victims because they stole his one-half pound of marijuana. Lewis contacted the police to reveal what he had learned. Lewis was not promised, nor was he given anything in exchange for his statement to police.[4]

Petitioner did not know about Lewis's cooperation. He sent a letter addressed to Lewis including lyrics to a song Petitioner wrote about the murder. He titled the song "Killer in Me" and hoped to have the song released on the "Murda Music CD" upon his release. The lyrics to the rap song:

> The call me Smalls, a.k.a A.I.
> Everyday on the street, I used to get high
>
> There's rules for a killa, Don't get it confused

[3] The nickname is derived from that of NBA player Allen Iverson. Iverson is among the smallest players in the league and has distinctive braids in his hair.

[4] The District Attorney's Office did write to the Parole Board to inform them of Mr. Lewis' assistance in solving the triple homicide. This did not result in a reduced sentence or his release.

I'm wearing county blues, with my face on the news

Blew these niggas off the earth. That's the way it had to go
I only killed three, but I should have killed four

Left them dead on the floor, but just right before

They was crying and pleading, screaming for Jesus.

Y'all can keep the weed, because you can't smoke it now
Because your ass is in the ground

Cross me, I blow like a bomb,
took three niggas from their moms,

I'm a thrilla killa.
Ask Saratoga Palms.

Petitioner's handwriting was identified by Lewis based on a prior letter Petitioner had sent to Lewis. Petitioner's distinctive handwriting for the lyrics, which he admitted was done to prevent "snitches" from reading, was recognized by Lewis from a prior event where he observed Petitioner use that style of handwriting.

ANALYSIS

I. This Petition is Procedurally Barred

A. Application of Procedural Bars is Mandatory

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a *duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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///

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

Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars.

B. NRS 34.726(1)

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

Petitioner failed to file this Petition prior to the one-year deadline. Remittitur issued from Petitioner's appeal on February 6, 2007. Therefore, Petitioner had until February 6, 2007, to file a timely habeas petition. Petitioner filed the underlying Petition on June 7, 2021. This is fourteen years after Petitioner's one-year deadline. As such, this Court finds that the instant Petition is time-barred.

C. NRS 34.800

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS

34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). Over fourteen years has passed since remittitur issued from Petitioner's direct appeal on February 6, 2007. As such, the State plead statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1). After such a passage of time, the State would be prejudiced in its ability to answer the Petition. If the Petition is not dismissed or denied on the procedural bars, the State would be forced to track down witnesses who may have died or retired to prove a case that is over fourteen years old. Assuming witnesses are available, their memories have certainly faded, and they will not present to a jury the same way they did in 2005. As such, this Court finds that both statutory laches applies and that the State would be prejudiced in answering the Petition.

D. This Petition is Barred as Successive

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Petitioner's claims fall into two categories: (1) claims that could have been brought in a prior petition; and (2) claims that already were brought in a petition. The following claims could have been brought in a prior petition: (1) Petitioner's claim on page forty-nine (49) that trial counsel failed to properly investigate the case; (2) Petitioner's claim on page fifty (50) that trial counsel failed to object to eyewitness identification; (3) Petitioner's claim on page fifty-one (51) that trial counsel failed to object to uncharged bad acts; (4) Petitioner's claim on page fifty-two (52) that trial counsel failed to conduct scientific testing; (5) Petitioner's claims on page fifty-nine (59) regarding the disclosure of $30 in relocation assistance; (6) Petitioner's claim on page sixty (60) regarding the rap song; (7) Petitioner's claim on page sixty-one (61)

regarding the disclosure of a letter; (8) Petitioner's claim on page sixty-one (61) regarding prosecutorial misconduct; (9) Petitioner's claim on page sixty-three (63) regarding judicial misconduct; (10) Petitioner's claim on sixty-four (64) regarding jury instructions; (11) Petitioner's claim on page sixty-five (65) regarding appellate counsel providing ineffective assistance; (12) Petitioner's claim on page sixty-nine (69) challenging his sentence; and (13) Petitioner's claim on page seventy (70) that relies on McCoy. Each of these claims relies on both facts and law previously available to Petitioner. As such, they constitute successive claims and are only fit for summary denial.

Petitioner already raised the following claims in his prior petition: (1) Petitioner's claim on page fifty-two (52) that trial counsel failed to call a certain witness; (2) Petitioner's claim on page fifty-five (55) regarding a conflict of interest; and (3) Petitioner's claim on page fifty-seven (57) that trial counsel should have objected to the admission of transcribed testimony. The prior ruling is discussed in each applicable section of this Response. Petitioner reraising already litigated issues constitute an abuse of the writ. As such, this Court finds that this Petition is successive.

E. Petitioner Waived Substantive Claims by Not Addressing Them on Direct Appeal

Petitioner makes numerous substantive claims in his Petition: (1) a challenge on page fifty-seven (57) regarding this Court's error; (2) challenges on pages fifty-nine (59) and sixty-one (61) regarding the failure to disclose evidence; (3) a challenge on page sixty (60) regarding the authentication of evidence (4) a challenge on page 63 regarding judicial misconduct; and (5) a challenge on page 69 regarding improper sentencing.

The court shall dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

. . .

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

NRS 34.810(1)(a)-(b)(2).

The Nevada Supreme Court held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings . . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

NRS 34.810(1)(b) specifically states that if a conviction was the result of trial, the Court shall dismiss a petition if the claim could have been raised in a direct appeal. As such, the only claims Petitioner could raise in a Petition for Writ of Habeas Corpus must be those related to whether his plea was involuntarily or unknowingly entered, or whether he received ineffective assistance of counsel.

Petitioner's substantive claims should have been raised on direct appeal. All the facts and law necessary to appeal these issues were available at that time. Therefore, these claims are waived unless Petitioner can demonstrate good cause and prejudice to overcome the procedural bars. Given that Petitioner fails to demonstrate good cause and prejudice, as discussed below, this Court finds that these claims are waived.

II. Petitioner Fails to Justify Ignoring the Procedural Bars

Petitioner's failure to prove good cause or prejudice requires the dismissal of his Petition. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for

delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012), cert. denied, 568 U.S. 1147, 133 S.Ct. 988 (2013).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas a finding by Supreme Court that a defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at 197, 275 P.3d at 95, footnote 2). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial

counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

A. Petitioner Makes No Attempt to Establish Good Cause

Petitioner makes no attempt to establish good cause to ignore his procedural defaults. His failure to do so is particularly glaring because the State pointed out this failure in the opposition to the petition and the supplement does nothing to correct this fatal defect. Regardless, Petitioner cannot demonstrate good cause because all the facts and law necessary to raise these claims were available to be brought on direct appeal or a timely filed habeas petition. Further, that the case was being litigated in federal court does not establish good cause. Colley v. Warden, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). As such, this Court finds that Petitioner's failure to demonstrate good cause necessitates the dismissal of his Petition.

B. Petitioner Cannot Show Sufficient Prejudice

Petitioner's failure to demonstrate good cause necessitates the dismissal of his Petition. However, Petitioner also fails to properly allege prejudice. "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) (emphasis added). To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason;

one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

In this case, Petitioner cannot establish prejudice to ignore the procedural defaults because his claims are without merit. Additionally, it is not necessary for this Court to consider Petitioner's failure to demonstrate prejudice given that he fails to demonstrate good cause. However, even if this Court does analyze the prejudice prong, this Court finds that Petitioner fails to demonstrate prejudice.

1. Petitioner Cannot Establish He Received Ineffective Assistance of Counsel Due to a Failure to Investigate

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). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), 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). "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 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "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. 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). "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, 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)).

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). 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) (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. 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." Id. 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.

The Strickland analysis does not "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)). 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). "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). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "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). 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).

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). Further, 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).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing 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.

a. Trial Counsel's Failure to Object to an Identification Was Not Ineffective Assistance

Trial Counsel was not ineffective for failing to object to an identification of Petitioner. Petitioner reraises this argument from the underlying Petition. As observed by the Nevada Supreme Court when affirming Petitioner's Judgment of Conviction, Celeste testified that when she heard gunshots coming from Lazon Jones's apartment while she was on her patio, she looked in that direction and "saw Petitioner exit the front door, linger on the landing while firing a weapon three times, then walk down the staircase and away from the area." Order of Affirmance, Budd v. State, Docket No. 46977, at 4 (filed January 9, 2007). Not only did the court conclude that this testimony was sufficient circumstantial evidence of guilt, but Petitioner has otherwise failed to establish that counsel did not properly challenge Celeste's identification of Petitioner at trial. Indeed, he cannot as the record is clear that during cross examination, counsel extensively challenged Celeste's identification of Petitioner:

> Q: So, you're looking from one building diagonally across to the other, correct?
> A: Yes.
> Q: You do not have a clear view directly across into that apartment at 2068?
> A: No.
> Q: In fact, it is a diagonal view of, of the distance shown in that exhibit?
> A: Yes.
> Q: And what you're seeing simply is people coming out of there and coming down the stairs, which you described the two people leaving?
> A: Yes.
> Q: Then you're testifying that you saw AI come out after they had already gone and shooting someone there on the balcony?
> A: Yes.
> Q: And this is your view from your balcony, looking across the other balcony?
> A: Yes.
> Q: And the lighting that you're saying shows, this would have to be, for the most part, the lighting provided by that --
> A: Yes.
> Q: -- exhibit? When he comes out -- when I say he, I mean A.I. -- you can see his face?
> A: I could see the, the outline, the structure of his body and everything else.

Q: You can't see, I mean, he's not close to you obviously?
A: No.

Reporter's Transcript of Jury Trial – Volume 4, at 156-58.

Petitioner fails to explain what else counsel should have done or what counsel should have objected to. The reliability and credibility of Celeste's identification was an issue to be decided by the jury and Petitioner's complaint pertains to the weight and not admissibility of her identification. Given that this thorough challenge to Celeste's testimony did not change the outcome at trial, it is unlikely that any other challenge would have either.

Petitioner also claims trial counsel should have investigated the people Celeste told the police about during the investigation. However, this is nothing but a bare and naked allegation as Petitioner has failed to provide the names of these people, much less explain what information they would have had that reasonably would have changed the outcome at trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Accordingly, this Court finds that this bare and naked claim cannot establish prejudice sufficient to overcome the procedural bars. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

b. Trial Counsel Did Not Provide Ineffective Assistance for Failing to Object to Certain Bad Acts

Trial counsel cannot be deemed ineffective for failing to object to uncharged bad acts. Petitioner reraises this argument from the underlying Petition. Specifically, Petitioner believes that counsel should have objected to Lazon Jones' testimony that the day of the murders, Petitioner and the victims got into a fight about marijuana and that Petitioner threatened the victims. Petitioner alleges that because this was inadmissible propensity evidence. However, counsel cannot be deemed ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. At trial, Lazon testified that he, Derrick, Dajon, and Jason were with Petitioner all day. Lazon explained that Petitioner thought someone stole his "weed," that, Petitioner and Jason got into a confrontation as a result, and then Petitioner told him "he wasn't going to fight him; he was going to put some slugs in him." That night Petitioner again accused the victims of stealing his "weed," and Petitioner shot the victims.

While Petitioner is correct that evidence of person's character is not admissible to show conformity therewith on a particular occasion, the introduction of evidence that Petitioner and the victims fought the day of the murder and Petitioner threatened to kill the victims was not to show that Petitioner had a propensity to be violent. Instead, the statement was introduced to show why Petitioner was angry and established motive. Pursuant to NRS 48.045(2) "Evidence of other crimes, wrongs or acts" is admissible to show motive. Accordingly, any challenge to the admission of Lazon's testimony would have been overruled.

Additionally, the evidence was admissible pursuant to the doctrine of res gestae. Evidence of an uncharged crime "which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime" is admissible. NRS 48.035(3). This long-standing principle of res gestae provides that the State is entitled to present, and the jury is entitled to hear, "the complete story of the crime." Allen v. State, 92 Nev. 318, 549 P.2d 1402 (1976). The Nevada Supreme Court set forth the principle in Dutton v. State, 94 Nev. 461, 581 P.2d 856 (1978), when it explained:

> The State is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates Defendant or Defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible.

(quoting State v. Izatt, 96 Idaho 667, 534 P.2d 1107, 1110 (1975)).

The Nevada Supreme Court has explained that, where the doctrine of res gestae is invoked:

> [The] determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence...the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (emphasis added). Indeed, res gestae evidence cannot be excluded solely because of its prejudicial nature. Shade, 111 Nev. at 894 n.1, 900 P.2d at 331 n.1. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed unless manifestly wrong. Wesley v. State, 112 Nev. 503, 512, 916 P.2d 793, 799 (1996).

Petitioner argues the evidence was "nothing more than cumulative and unduly prejudicial to show that [Petitioner] was a 'bad man' who was a drug dealer." Supplemental Petition, at 52. Petitioner fails to recognize that the State had the right to present the "full account" of what transpired, leading to the three murders. Dutton, 94 Nev. 461, 581 P.2d 856. Accord. Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995). The disputed testimony involves threats from Petitioner that he would shoot the victims. Later that day, Petitioner carried through on his threats. As such, admission of this evidence gives the jury a complete picture and is admissible under the doctrine of res gestae. Accordingly, Petitioner cannot be ineffective for failing to object, as any objection would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this Court finds that this claim is insufficient to establish prejudice to overcome the procedural bars.

c. Trial Counsel Did Not Provide Ineffective Assistance by Not Conducting a Scientific Testing of The Blood Samples

Trial counsel cannot be deemed ineffective for failing to conduct scientific testing of the recovered blood samples. Petitioner reraises this argument from the underlying Petition. Petitioner has not established that doing so would have reasonably changed the outcome at trial. Given the fact that Petitioner shot three people, there was likely an extreme amount of blood at the crime scene. That Petitioner's blood might not have been there does not change the fact that multiple eyewitnesses placed Petitioner at the murder scene.

Additionally, Petitioner is unable to establish prejudice for two reasons. First, the Nevada Supreme Court held that substantial evidence existed to support the jury verdict:

> It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.

Order of Affirmance, Budd v. State, Docket No. 46977, at 7 (filed January 9, 2007). Secondly, Petitioner failed to establish how testing the blood samples at the murder scene could in any realm possibly have changed the outcome at trial. A defendant must allege with specificity what the investigation would have revealed. Molina, 120 Nev. 185,192, 87 P.3d 533, 538 (2004). Here, Petitioner merely asserts a bare and naked claim that scientific testing would have exonerated himself. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

d. Trial Counsel Was Not Ineffective for Failing to Call a Certain Witness

Trial Counsel cannot be deemed ineffective, as Petitioner has not established that further investigation would have reasonably changed the outcome at trial. Petitioner merely asserts conclusory claims that additional exculpatory information may have been found. Additionally, Petitioner raised this claim before both this Court and the Supreme Court of Nevada. The Supreme Court of Nevada already upheld the District Court's denial of this claim:

> Budd contends that the district court erred by denying his claim that counsel was ineffective for failing to investigate and present evidence supporting second-degree murder. We disagree because Budd presented no evidence at the evidentiary hearing that a better investigation would have revealed. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). While Budd suggests that trial counsel could have learned from a witness that he ingested drugs before the killings, postconviction counsel admitted at the evidentiary hearing that he spoke with the witness and she denied ever stating that Budd ingested drugs. Therefore, Budd fails to demonstrate that the district court erred.

Budd v. State, No. 66815, 2015 WL 9258248, at *1 (Dec. 16, 2015).

Accordingly, both res judicata and the law of the case bar Petitioner's claim. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially

the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

2. Petitioner Cannot Establish Ineffective Assistance of Counsel Regarding Any Conflict of Interest

Petitioner argues that trial counsel was ineffective for failing to inform the court that he and Petitioner had a conflict of interest. Petitioner reraises this argument from the underlying Petition. Petitioner argues that counsel was conflicted between his duty of loyalty to Petitioner and his desire to protect himself from an ineffective assistance of counsel claim. An actual conflict only exists when "an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (internal quotation omitted). "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." Id., 831 P.2d at 1376. For example, in Clark, an actual conflict occurred where counsel representing a client charged with first-degree murder also had a pending civil suit against that same client during trial, and further, counsel obtained a default judgment against that client while he was awaiting sentencing on the murder conviction. Id., 831 P.2d at 1376.

Here, Petitioner seemingly misunderstands the meaning of "conflict" in these circumstances. Counsel expressed frustration to this Court on day two of trial that Defendant's family was not cooperating with the defense. Reporter's Transcript of Jury Trial – Volume 2, at 3-6. That frustration does not represent divided loyalty, but rather it reflects counsel's desire to provide the best defense possible.

The District Court concluded as much when denying Petitioner's claim which was raised in his First and Supplemental Petitions. Specifically, when denying Petitioner's Supplemental Petitions, the court found:

> Defendant's claim in Ground H that his counsel was ineffective because his counsel was conflicted is unsupported by any evidence of an actual conflict. Defendant's counsel was objectively reasonable in explaining to the Court his frustration with Defendant and his family in hopes that the Court might be able to encourage them to aid in the defense. Further, Defendant failed to demonstrate a reasonable probability of a more favorable outcome had counsel performed differently.

Findings of Fact, Conclusions of Law and Order, at 5-6 (filed October 17, 2014).

While Petitioner appealed the District Court's denial of his First and Supplemental Petitions, he did not claim that the court abused its discretion in denying this specific claim. His failure to do so has waived his ability to challenge or even re-litigate this claim in these proceedings. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

Here, Petitioner has done nothing but re-argue this already denied claim and has done so without providing any new information or alleging that the District Court erred in denying this claim. Petitioner has therefore failed to establish prejudice sufficient to overcome the procedural bars.

Additionally, in the heading of his claim, Petitioner states that the trial court erred by not granting a continuance. However, he fails to mention anything regarding this claim. It is his responsibility, pursuant to Emperor's Garden, to cogently argue and to support his allegations with relevant legal authority. 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

(2006). His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). To the extent this Court is willing to consider this claim, it fails as nothing more than a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

3. The Trial Court Did Not Err in Admitting Transcribed Testimony

Petitioner argues the trial court erred for allowing the admission of the transcript because Winston Budd was not truly unavailable even though he moved to Belize and would not take the State's phone calls. Petitioner reraises this argument from the underlying Petition. Petitioner already raised this claim and this Court rejected it. Specifically, when denying Petitioner's Supplemental Petitions, the court found:

> Defendant next claims in Ground G that his counsel was ineffective for objecting to the use of the preliminary hearing transcript of Winston Budd's testimony, since he was unavailable at trial. Winston Budd is Defendant's uncle, who testified that Defendant confessed to him after the crimes occurred. Defendant's trial counsel objected and argued that the State failed to exercise reasonable diligence in attempting to obtain this witness for trial, which is a reasonable strategy. Thus, Defendant failed to show that his counsel's representation was objectively unreasonable and that he was prejudiced by it.

Findings of Fact, Conclusions of Law and Order, at 5 (filed October 17, 2014).

While Petitioner appealed the District Court's denial of his First and Supplemental Petitions, he did not claim that the court abused its discretion in denying this specific claim. His failure to do so has waived his ability to challenge or even re-litigate this claim in these proceedings. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner has done nothing but re-argue this already denied claim and has done so without providing any new information or alleging that the District Court erred in denying this claim.

To the extent Petitioner accuses the trial court of error for admitting Winston Budd's preliminary hearing testimony at trial, NRS 5 l.055(d) provides that, for the purpose of the hearsay rule, a declarant is unavailable if the declarant is "[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the declarant's statement has exercised reasonable diligence but has been unable to procure the declarant's attendance or to take the declarant's deposition." Common sense dictates that a witness living in Belize is beyond the court's jurisdiction, and unreturned phone calls sufficiently established that Winston Budd was unavailable for trial.

Admission of the transcript also complies with the Confrontation Clause. Admission of transcripts does not violate the Confrontation Clause when: (1) a defendant is represented by counsel; (2) counsel previously had an opportunity to cross examine the witness; and (3) the witness is unavailable at trial. State v. Eighth Judicial Dis. Court (Baker), 134 Nev. 104, 107-08, 412 P.3d 18, 22 (2018). Here, Petitioner was represented during the preliminary hearing and cross Winston Budd. Reporter's Transcript of Preliminary Hearing, at 56. For the reason's stated above, Winston Budd was unavailable at trial. As such, introduction of the transcript did not violate the Confrontation Clause. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

4. Petitioner's Claim Challenging the Disclosure of Evidence and the Rap Song Fails

Petitioner argues three unrelated claims in this section: (1) a claim revolving around the disclosure of impeachment evidence (2) a claim that the State did not prove by clear and convincing evidence that Petitioner wrote the rap song; and (3) a claim the State did not disclose that they had a deal with a witness. In his first claim, Petitioner is unclear as to whether he argues that a Brady violation occurred, that trial counsel was ineffective for failing to request a mistrial or that trial counsel was ineffective for failing to cross-examine the witness.

In making these claims, Petitioner misstates the amount of assistance given to the witness. The State provided relocation assistance in the amount of $30:

> Mr. Kane: At the time that Celeste Palau first came forward, she asked us for some help in relocating her. She didn't necessarily want to still be at the Saratoga Palms. We said we'd help her. It turned out that the same landlord had an available apartment at another location, and, so, **it would have cost us $30.**
> . . .
> Because of those things she asked me if we'd be willing to help her out with limited funds for relocation once the trial was over. **Our budget for those things is ordinarily $300.** And I told her we would do that

Reporter's Transcript of Jury Trial – Volume 6, at 7-8 (emphases added). Petitioner's claim that the State provided $300 to the witness is belied by the record. The record states that the State generally has a budget of $300 for relocation assistance but that the witness only received $30.

To the extent that Petitioner argues a Brady violation occurred, this claim is meritless. A Brady violation can establish both good cause and prejudice sufficient to waive a procedural default:

> We have acknowledged that a Brady violation may provide good cause and prejudice to excuse the procedural bars to a post-conviction habeas petition. See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). A successful Brady claim has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Id. The second and third components of a Brady violation parallel the good cause and prejudice showings required to excuse the procedural bars to an untimely and/or successive post-conviction habeas petition. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). "[I]n other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." Id. But, "*a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense*." Huebler, 128 Nev. Adv. Rep. 19, 275 P.3d at 95 n.3; see also Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003) (holding that good cause to excuse an

> untimely appeal-deprivation claim must be filed within a reasonable time of learning that the appeal had not been filed).

Lisle, 131 Nev. 356, 359-60, 351 P.3d 725, 728 (2015) (emphasis added). A prerequisite to a valid Brady claim is a showing that the information was actually or constructively known by the prosecution. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976). Further, "the burden of demonstrating the elements of a Brady claim as well as its timeliness" rests with Petitioner. Lisle, 131 Nev. at 360, 351 P.3d at 729. Of particular importance to this matter, Brady violations cannot be premised upon speculation. Strickler v. Greene, 527 U.S. 263, 286, 119 S.Ct. 1936, 1950-51 (1999).

As noted above, "a Brady claim … must be raised within a reasonable time after the withheld evidence was disclosed or discovered by the defense." Lisle, 131 Nev. at 360, 351 P.3d at 728 (quoting, Huebler, 128 Nev. at 95, footnote 3, 275 P.3d at 95, footnote 3).[1] A reasonable time is one year from when the claim was reasonably available to defense. See Rippo, 132 Nev. at 101, 368 P.3d at 734 ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur."); Pellegrini, 117 Nev. at 874-75 34 P.3d at 529 ("The State concedes, and we agree, that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the

[1] This requirement flows from Chapter 34 and Brady. NRS 34.800(1)(a) ("A petition may be dismissed … unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence"); Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) ("Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense"). Accord, Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994), cert. denied, 513 U.S. 1137, 130 L. Ed. 2d 901, 115 S. Ct. 959 (1995) (Brady claim fails where habeas petitioner could have obtained exculpatory statement through reasonable diligence); United States v. Dupuy, 760 F.2d 1492, 1501, footnote 5 (9th Cir. 1985) ("if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails"); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) (where prosecution disclosed identity of witness, it was within the defendant's knowledge to have ascertained the alleged Brady material); United States v. Brown, 582 F.2d 197, 200, cert. denied, 439 U.S. 915, 99 S.Ct. 289 (2nd Cir. 1978) (no Brady violation where defendant was aware of essential facts enabling him to take advantage of the exculpatory evidence).

laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions").

Any Brady claim fails as Petitioner is unable to establish that he raises this claim within a reasonable time of discovering the evidence. On December 13, 2005, the State disclosed to this Court the conversation that occurred with trial counsel. Petitioner does not allege any new facts or circumstances surrounding the $30 provided to the witness for relocation assistance. Accordingly, Petitioner had over fourteen (14) years to bring this claim. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Petitioner's next claim that trial counsel should have moved for a mistrial is also meritless. "The trial court has discretion to determine whether a mistrial is warranted." Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). A mistrial may only be granted where "prejudice occurs that prevents the defendant from receiving a fair trial." Id. at 144, 86 P.3d at 587. Petitioner fails to explain how any prejudice he received prevented him from receiving a fair trial. Trial counsel had the opportunity to have the witness testify again and cross examine her on the $30's worth of assistance. Accordingly, any motion for a mistrial would have been futile. Counsel cannot be deemed deficient for failing to make futile arguments. Ennis 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Additionally, Petitioner fails to include any law regarding when a mistrial is appropriate. It is his responsibility, pursuant to Emperor's Garden, to cogently argue and to support his allegations with relevant legal authority. 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). To the extent this Court is willing to consider this claim, it fails as nothing more than a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, this claim is denied.

Any claim that counsel was ineffective for failing to cross-examine the witness regarding the $30 in relocation assistance is meritless. Trial counsel had numerous strategic reasons to not recall the witness to examine her about $30 in relocation assistance. During

cross examination, trial counsel focused on challenging the witness' ability to perceive the events she testified about. Reporter's Transcript of Jury Trial – Volume 4, at 143-162, 164. Further cross examination on the State assisting the witness with de minimis assistance would have drawn attention away from his other examination.

Furthermore, the reason for the State's assistance is because the witness became a victim of harassment:

> When we were interviewing her in preparation for this trial, she let us know that in the last few weeks she had a series of incidents - - kids calling her snitch lady in the street, coming home and finding her door unlocked; things that made her nervous but things that - - I'm not trying to attribute to the defendant, and there certainly no connection with the defendant.

Reporter's Transcript of Jury Trial – Volume 6, at 8 (emphases added). While there was no connection to the defendant, such testimony would have left the jury questioning who was behind the harassment. As such, trial counsel was not deficient for failing to cross examine the witness. Petitioner also cannot establish prejudice because, as discussed above, the Nevada Supreme Court already held that substantial evidence supports the conviction. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Petitioner then argues that the introduction of the rap song violated his right to a fair trial as it was not properly authenticated. "Nonexpert opinion as to the genuineness of handwriting is sufficient for authentication or identification if it is based upon familiarity not acquired for purposes of the litigation." NRS 52.035. Greg Lewis testified regarding the authenticity of the letter:

> Q [Ms. Pandukht]: Okay. Now, this piece of paper is State's proposed Exhibit 49C. Okay? Could you take a look at this and tell me if you recognize, one, that it came inside the envelope?
> A [Mr. Lewis]: Yeah
> Q: Okay. And then do you recognize the type of handwriting this is?
> A: Yeah. I recognize the writing.

> Q: It looks different than the handwriting in 49B. Do you know why?
> A: It's harder to read for other people.
> Q: Why is that?
> A: Because when you writing in that style of writing, you make it hard for other people to read. That's the purpose of it. You don't want it to be deciphered.
> Q: Have you, you know, ever written this kind of writing?
> A: No. I write regular cursive.
> Q: Have you seen anyone writing this kind of writing?
> A: Once.
> Q: Who?
> A: In jail we write, well, they write like that when you make raps and you don't want people reading your stuff.
> Q: And who did you see write like this?
> A: Budd
> Q: Did you actually see him writing out something similar to this kind of writing?
> A: Yeah.
> Q: What was he doing?
> A: Writing a rap song.
> Q: And were you there when he was doing that?
> A: Yeah.
> Q: And this kind of writing, you still recognize it as belonging to someone?
> A: Yeah.
> Q: As whose?
> A: Budd.

Reporter's Transcript of Jury Trial – Volume 5, at 25-27. Based on his testimony, there was sufficient evidence to support that Petitioner wrote the letter. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

To the extent that Petitioner argues trial counsel was ineffective for not objecting, this Court already denied this claim. In denying that claim, the District Court found:

> 12. Defendant next claims in Ground B that his counsel was ineffective for failing to object to the authentication of the letter by the State's witness, Greg Lewis. However, Lewis was familiar with Defendant's handwriting, thus Defendant fails to show that an objection would not have been futile. Defendant failed to demonstrate that his counsel's failure to object during the

> proceedings fell below an objective standard of reasonableness. Further, Defendant failed to demonstrate a reasonable probability of a more favorable outcome had counsel objected to the authentication.

Findings of Fact, Conclusions of Law and Order, at 3-4 (filed October 17, 2014).

> 32. Defendant further fails to show that a handwriting expert would have revealed any exculpatory evidence, and given the overwhelming evidence against Defendant, an expert would likely have discovered incriminating evidence. This further would have limited Defendant's counsel from arguing the lack of evidence that Defendant committed the killings and wrote the letter. Therefore, Defendant fails to show that his counsel's representation was objectively unreasonable and that Defendant was prejudiced.

Id. at 8. As such, the doctrine of res judicata bars this claim. The decisions of the district court are final decisions absent a showing of changed circumstances, and relitigation of claims is barred by the doctrine of res judicata. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Finally, Petitioner reraises the argument from the underlying Petition that the State failed to disclose a deal with Greg Lewis. This claim is belied by the record. In affirming Petitioner's Judgment of Conviction, the Nevada Supreme Court noted:

> Greg Lewis, who knew Budd before the killings, was in the same jail housing unit as Budd after Budd's arrest. Lewis testified that Budd told him he shot three people but a fourth had gotten away. Lewis notified homicide detectives of this information. Several days later, he also gave detectives a letter he had received from Budd in which Budd implicated himself in the killings. Lewis and a detective testified that no promises were made to Lewis to obtain his information or testimony, but the jury was informed that an assistant district attorney wrote a letter to the parole board noting Lewis's cooperation in the investigation

Order of Affirmance, Budd v. State, Docket No. 46977, at 4-5 (filed January 9, 2007) (emphasis added).

Given that the District Court informed the jury of this letter, common sense dictates not only that the State disclosed this information, but that this letter's existence cannot establish prejudice sufficient to overcome the procedural bars. The jury heard about this letter and still found Petitioner guilty. The Nevada Supreme Court knew about this letter and still concluded that there was sufficient evidence of Petitioner's guilt. Therefore, this Court finds that any claim of prejudice fails.

5. Trial Counsel Was Not Ineffective for Failing to Object to Prosecutorial Misconduct as There Was No Prosecutorial Misconduct

Petitioner argues that trial counsel failed to object on grounds of prosecutorial misconduct when the State argued during opening statements that the jury would hear testimony from Tracy Richards and Winston Budd when neither testified at trial. Petitioner reraises this argument from the underlying Petition. A prosecutor has "a duty to refrain from making statements in opening arguments that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997). Furthermore, "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." Id. at 1312-1313, 949 P.2d at 270. Under the standard above, the prosecutor did not commit prosecutorial misconduct.

The State noticed both Tracey Richards and Winston Budd as witnesses and therefore had a good faith belief they would be testifying. Notice of Witnesses, at 2 (filed September 28, 2004). However, when it became clear on the last day of trial that Tracey Richards would not be testifying, counsel moved for a mistrial and the District Court denied that request:

> MR. BROOKS: Second issue, Judge, is during opening statements, Mr. Kane … said that, "say we presume testimony of Tracey Richards," and Mr. Kane explained what she would say if she testified.
> […]
> No such evidence was actually presented by the State during trial. Tracey Richards did not testify.

> Under these circumstances, Judge, the jury has been exposed to the State making factual statements not supported by the record, statements of a highly inculpatory and prejudicial nature. Therefore, because this caused us due process, we asked for a mistrial.
> THE COURT: Mr. Kane, do you wish to be heard?
> MR. KANE: Judge, we had contacted and served Tracey prior to trial period throughout the trial she was in phone contact with my investigator, and on several occasions promised to come to court, and never did.
>
> As the trial approached its close, I was faced with a couple of choices: one was, of course, to get an arrest warrant and go out and pick her up; one was to lay a foundation for her unavailability an read her testimony into the record -- as we already did that with Mr. Budd and as he testified both as to admissions by the defendant, the defendant's changed appearance and his preparations for flight -- I deemed it not necessary to go to those lengths to get her testimony into the record. So, I made a choice not to call her and not to have a warrant issued and go out and have her picked up or read her testimony into the record.
>
> If the Court feels that any curative action is necessary, I suggest one of two on alternatives. We can either into a stipulation on the record that Tracey Richards was unavailable as a witness, or I can move to reopen the case; if Mr. Brooks is so concerned about it, I'll lay a foundation for her unavailability and we will read her preliminary hearing testimony into the record. Whichever makes the defendant happy.
> […]
> MR. BROOKS: Judge, I will simply say that what I desire, as far as a remedy, is that the defense -- well, I've asked for a mistrial. If the Court is not inclined to grant a mistrial, then I would ask that the defense be allowed to comment in the closing argument that the State mentioned this evidence and the State did not present the evidence.

Reporter's Transcript of Jury Trial – Volume 6, at 4-6.

Accordingly, the record is clear that the State had a good faith belief that Tracey Richards would testify at trial when the state noted during opening statements that she would be testifying. Given that trial counsel is not psychic, there is no way he could have known during opening statements that Tracey Richards would not be available to testify. Indeed, had counsel objected during opening statements, the District Court would have overruled that

objection because the State had a good faith belief that Tracey Richards would be testifying. Counsel cannot be deemed deficient for failing to make futile arguments. Ennis 122 Nev. at 706, 137 P.3d at 1103. Once counsel was aware of this information, he acted diligently in moving for a mistrial. That the district denied that motion further establishes that any earlier challenge would have also been futile. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Second, Petitioner's claim that Winston Budd did not testify at trial and that the State engaged in misconduct by informing the jury about the substance of is testimony during opening statements is belied by the record. Petitioner admits that Winston Budd's preliminary hearing testimony was read into the record. Accordingly, the jury heard Winston Budd's testimony, specifically testimony that Petitioner told Winston Budd he committed the murders he was standing trial for. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

6. Trial Counsel Was Not Ineffective for Failing to Object to Judicial Misconduct as There Was No Judicial Misconduct

Petitioner argues that Trial Counsel provided ineffective assistance of counsel by failing to object to this Court's decision to not *sua sponte* declare a mistrial. A trial court will only grant a mistrial on its own motion when there is presentation of evidence so inherently prejudicial that the declaration of a mistrial is necessary. Baker v. State, 89 Nev. 87, 88, 506 P.2d 1261 (1973). Here, there was absolutely no cause for declaring a mistrial. As explained above, the record is clear that the State had no idea Tracey Richards would not be testifying at trial when they stated during opening statements that she would testify. Therefore, the court cannot have erred for failing to *sua sponte* declare a mistrial based on information it did not know. As such, trial counsel cannot be ineffective for failing to make a futile motion. Ennis, 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

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7. Trial Counsel Was Not Ineffective for Failing to Object to Certain Jury Instructions

Petitioner argues that his trial counsel was ineffective for failing to object to the wording of Jury Instructions Seven (7) and Nineteen (19). Regarding Jury Instruction Seven (7), Petitioner block quotes the instruction but never explained what is wrong with the instruction. His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. at 673, 748 P.2d at 6. To the extent this Court is willing to consider this claim, the jury instruction is correct under Byford v. State, 116 Nev. 215, 235-37, 994 P.2d 700, 713-15 (2000). As such, this is denied.

Petitioner then argues that he was entitled to an instruction that a biased witness can be discredited. Petitioner reraises this argument from the underlying Petition. The language Petitioner desires is substantially covered by Jury Instruction Nineteen (19).

In its entirety, Jury Instruction Nineteen 19 reads:

> The credibility or believability of a witness should be determined by his manner upon the stand, his or her relationship to the parties, his or her fears, motives interests or feelings, his or her opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his or her testimony which is not proved by other evidence.

This instruction essentially covers the same information Petitioner desires. Since the District Court is not obligated to use a defendant's exact wording, Petitioner cannot establish that he was entitled. As such, any objection would have been futile. Ennis 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

8. Appellate Counsel Did Not Provide Ineffective Assistance of Counsel

Petitioner argues that appellate counsel was ineffective for not challenging the reasonable doubt instruction. At trial, the Court gave the following instruction as to reasonable doubt:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation.
>
> If you have reasonable doubt as to the guilty of the Defendant, he is entitled to a verdict of not guilty.

Petitioner believes the clause, "after the entire comparison and consideration of all the evidence" shifted the burden on the defense to present evidence for the jury to compare. Petitioner next believes that the clause, "are in such a condition that they can say they feel and abiding conviction of the truth of the charge" lowered the State's burden of proof because it allows the jury to convict a defendant if they merely believe the state. Petitioner further believes that the last sentence of the second paragraph put the burden on Petitioner to prove that there is no truth to the charge. Finally, Petitioner argues that the third paragraph misled the jury into believing that reasonable doubt was actual, not reasonable doubt.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order

to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

Here, any claim of ineffective assistance of appellate counsel for failing to challenge the reasonable doubt instruction would have failed. NRS 175.211 explicitly requires courts to issue this instruction and none other:

> Definition of reasonable doubt; no other definition to be given to juries.
>
> 1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

Specifically, the Nevada Supreme Court has found this instruction to be constitutional time and time again. Jeremias v. State, 134 Nev. 46, 412 P.3d 43 (2018); Garcia v. State, 121 Nev. 327, 331, 113 P.3d 826, 838 (2005)(finding that "the reasonable doubt instruction required by NRS 175.211 is not unconstitutional); Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003)("This court has repeatedly reaffirmed the constitutionality of Nevada's

reasonable doubt instruction); Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999). This is particularly true where, as here, the jury was also instructed on the presumption of innocence and the State's burden of proof. Leonard v. State, 114 Nev. 1196, 1209 969 P.2d 288, 298 (1998). The Ninth Circuit has also deemed this instruction constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211 (9th Cir. 1998). As this instruction comported with the law, any challenge to its legality on appeal would have failed and appellate counsel could not have been deemed ineffective for failing to raise it. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

9. Petitioner Cannot Demonstrate Cumulative Error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. However, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the petitioner fails to demonstrate any single violation of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there were no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either procedurally barred, waived, or otherwise meritless. As such, this Court finds that Petitioner failed to establish cumulative error

10. Petitioner's Challenge to His Sentence Fails

Petitioner argues that the three additional and/or consecutive life sentences for the deadly weapon enhancement constitute an illegal sentence.

Petitioner committed the instant offense on May 26, 2003, was convicted on December 13, 2005, and sentenced on February 22, 2006. The District Court sentenced Appellant as follows: Count 1 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon; Count 2 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 1; and Count 3 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 2.

To the extent that Petitioner argues that some fact increased his penalty without being submitted to the jury, this claim belied by the record. The jury returned a verdict that included three findings of guilty of murder with use of a deadly weapon:

> We the jury in the above entitled case, find the Defendant, Glenford Anthony Budd, as follows:
>
> > Count 1 -- Murder with Use of a Deadly Weapon (Victim – Dajon Jones), Guilty of First Degree Murder with Use of a Deadly Weapon.
> >
> > Count 2 -- Murder with Use of a Deadly Weapon (Victim – Derrick Jones) Guilty of First Degree Murder with Use of a Deadly Weapon.
> >
> > Count 3 -- Murder with Use of a Deadly Weapon (Victim – Jason Moore) Guilty of First Degree Murder with Use of a Deadly Weapon.

Reporter's Transcript of Jury Trial – Volume 5, at 90. Given that the jury found Petitioner guilty, any argument under Apprendi is meritless.

Petitioner then argues because NRS 193.165, the statute governing the sentence allowed for the deadly weapon enhancement, was amended in 2007—after Petitioner was convicted and sentenced—he should get the benefit of that amendment. At the time Petitioner committed the offense, was convicted, and sentenced, NRS 193.165 required an "equal and consecutive sentence" be imposed as a deadly weapon sentence enhancement. NRS 193.165 (2006), *amended* by Assembly Bill 510 (effective July 1, 2007). NRS 193.165 was amended after Petitioner was sentenced. The changed language does not apply retroactively to offenses committed prior to the changes in statute. State v. Second Judicial District Court, 124 Nev. 564, fn. 11, 188 P.3d 1079, fn. 11 (2008). Accordingly, in compliance with the language of NRS 193.165 in effect in 2006, Petitioner's equal and consecutive sentences of life without the possibility of parole for all three deadly weapon enhancements were correct and does not amount to cruel and unusual punishment. As such, this Court finds that Petitioner's claim is meritless and therefore cannot constitute prejudice sufficient to overcome the procedural bars.

11. Petitioner is Not Entitled to Relief Based on McCoy

Petitioner claims that the U.S. Supreme Court decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), which was issued over a decade after Petitioner's Judgment of Conviction was affirmed, applies retroactively to his case, and establishes that his counsel committed structural error when he conceded Petitioner's guilt at trial. Petitioner reraises this argument from the underlying Petition. As an initial matter, Petitioner's has not identified where counsel allegedly conceded his guilt during trial. Such a bare and naked claim cannot establish prejudice. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner is re-arguing the claim made in his Supplemental Petitions that counsel conceded Petitioner's guilt during opening statements when counsel stated that "some evidence will show that [Petitioner] killed these three people," the District Court has already rejected that claim, holding that counsel did not concede Petitioner's guilt:

> 23. Defendant claims in Ground J that his counsel was ineffective and violated his right to remain silent when he stated during the opening statement that "some evidence will show that [Defendant] killed these three (3) people," which Defendant claims was an admission of guilt without his consent. RT, 12/8/05, at 58. However, Defendant's counsel then explained that the evidence was insufficient to overcome reasonable doubt, which was an objectively reasonable strategy given the overwhelming evidence against Defendant. Moreover, Defendant did not receive the death penalty, thus Defendant cannot show that he suffered prejudice.

Findings of Fact, Conclusions of Law and Order, at 6 (filed October 17, 2014).

Additionally, the McCoy cannot help Petitioner overcome the mandatory procedural bars. McCoy does not apply to post-conviction habeas proceedings, does not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new rule.

First, McCoy was decided on direct appeal, and the Court explicitly stated that it was not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

Second, McCoy does not require counsel to obtain their client's consent before conceding their guilt, as Petitioner claims. Instead, McCoy held that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's *intransigent and unambiguous objection*" and that such an error is structural. 138 S.Ct. at 1511. (emphasis added). A review of the law leading up to McCoy further dispels Petitioner's claim. Fifteen years ago, the US Supreme Court held that no "blanket rule demand[s] the defendant's explicit consent" to the strategic concession of guilt. Florida v. Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the defendant of the strategy and the defendant thereafter neither approves nor protests the strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State, 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had "expressly rejected" framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs. The rule announced in McCoy did not create any new rights except when a defendant does object in such a manner. While it appears that Petitioner testified in his defense, Petitioner does not allege that he objected to counsel's argument. Therefore, McCoy would not even apply to Petitioner's claim.

Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada Supreme Court has held as much. With narrow exception, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989). In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev. 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to proscribe certain conduct

or impose certain punishment based on the class of offender or the status of the offense; or 2) The rule establishes a procedure "without which the likelihood of an accurate conviction is seriously diminished." Id. at 820, 59 P.3d at 472.

While McCoy was a new constitutional rule, as Petitioner's conviction was final at the time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it is not retroactive. McCoy does not fit under either exception. It did not establish that it is unconstitutional to proscribe certain conduct or impose certain punishments based on the class of offender; and it does not impose a new procedural rule designed to improve the accuracy of criminal convictions. McCoy demands that defendants assert the right clearly and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather than concern about the relative accuracy of judicial vs. jury findings. Therefore, as Petitioner's conviction was final when McCoy was decided, and McCoy does not fall under either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to good cause.

Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada Supreme Court held that if counsel undermines the "client's testimonial disavowal of guilt during the guilt phase of the trial," counsel is ineffective. Jones v. State, 110 Nev. 730, 739, 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the McCoy Court explained that many state supreme courts had already held as the Nevada Supreme Court held in Jones: that counsel may not admit guilt when the defendant "vociferous[ly] and repeated[ly] protest[s]." Id. Accordingly, McCoy provides nothing that was not already available under Nevada law. Any claim based on Petitioner's alleged objection to conceding guilt has been available to him under Jones since 1994. Petitioner cannot now claim that he has good cause to raise this claim which has therefore been available to him for 25 years.

As McCoy is inapplicable to Petitioner's claim, this Court finds that it cannot conceivably establish prejudice sufficient to overcome the procedural bars.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus and Fifth Supplemental Petition for Writ of Habeas Corpus shall be, and it is, hereby denied.

DATED this _____ day of January, 2022.

Dated this 21st day of January, 2022

Michael A. Cherry

DISTRICT JUDGE

57A D4A 6746 E47B
Michael Cherry
District Court Judge

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

BY /s/ Jonathan E. VanBoskerck
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing, was made this 20th day of January 2022, by email to:

Matthew D. Carling, Esq.
CedarLegal@gmail.com

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

03F09137X/EE/APPEALS/sj/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Glenford Budd, Plaintiff(s)	CASE NO: A-21-835835-W
vs.	DEPT. NO. Department 3
William Hutchings, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

Electronically Filed
1/27/2022 11:21 AM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

GLENFORD BUDD,

Petitioner,

vs.

WILLIAM HUTCHINGS,

Respondent,

Case No: A-21-835835-W

Dept No: III

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

PLEASE TAKE NOTICE that on January 21, 2022, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on January 27, 2022.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 27 day of January 2022, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:

Glenford Budd # 90043
P.O. Box 208
Indian Springs, NV 89070

Matthew D. Carling, Esq.
703 S. 8th St.
Las Vegas, NV 89101

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Respondent,

-vs-

GLENFORD BUDD,
#1900089

Petitioner,

CASE NO: A-21-835835-W
03C193182

DEPT NO: III

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: 01/19/2022
TIME OF HEARING: 8:30 AM

THIS CAUSE having come on for hearing before the Honorable MONICA TRUJILLO, District Judge, on the 19th day of January, 2022, the Petitioner not being present, but represented by MATTHEW CARLING, ESQ., the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through BERNARD ZADROWSKI, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

On May 29, 2003, the State charged Glenford Budd (hereinafter "Petitioner") with three counts of Murder with Use of a Deadly Weapon. The State subsequently filed an Information reflecting these charges on June 26, 2003.

On July 25, 2003, the State filed its Notice of Intent to Seek Death Penalty.[1]

On December 5, 2005, Petitioner's jury trial began. On December 13, 2005, the jury found Petitioner guilty of all charges. On December 14, 2005, the penalty phase of Petitioner's jury trial began. On December 16, 2005, the jury returned a penalty verdict of life in prison without the possibility of parole on each of the three counts.

On February 22, 2006, the District Court sentenced Petitioner as follows: Count 1 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon; Count 2 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 1; and Count 3 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 2, with 995 days credit for time served. Petitioner's Judgment of Conviction was filed on March 1, 2006.

On January 9, 2007, the Nevada Supreme Court affirmed Petitioner's conviction. Remittitur issued on February 6, 2007.

On September 21, 2007, Petitioner filed a pro per post-conviction Petition for Writ of Habeas Corpus ("First Petition"). The State filed a Response to Petitioner's First Petition on November 27, 2007. On November 30, 2007, the District Court denied Petitioner's First Petition and filed its Findings of Fact, Conclusions of Law and Order on January 7, 2008.

On September 25, 2009, the Nevada Supreme Court reversed this Court's denial of Petitioner's First Petition on grounds that he should have been appointed post-conviction counsel, and remanded the case to the District Court. Remittitur issued on October 20, 2009. Represented by counsel, Petitioner filed a First Supplemental Post-Conviction Petition for

[1] The State subsequently filed an Amended Notice of Intent to Seek Death Penalty on October 8, 2004.

Writ of Habeas Corpus ("First Supplemental Petition") on May 23, 2013, Petitioner filed a First Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("First Supplement"). On October 25, 2013, Petitioner filed a Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Second Supplement"). On November 6, 2013, the State filed a Response to Petitioner's First and Second Supplements. On November 20, 2013, Petitioner filed a Reply to the State's Response to Petitioner's First and Second Supplements. On December 12, 2013, Petitioner filed a Third Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Third Supplement"), and Memorandum Regarding Petitioner's Exhibits (In *Camera* Review). On December 17, 2013, the State filed a Response to Petitioner's Memorandum Regarding Petitioner's Exhibits (In *Camera* Review). On December 26, 2013, Petitioner filed a Fourth Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) ("Fourth Supplement").

On January 31, 2014, heard argument from counsels and ordered a limited evidentiary hearing on Grounds B and C. At the evidentiary hearing on August 22, 2014, Petitioner's prior counsel, Howard Brooks, Esq., testified. Ultimately, the District Court found that Mr. Brooks was not ineffective and denied Petitioner First and Supplemental Petitions. The District Court filed its Findings of Fact, Conclusions of Law and Order on October 17, 2014.

On December 18, 2015, the Nevada Supreme Court affirmed the District Court's denial of Petitioner's First and Supplemental Petitions. Remittitur issued on January 12, 2018.

On June 7, 2021, Petitioner a Petition for Writ of Habeas Corpus (Post-Conviction) (Non-Death) ("Second Petition") and Ex Parte Motion for Appointment of Attorney and Request for Evidentiary Hearing. On July 22, 2021, the State filed a Response to Petitioner's Second Petition. On August 4, 2021, this Court granted Petitioner's request for counsel. On September 7, 2021, this Court filed an Order of Appointment appointing Matthew D. Carling, Esq., to represent Petitioner.

On December 1, 2021, Petitioner filed the instant Supplemental Petition. On December 28, 2021, the State filed its Response. On January 18, 2022, Petitioner filed his Reply.

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FACTUAL BACKGROUND

At approximately midnight on May 26, 2003, detectives from the Las Vegas Metropolitan Police Department were on patrol in the Saratoga Palms East Apartments in Las Vegas, Clark County, Nevada. The apartment complex has been plagued with high levels of drug and gang activity. Thus, police drove through the complex slowly, with their windows down, to detect the sounds of gunshots or other criminal activity.

Detectives heard three gunshots. Within minutes, police were able to determine that the shots had come from Apartment 2068. Detectives climbed the stairs to find the first of three victims, Jason Moore, lying dead on the front doorstep. Detectives later found Dajon Jones dead in a front bedroom. Finally, detectives found the third victim, Derrick Jones, lying in the hallway clinging for life. Derrick was transported to the hospital where he later died. Following a search of the house, described as smoked-filled and having the smell of a shooting range, police secured the crime scene. A short time later, police were able to identify Petitioner as the shooter.

At the scene, crime scene analysts found eleven (11) bullet casings from a single nine-millimeter (9mm) semi-automatic handgun. The bullets from this gun either remained in, or passed through, the three victims. On May 28, 2003, autopsies were performed on all three victims. The medical examiner found that Dajon Jones suffered from two fatal gunshot wounds to the neck.[2] Derrick Jones suffered from seven wounds, including four to the back. Two of these wounds, both to the head, were fatal. Jason Moore suffered from three gunshot wounds, including a head wound and a neck wound. Two of the wounds were fatal. Evidence of marijuana usage was found during the autopsies of Derrick and Dajon Jones.

Petitioner fled the scene of the attack and went into hiding. During that time, he cut his hair. Petitioner initially told police that he went to the apartment to inquire about his stolen one-half pound of marijuana. He told police that he heard a gunshot and fled the apartment along with Lazon Jones. This statement was contradicted by Lazon Jones.

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[2] A third shot missed. The bullet was found in a closet near where Dajon's body was found.

Lazon Jones testified that he, Derrick, Dajon, and Jason were with Petitioner all day on May 26. During the day, Petitioner, known by Lazon as "A.I."[3] was involved in altercations with both Derrick and Jason. That night, the group was in Apartment 2068. Petitioner went to the store to get alcohol. He came back with a single can. Petitioner went into the room where Dajon had been lying down. Lazon heard Petitioner say "Where's my stuff at?" He then heard three gunshots. Lazon fled the apartment and called 911. After shooting Jason Moore on the front doorstep, Petitioner fled the scene. In the interim, Derrick Jones was shot and killed. As Petitioner ran from the scene, Lazon saw that he still held a gun in his hand.

While on the run, Petitioner admitted to his uncle, Winston Budd that he had shot three people. Petitioner had cut his distinctive braids after the Memorial Day shooting. his uncle told Petitioner to turn himself in, Petitioner said that he "preferred to run." Petitioner was eventually arrested.

After being booked into the Clark County Detention Center to await trial, Petitioner made contact with another inmate, Greg Lewis. Petitioner and Lewis knew each other before the incident. During Petitioner's incarceration at the Detention Center, Petitioner confided to Lewis that he had shot and killed the victims because they stole his one-half pound of marijuana. Lewis contacted the police to reveal what he had learned. Lewis was not promised, nor was he given anything in exchange for his statement to police.[4]

Petitioner did not know about Lewis's cooperation. He sent a letter addressed to Lewis including lyrics to a song Petitioner wrote about the murder. He titled the song "Killer in Me" and hoped to have the song released on the "Murda Music CD" upon his release. The lyrics to the rap song:

> The call me Smalls, a.k.a A.I.
> Everyday on the street, I used to get high
>
> There's rules for a killa, Don't get it confused

[3] The nickname is derived from that of NBA player Allen Iverson. Iverson is among the smallest players in the league and has distinctive braids in his hair.

[4] The District Attorney's Office did write to the Parole Board to inform them of Mr. Lewis' assistance in solving the triple homicide. This did not result in a reduced sentence or his release.

I'm wearing county blues, with my face on the news

Blew these niggas off the earth. That's the way it had to go
I only killed three, but I should have killed four

Left them dead on the floor, but just right before

They was crying and pleading, screaming for Jesus.

Y'all can keep the weed, because you can't smoke it now
Because your ass is in the ground

Cross me, I blow like a bomb,
took three niggas from their moms,

I'm a thrilla killa.
Ask Saratoga Palms.

Petitioner's handwriting was identified by Lewis based on a prior letter Petitioner had sent to Lewis. Petitioner's distinctive handwriting for the lyrics, which he admitted was done to prevent "snitches" from reading, was recognized by Lewis from a prior event where he observed Petitioner use that style of handwriting.

ANALYSIS

I. This Petition is Procedurally Barred

A. Application of Procedural Bars is Mandatory

The one-year time bar of NRS 34.726 is strictly construed. Gonzales v. State, 118 Nev. 590, 593-596, 53 P.3d 901, 902-904 (rejected post-conviction petition filed two days late pursuant to the "clear and unambiguous" provisions of NRS 34.726(1)). Further, the district courts have a *duty* to consider whether post-conviction claims are procedurally barred. State v. Eighth Judicial District Court (Riker), 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005). The Nevada Supreme Court has found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

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

Id., at 231, 112 P.3d at 1074. Additionally, the Court held that procedural bars "cannot be ignored when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars.

B. NRS 34.726(1)

NRS 34.726(1) states that "unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur." The one-year time bar is strictly construed and enforced. Gonzales, 118 Nev. 590, 53 P.3d 901. The Nevada Supreme Court has held that the "clear and unambiguous" provisions of NRS 34.726(1) demonstrate an "intolerance toward perpetual filing of petitions for relief, which clogs the court system and undermines the finality of convictions." Pellegrini v. State, 117 Nev. 860, 875, 34 P.3d 519, 529 (2001). For cases that arose before NRS 34.726 took effect on January 1, 1993, the deadline for filing a petition extended to January 1, 1994. Id. at 869, 34 P.3d at 525.

Petitioner failed to file this Petition prior to the one-year deadline. Remittitur issued from Petitioner's appeal on February 6, 2007. Therefore, Petitioner had until February 6, 2007, to file a timely habeas petition. Petitioner filed the underlying Petition on June 7, 2021. This is fourteen years after Petitioner's one-year deadline. As such, this Court finds that the instant Petition is time-barred.

C. NRS 34.800

NRS 34.800 recognizes that a post-conviction petition should be dismissed when delay in presenting issues would prejudice the State in responding to the petition or in retrial. NRS

34.800(1). NRS 34.800(2) creates a rebuttable presumption of prejudice to the State if "[a] period of five years [elapses] between the filing of a judgment of conviction, an order imposing sentence of imprisonment or a decision on direct appeal of a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction." See also, Groesbeck v. Warden, 100 Nev. 259, 260, 679 P.2d 1268, 1269 (1984), superseded by statute as recognized by, Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) ("petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system dictates that there must exist a time when a criminal conviction is final.").

To invoke the presumption, the statute requires that the State specifically plead presumptive prejudice. NRS 34.800(2). Over fourteen years has passed since remittitur issued from Petitioner's direct appeal on February 6, 2007. As such, the State plead statutory laches under NRS 34.800(2) and prejudice under NRS 34.800(1). After such a passage of time, the State would be prejudiced in its ability to answer the Petition. If the Petition is not dismissed or denied on the procedural bars, the State would be forced to track down witnesses who may have died or retired to prove a case that is over fourteen years old. Assuming witnesses are available, their memories have certainly faded, and they will not present to a jury the same way they did in 2005. As such, this Court finds that both statutory laches applies and that the State would be prejudiced in answering the Petition.

D. This Petition is Barred as Successive

NRS 34.810(2) reads:

> A second or successive petition *must be dismissed* if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

(emphasis added).

Second or successive petitions are petitions that either fail to allege new or different grounds for relief and the grounds have already been decided on the merits or that allege new or different grounds, but a judge or justice finds that the petitioner's failure to assert those grounds in a prior petition would constitute an abuse of the writ. Second or successive petitions will only be decided on the merits if the petitioner can show good cause and prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994); see also Hart v. State, 116 Nev. 558, 563–64, 1 P.3d 969, 972 (2000) (holding that "where a defendant previously has sought relief from the judgment, the defendant's failure to identify all grounds for relief in the first instance should weigh against consideration of the successive motion.")

The Nevada Supreme Court has stated: "Without such limitations on the availability of post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-conviction remedies. In addition, meritless, successive and untimely petitions clog the court system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950. The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require a careful review of the record, successive petitions may be dismissed based solely on the face of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words, if the claim or allegation was previously available with reasonable diligence, it is an abuse of the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497–98 (1991). Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

Petitioner's claims fall into two categories: (1) claims that could have been brought in a prior petition; and (2) claims that already were brought in a petition. The following claims could have been brought in a prior petition: (1) Petitioner's claim on page forty-nine (49) that trial counsel failed to properly investigate the case; (2) Petitioner's claim on page fifty (50) that trial counsel failed to object to eyewitness identification; (3) Petitioner's claim on page fifty-one (51) that trial counsel failed to object to uncharged bad acts; (4) Petitioner's claim on page fifty-two (52) that trial counsel failed to conduct scientific testing; (5) Petitioner's claims on page fifty-nine (59) regarding the disclosure of $30 in relocation assistance; (6) Petitioner's claim on page sixty (60) regarding the rap song; (7) Petitioner's claim on page sixty-one (61)

regarding the disclosure of a letter; (8) Petitioner's claim on page sixty-one (61) regarding prosecutorial misconduct; (9) Petitioner's claim on page sixty-three (63) regarding judicial misconduct; (10) Petitioner's claim on sixty-four (64) regarding jury instructions; (11) Petitioner's claim on page sixty-five (65) regarding appellate counsel providing ineffective assistance; (12) Petitioner's claim on page sixty-nine (69) challenging his sentence; and (13) Petitioner's claim on page seventy (70) that relies on McCoy. Each of these claims relies on both facts and law previously available to Petitioner. As such, they constitute successive claims and are only fit for summary denial.

Petitioner already raised the following claims in his prior petition: (1) Petitioner's claim on page fifty-two (52) that trial counsel failed to call a certain witness; (2) Petitioner's claim on page fifty-five (55) regarding a conflict of interest; and (3) Petitioner's claim on page fifty-seven (57) that trial counsel should have objected to the admission of transcribed testimony. The prior ruling is discussed in each applicable section of this Response. Petitioner reraising already litigated issues constitute an abuse of the writ. As such, this Court finds that this Petition is successive.

E. Petitioner Waived Substantive Claims by Not Addressing Them on Direct Appeal

Petitioner makes numerous substantive claims in his Petition: (1) a challenge on page fifty-seven (57) regarding this Court's error; (2) challenges on pages fifty-nine (59) and sixty-one (61) regarding the failure to disclose evidence; (3) a challenge on page sixty (60) regarding the authentication of evidence (4) a challenge on page 63 regarding judicial misconduct; and (5) a challenge on page 69 regarding improper sentencing.

The court shall dismiss a petition if the court determines that:

> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

. . .

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

NRS 34.810(1)(a)-(b)(2).

The Nevada Supreme Court held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings . . . . [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be *considered waived in subsequent proceedings*." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

NRS 34.810(1)(b) specifically states that if a conviction was the result of trial, the Court shall dismiss a petition if the claim could have been raised in a direct appeal. As such, the only claims Petitioner could raise in a Petition for Writ of Habeas Corpus must be those related to whether his plea was involuntarily or unknowingly entered, or whether he received ineffective assistance of counsel.

Petitioner's substantive claims should have been raised on direct appeal. All the facts and law necessary to appeal these issues were available at that time. Therefore, these claims are waived unless Petitioner can demonstrate good cause and prejudice to overcome the procedural bars. Given that Petitioner fails to demonstrate good cause and prejudice, as discussed below, this Court finds that these claims are waived.

II. Petitioner Fails to Justify Ignoring the Procedural Bars

Petitioner's failure to prove good cause or prejudice requires the dismissal of his Petition. To overcome the procedural bars, a petitioner must demonstrate: (1) good cause for

delay in filing his petition or for bringing new claims or repeating claims in a successive petition; and (2) undue or actual prejudice. NRS 34.726(1); NRS 34.800(1); NRS 34.810(3). To establish prejudice "a petitioner must show that errors in the proceedings underlying the judgment worked to the petitioner's actual and substantial disadvantage." State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 94-95 (2012), cert. denied, 568 U.S. 1147, 133 S.Ct. 988 (2013).

"To establish good cause, petitioners must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003), rehearing denied, 120 Nev. 307, 91 P.3d 35 cert. denied, 543 U.S. 947, 125 S.Ct. 358 (2004); see also, Hathaway v. State, 119 Nev. 248, 251, 71 P.3d 503, 506 (2003) ("In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules"); Pellegrini, 117 Nev. at 887, 34 P.3d at 537 (neither ineffective assistance of counsel, nor a physician's declaration in support of a habeas petition were sufficient "good cause" to overcome a procedural default, whereas a finding by Supreme Court that a defendant was suffering from Multiple Personality Disorder was). An external impediment could be "that the factual or legal basis for a claim was not reasonably available to counsel, or that 'some interference by officials' made compliance impracticable." Id. (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645 (1986)); see also, Gonzalez, 118 Nev. at 595, 53 P.3d at 904 (citing Harris v. Warden, 114 Nev. 956, 959-60 n.4, 964 P.2d 785 n.4 (1998)).

The Nevada Supreme Court has held that, "appellants cannot attempt to manufacture good cause[.]" Clem, 119 Nev. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway, 119 Nev. at 251, 71 P.3d at 506; (quoting, Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989), superseded by statute as recognized by, Huebler, 128 Nev. at 197, 275 P.3d at 95, footnote 2). Excuses such as the lack of assistance of counsel when preparing a petition as well as the failure of trial

counsel to forward a copy of the file to a petitioner have been found not to constitute good cause. Phelps v. Dir. Nev. Dep't of Prisons, 104 Nev. 656, 660, 764 P.2d 1303, 1306 (1988), superseded by statute as recognized by, Nika v. State, 120 Nev. 600, 607, 97 P.3d 1140, 1145 (2004); Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).

A. Petitioner Makes No Attempt to Establish Good Cause

Petitioner makes no attempt to establish good cause to ignore his procedural defaults. His failure to do so is particularly glaring because the State pointed out this failure in the opposition to the petition and the supplement does nothing to correct this fatal defect. Regardless, Petitioner cannot demonstrate good cause because all the facts and law necessary to raise these claims were available to be brought on direct appeal or a timely filed habeas petition. Further, that the case was being litigated in federal court does not establish good cause. Colley v. Warden, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989). As such, this Court finds that Petitioner's failure to demonstrate good cause necessitates the dismissal of his Petition.

B. Petitioner Cannot Show Sufficient Prejudice

Petitioner's failure to demonstrate good cause necessitates the dismissal of his Petition. However, Petitioner also fails to properly allege prejudice. "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) (emphasis added). To demonstrate prejudice to overcome the procedural bars, a defendant must show "not merely that the errors of [the proceeding] created possibility of prejudice, but that they worked to his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason;

one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)).

In this case, Petitioner cannot establish prejudice to ignore the procedural defaults because his claims are without merit. Additionally, it is not necessary for this Court to consider Petitioner's failure to demonstrate prejudice given that he fails to demonstrate good cause. However, even if this Court does analyze the prejudice prong, this Court finds that Petitioner fails to demonstrate prejudice.

1. Petitioner Cannot Establish He Received Ineffective Assistance of Counsel Due to a Failure to Investigate

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). Claims of ineffective assistance of counsel are analyzed under the two-pronged test articulated in Strickland, 466 U.S. 668, 104 S. Ct. 2052 (1984), 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). "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 (1996); Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S. Ct. 1473, 1485 (2010). "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. 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). "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, 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)).

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). 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) (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. 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." Id. 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.

The Strickland analysis does not "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)). 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). "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). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. "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). 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).

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). Further, 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).

Even if a petitioner can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice by showing 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.

a. Trial Counsel's Failure to Object to an Identification Was Not Ineffective Assistance

Trial Counsel was not ineffective for failing to object to an identification of Petitioner. Petitioner reraises this argument from the underlying Petition. As observed by the Nevada Supreme Court when affirming Petitioner's Judgment of Conviction, Celeste testified that when she heard gunshots coming from Lazon Jones's apartment while she was on her patio, she looked in that direction and "saw Petitioner exit the front door, linger on the landing while firing a weapon three times, then walk down the staircase and away from the area." Order of Affirmance, Budd v. State, Docket No. 46977, at 4 (filed January 9, 2007). Not only did the court conclude that this testimony was sufficient circumstantial evidence of guilt, but Petitioner has otherwise failed to establish that counsel did not properly challenge Celeste's identification of Petitioner at trial. Indeed, he cannot as the record is clear that during cross examination, counsel extensively challenged Celeste's identification of Petitioner:

> Q: So, you're looking from one building diagonally across to the other, correct?
> A: Yes.
> Q: You do not have a clear view directly across into that apartment at 2068?
> A: No.
> Q: In fact, it is a diagonal view of, of the distance shown in that exhibit?
> A: Yes.
> Q: And what you're seeing simply is people coming out of there and coming down the stairs, which you described the two people leaving?
> A: Yes.
> Q: Then you're testifying that you saw AI come out after they had already gone and shooting someone there on the balcony?
> A: Yes.
> Q: And this is your view from your balcony, looking across the other balcony?
> A: Yes.
> Q: And the lighting that you're saying shows, this would have to be, for the most part, the lighting provided by that --
> A: Yes.
> Q: -- exhibit? When he comes out -- when I say he, I mean A.I. -- you can see his face?
> A: I could see the, the outline, the structure of his body and everything else.

Q: You can't see, I mean, he's not close to you obviously?
A: No.

Reporter's Transcript of Jury Trial – Volume 4, at 156-58.

Petitioner fails to explain what else counsel should have done or what counsel should have objected to. The reliability and credibility of Celeste's identification was an issue to be decided by the jury and Petitioner's complaint pertains to the weight and not admissibility of her identification. Given that this thorough challenge to Celeste's testimony did not change the outcome at trial, it is unlikely that any other challenge would have either.

Petitioner also claims trial counsel should have investigated the people Celeste told the police about during the investigation. However, this is nothing but a bare and naked allegation as Petitioner has failed to provide the names of these people, much less explain what information they would have had that reasonably would have changed the outcome at trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Accordingly, this Court finds that this bare and naked claim cannot establish prejudice sufficient to overcome the procedural bars. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

b. Trial Counsel Did Not Provide Ineffective Assistance for Failing to Object to Certain Bad Acts

Trial counsel cannot be deemed ineffective for failing to object to uncharged bad acts. Petitioner reraises this argument from the underlying Petition. Specifically, Petitioner believes that counsel should have objected to Lazon Jones' testimony that the day of the murders, Petitioner and the victims got into a fight about marijuana and that Petitioner threatened the victims. Petitioner alleges that because this was inadmissible propensity evidence. However, counsel cannot be deemed ineffective for failing to make futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. At trial, Lazon testified that he, Derrick, Dajon, and Jason were with Petitioner all day. Lazon explained that Petitioner thought someone stole his "weed," that, Petitioner and Jason got into a confrontation as a result, and then Petitioner told him "he wasn't going to fight him; he was going to put some slugs in him." That night Petitioner again accused the victims of stealing his "weed," and Petitioner shot the victims.

While Petitioner is correct that evidence of person's character is not admissible to show conformity therewith on a particular occasion, the introduction of evidence that Petitioner and the victims fought the day of the murder and Petitioner threatened to kill the victims was not to show that Petitioner had a propensity to be violent. Instead, the statement was introduced to show why Petitioner was angry and established motive. Pursuant to NRS 48.045(2) "Evidence of other crimes, wrongs or acts" is admissible to show motive. Accordingly, any challenge to the admission of Lazon's testimony would have been overruled.

Additionally, the evidence was admissible pursuant to the doctrine of res gestae. Evidence of an uncharged crime "which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime" is admissible. NRS 48.035(3). This long-standing principle of res gestae provides that the State is entitled to present, and the jury is entitled to hear, "the complete story of the crime." Allen v. State, 92 Nev. 318, 549 P.2d 1402 (1976). The Nevada Supreme Court set forth the principle in Dutton v. State, 94 Nev. 461, 581 P.2d 856 (1978), when it explained:

> The State is entitled to present a full and accurate account of the circumstances of the commission of the crime, and if such an account also implicates Defendant or Defendants in the commission of other crimes for which they have not been charged, the evidence is nevertheless admissible.

(quoting State v. Izatt, 96 Idaho 667, 534 P.2d 1107, 1110 (1975)).

The Nevada Supreme Court has explained that, where the doctrine of res gestae is invoked:

> [The] determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence...the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts. If the court determines that testimony relevant to the charged crime cannot be introduced without reference to uncharged acts, it must not exclude the evidence of the uncharged acts.

State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995) (emphasis added). Indeed, res gestae evidence cannot be excluded solely because of its prejudicial nature. Shade, 111 Nev. at 894 n.1, 900 P.2d at 331 n.1. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed unless manifestly wrong. Wesley v. State, 112 Nev. 503, 512, 916 P.2d 793, 799 (1996).

Petitioner argues the evidence was "nothing more than cumulative and unduly prejudicial to show that [Petitioner] was a 'bad man' who was a drug dealer." Supplemental Petition, at 52. Petitioner fails to recognize that the State had the right to present the "full account" of what transpired, leading to the three murders. Dutton, 94 Nev. 461, 581 P.2d 856. Accord. Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995). The disputed testimony involves threats from Petitioner that he would shoot the victims. Later that day, Petitioner carried through on his threats. As such, admission of this evidence gives the jury a complete picture and is admissible under the doctrine of res gestae. Accordingly, Petitioner cannot be ineffective for failing to object, as any objection would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, this Court finds that this claim is insufficient to establish prejudice to overcome the procedural bars.

c. Trial Counsel Did Not Provide Ineffective Assistance by Not Conducting a Scientific Testing of The Blood Samples

Trial counsel cannot be deemed ineffective for failing to conduct scientific testing of the recovered blood samples. Petitioner reraises this argument from the underlying Petition. Petitioner has not established that doing so would have reasonably changed the outcome at trial. Given the fact that Petitioner shot three people, there was likely an extreme amount of blood at the crime scene. That Petitioner's blood might not have been there does not change the fact that multiple eyewitnesses placed Petitioner at the murder scene.

Additionally, Petitioner is unable to establish prejudice for two reasons. First, the Nevada Supreme Court held that substantial evidence existed to support the jury verdict:

> It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.

Order of Affirmance, Budd v. State, Docket No. 46977, at 7 (filed January 9, 2007). Secondly, Petitioner failed to establish how testing the blood samples at the murder scene could in any realm possibly have changed the outcome at trial. A defendant must allege with specificity what the investigation would have revealed. Molina, 120 Nev. 185,192, 87 P.3d 533, 538 (2004). Here, Petitioner merely asserts a bare and naked claim that scientific testing would have exonerated himself. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

d. Trial Counsel Was Not Ineffective for Failing to Call a Certain Witness

Trial Counsel cannot be deemed ineffective, as Petitioner has not established that further investigation would have reasonably changed the outcome at trial. Petitioner merely asserts conclusory claims that additional exculpatory information may have been found. Additionally, Petitioner raised this claim before both this Court and the Supreme Court of Nevada. The Supreme Court of Nevada already upheld the District Court's denial of this claim:

> Budd contends that the district court erred by denying his claim that counsel was ineffective for failing to investigate and present evidence supporting second-degree murder. We disagree because Budd presented no evidence at the evidentiary hearing that a better investigation would have revealed. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). While Budd suggests that trial counsel could have learned from a witness that he ingested drugs before the killings, postconviction counsel admitted at the evidentiary hearing that he spoke with the witness and she denied ever stating that Budd ingested drugs. Therefore, Budd fails to demonstrate that the district court erred.

Budd v. State, No. 66815, 2015 WL 9258248, at *1 (Dec. 16, 2015).

Accordingly, both res judicata and the law of the case bar Petitioner's claim. "The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially

the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). Accordingly, by simply continuing to file motions with the same arguments, his motion is barred by the doctrines of the law of the case and res judicata. Id.; Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

2. Petitioner Cannot Establish Ineffective Assistance of Counsel Regarding Any Conflict of Interest

Petitioner argues that trial counsel was ineffective for failing to inform the court that he and Petitioner had a conflict of interest. Petitioner reraises this argument from the underlying Petition. Petitioner argues that counsel was conflicted between his duty of loyalty to Petitioner and his desire to protect himself from an ineffective assistance of counsel claim. An actual conflict only exists when "an attorney is placed in a situation conducive to divided loyalties." Clark v. State, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992) (internal quotation omitted). "Conflict of interest and divided loyalty situations can take many forms, and whether an actual conflict exists must be evaluated on the specific facts of each case." Id., 831 P.2d at 1376. For example, in Clark, an actual conflict occurred where counsel representing a client charged with first-degree murder also had a pending civil suit against that same client during trial, and further, counsel obtained a default judgment against that client while he was awaiting sentencing on the murder conviction. Id., 831 P.2d at 1376.

Here, Petitioner seemingly misunderstands the meaning of "conflict" in these circumstances. Counsel expressed frustration to this Court on day two of trial that Defendant's family was not cooperating with the defense. Reporter's Transcript of Jury Trial – Volume 2, at 3-6. That frustration does not represent divided loyalty, but rather it reflects counsel's desire to provide the best defense possible.

The District Court concluded as much when denying Petitioner's claim which was raised in his First and Supplemental Petitions. Specifically, when denying Petitioner's Supplemental Petitions, the court found:

> Defendant's claim in Ground H that his counsel was ineffective because his counsel was conflicted is unsupported by any evidence of an actual conflict. Defendant's counsel was objectively reasonable in explaining to the Court his frustration with Defendant and his family in hopes that the Court might be able to encourage them to aid in the defense. Further, Defendant failed to demonstrate a reasonable probability of a more favorable outcome had counsel performed differently.

Findings of Fact, Conclusions of Law and Order, at 5-6 (filed October 17, 2014).

While Petitioner appealed the District Court's denial of his First and Supplemental Petitions, he did not claim that the court abused its discretion in denying this specific claim. His failure to do so has waived his ability to challenge or even re-litigate this claim in these proceedings. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059.

Here, Petitioner has done nothing but re-argue this already denied claim and has done so without providing any new information or alleging that the District Court erred in denying this claim. Petitioner has therefore failed to establish prejudice sufficient to overcome the procedural bars.

Additionally, in the heading of his claim, Petitioner states that the trial court erred by not granting a continuance. However, he fails to mention anything regarding this claim. It is his responsibility, pursuant to Emperor's Garden, to cogently argue and to support his allegations with relevant legal authority. 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38

(2006). His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). To the extent this Court is willing to consider this claim, it fails as nothing more than a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

3. The Trial Court Did Not Err in Admitting Transcribed Testimony

Petitioner argues the trial court erred for allowing the admission of the transcript because Winston Budd was not truly unavailable even though he moved to Belize and would not take the State's phone calls. Petitioner reraises this argument from the underlying Petition. Petitioner already raised this claim and this Court rejected it. Specifically, when denying Petitioner's Supplemental Petitions, the court found:

> Defendant next claims in Ground G that his counsel was ineffective for objecting to the use of the preliminary hearing transcript of Winston Budd's testimony, since he was unavailable at trial. Winston Budd is Defendant's uncle, who testified that Defendant confessed to him after the crimes occurred. Defendant's trial counsel objected and argued that the State failed to exercise reasonable diligence in attempting to obtain this witness for trial, which is a reasonable strategy. Thus, Defendant failed to show that his counsel's representation was objectively unreasonable and that he was prejudiced by it.

Findings of Fact, Conclusions of Law and Order, at 5 (filed October 17, 2014).

While Petitioner appealed the District Court's denial of his First and Supplemental Petitions, he did not claim that the court abused its discretion in denying this specific claim. His failure to do so has waived his ability to challenge or even re-litigate this claim in these proceedings. NRS 34.724(2)(a); Evans, 117 Nev. at 646–47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner has done nothing but re-argue this already denied claim and has done so without providing any new information or alleging that the District Court erred in denying this claim.

To the extent Petitioner accuses the trial court of error for admitting Winston Budd's preliminary hearing testimony at trial, NRS 5 l.055(d) provides that, for the purpose of the hearsay rule, a declarant is unavailable if the declarant is "[a]bsent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the declarant's statement has exercised reasonable diligence but has been unable to procure the declarant's attendance or to take the declarant's deposition." Common sense dictates that a witness living in Belize is beyond the court's jurisdiction, and unreturned phone calls sufficiently established that Winston Budd was unavailable for trial.

Admission of the transcript also complies with the Confrontation Clause. Admission of transcripts does not violate the Confrontation Clause when: (1) a defendant is represented by counsel; (2) counsel previously had an opportunity to cross examine the witness; and (3) the witness is unavailable at trial. State v. Eighth Judicial Dis. Court (Baker), 134 Nev. 104, 107-08, 412 P.3d 18, 22 (2018). Here, Petitioner was represented during the preliminary hearing and cross Winston Budd. Reporter's Transcript of Preliminary Hearing, at 56. For the reason's stated above, Winston Budd was unavailable at trial. As such, introduction of the transcript did not violate the Confrontation Clause. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

4. Petitioner's Claim Challenging the Disclosure of Evidence and the Rap Song Fails

Petitioner argues three unrelated claims in this section: (1) a claim revolving around the disclosure of impeachment evidence (2) a claim that the State did not prove by clear and convincing evidence that Petitioner wrote the rap song; and (3) a claim the State did not disclose that they had a deal with a witness. In his first claim, Petitioner is unclear as to whether he argues that a Brady violation occurred, that trial counsel was ineffective for failing to request a mistrial or that trial counsel was ineffective for failing to cross-examine the witness.

In making these claims, Petitioner misstates the amount of assistance given to the witness. The State provided relocation assistance in the amount of $30:

> Mr. Kane: At the time that Celeste Palau first came forward, she asked us for some help in relocating her. She didn't necessarily want to still be at the Saratoga Palms. We said we'd help her. It turned out that the same landlord had an available apartment at another location, and, so, **it would have cost us $30.**
> . . .
> Because of those things she asked me if we'd be willing to help her out with limited funds for relocation once the trial was over. **Our budget for those things is ordinarily $300.** And I told her we would do that

Reporter's Transcript of Jury Trial – Volume 6, at 7-8 (emphases added). Petitioner's claim that the State provided $300 to the witness is belied by the record. The record states that the State generally has a budget of $300 for relocation assistance but that the witness only received $30.

To the extent that Petitioner argues a Brady violation occurred, this claim is meritless. A Brady violation can establish both good cause and prejudice sufficient to waive a procedural default:

> We have acknowledged that a Brady violation may provide good cause and prejudice to excuse the procedural bars to a post-conviction habeas petition. See Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). A successful Brady claim has three components: "the evidence at issue is favorable to the accused; the evidence was withheld by the state, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material." Id. The second and third components of a Brady violation parallel the good cause and prejudice showings required to excuse the procedural bars to an untimely and/or successive post-conviction habeas petition. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003). "[I]n other words, proving that the State withheld the evidence generally establishes cause, and proving that the withheld evidence was material establishes prejudice." Id. But, "*a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense*." Huebler, 128 Nev. Adv. Rep. 19, 275 P.3d at 95 n.3; see also Hathaway v. State, 119 Nev. 248, 254-55, 71 P.3d 503, 507-08 (2003) (holding that good cause to excuse an

> untimely appeal-deprivation claim must be filed within a reasonable time of learning that the appeal had not been filed).

Lisle, 131 Nev. 356, 359-60, 351 P.3d 725, 728 (2015) (emphasis added). A prerequisite to a valid Brady claim is a showing that the information was actually or constructively known by the prosecution. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976). Further, "the burden of demonstrating the elements of a Brady claim as well as its timeliness" rests with Petitioner. Lisle, 131 Nev. at 360, 351 P.3d at 729. Of particular importance to this matter, Brady violations cannot be premised upon speculation. Strickler v. Greene, 527 U.S. 263, 286, 119 S.Ct. 1936, 1950-51 (1999).

As noted above, "a Brady claim … must be raised within a reasonable time after the withheld evidence was disclosed or discovered by the defense." Lisle, 131 Nev. at 360, 351 P.3d at 728 (quoting, Huebler, 128 Nev. at 95, footnote 3, 275 P.3d at 95, footnote 3).[1] A reasonable time is one year from when the claim was reasonably available to defense. See Rippo, 132 Nev. at 101, 368 P.3d at 734 ("[A] petition … has been filed within a reasonable time after the … claim became available so long as it is filed within one year after entry of the district court's order disposing of the prior petition or, if a timely appeal was taken from the district court's order, within one year after this court issues its remittitur."); Pellegrini, 117 Nev. at 874-75 34 P.3d at 529 ("The State concedes, and we agree, that for purposes of determining the timeliness of these successive petitions pursuant to NRS 34.726, assuming the

[1] This requirement flows from Chapter 34 and Brady. NRS 34.800(1)(a) ("A petition may be dismissed … unless the petitioner shows that the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence"); Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998) ("Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense"). Accord, Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994), cert. denied, 513 U.S. 1137, 130 L. Ed. 2d 901, 115 S. Ct. 959 (1995) (Brady claim fails where habeas petitioner could have obtained exculpatory statement through reasonable diligence); United States v. Dupuy, 760 F.2d 1492, 1501, footnote 5 (9th Cir. 1985) ("if the means of obtaining the exculpatory evidence has been provided to the defense, the Brady claim fails"); United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983) (where prosecution disclosed identity of witness, it was within the defendant's knowledge to have ascertained the alleged Brady material); United States v. Brown, 582 F.2d 197, 200, cert. denied, 439 U.S. 915, 99 S.Ct. 289 (2nd Cir. 1978) (no Brady violation where defendant was aware of essential facts enabling him to take advantage of the exculpatory evidence).

laches bar does not apply, it is both reasonable and fair to allow petitioners one year from the effective date of the amendment to file any successive habeas petitions").

Any Brady claim fails as Petitioner is unable to establish that he raises this claim within a reasonable time of discovering the evidence. On December 13, 2005, the State disclosed to this Court the conversation that occurred with trial counsel. Petitioner does not allege any new facts or circumstances surrounding the $30 provided to the witness for relocation assistance. Accordingly, Petitioner had over fourteen (14) years to bring this claim. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Petitioner's next claim that trial counsel should have moved for a mistrial is also meritless. "The trial court has discretion to determine whether a mistrial is warranted." Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004). A mistrial may only be granted where "prejudice occurs that prevents the defendant from receiving a fair trial." Id. at 144, 86 P.3d at 587. Petitioner fails to explain how any prejudice he received prevented him from receiving a fair trial. Trial counsel had the opportunity to have the witness testify again and cross examine her on the $30's worth of assistance. Accordingly, any motion for a mistrial would have been futile. Counsel cannot be deemed deficient for failing to make futile arguments. Ennis 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Additionally, Petitioner fails to include any law regarding when a mistrial is appropriate. It is his responsibility, pursuant to Emperor's Garden, to cogently argue and to support his allegations with relevant legal authority. 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). To the extent this Court is willing to consider this claim, it fails as nothing more than a naked assertion. Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, this claim is denied.

Any claim that counsel was ineffective for failing to cross-examine the witness regarding the $30 in relocation assistance is meritless. Trial counsel had numerous strategic reasons to not recall the witness to examine her about $30 in relocation assistance. During

cross examination, trial counsel focused on challenging the witness' ability to perceive the events she testified about. Reporter's Transcript of Jury Trial – Volume 4, at 143-162, 164. Further cross examination on the State assisting the witness with de minimis assistance would have drawn attention away from his other examination.

Furthermore, the reason for the State's assistance is because the witness became a victim of harassment:

> When we were interviewing her in preparation for this trial, she let us know that in the last few weeks she had a series of incidents - - kids calling her snitch lady in the street, coming home and finding her door unlocked; things that made her nervous but things that - - I'm not trying to attribute to the defendant, and there certainly no connection with the defendant.

Reporter's Transcript of Jury Trial – Volume 6, at 8 (emphases added). While there was no connection to the defendant, such testimony would have left the jury questioning who was behind the harassment. As such, trial counsel was not deficient for failing to cross examine the witness. Petitioner also cannot establish prejudice because, as discussed above, the Nevada Supreme Court already held that substantial evidence supports the conviction. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Petitioner then argues that the introduction of the rap song violated his right to a fair trial as it was not properly authenticated. "Nonexpert opinion as to the genuineness of handwriting is sufficient for authentication or identification if it is based upon familiarity not acquired for purposes of the litigation." NRS 52.035. Greg Lewis testified regarding the authenticity of the letter:

> Q [Ms. Pandukht]: Okay. Now, this piece of paper is State's proposed Exhibit 49C. Okay? Could you take a look at this and tell me if you recognize, one, that it came inside the envelope?
> A [Mr. Lewis]: Yeah
> Q: Okay. And then do you recognize the type of handwriting this is?
> A: Yeah. I recognize the writing.

> Q: It looks different than the handwriting in 49B. Do you know why?
> A: It's harder to read for other people.
> Q: Why is that?
> A: Because when you writing in that style of writing, you make it hard for other people to read. That's the purpose of it. You don't want it to be deciphered.
> Q: Have you, you know, ever written this kind of writing?
> A: No. I write regular cursive.
> Q: Have you seen anyone writing this kind of writing?
> A: Once.
> Q: Who?
> A: In jail we write, well, they write like that when you make raps and you don't want people reading your stuff.
> Q: And who did you see write like this?
> A: Budd
> Q: Did you actually see him writing out something similar to this kind of writing?
> A: Yeah.
> Q: What was he doing?
> A: Writing a rap song.
> Q: And were you there when he was doing that?
> A: Yeah.
> Q: And this kind of writing, you still recognize it as belonging to someone?
> A: Yeah.
> Q: As whose?
> A: Budd.

Reporter's Transcript of Jury Trial – Volume 5, at 25-27. Based on his testimony, there was sufficient evidence to support that Petitioner wrote the letter. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

To the extent that Petitioner argues trial counsel was ineffective for not objecting, this Court already denied this claim. In denying that claim, the District Court found:

> 12. Defendant next claims in Ground B that his counsel was ineffective for failing to object to the authentication of the letter by the State's witness, Greg Lewis. However, Lewis was familiar with Defendant's handwriting, thus Defendant fails to show that an objection would not have been futile. Defendant failed to demonstrate that his counsel's failure to object during the

> proceedings fell below an objective standard of reasonableness. Further, Defendant failed to demonstrate a reasonable probability of a more favorable outcome had counsel objected to the authentication.

Findings of Fact, Conclusions of Law and Order, at 3-4 (filed October 17, 2014).

> 32. Defendant further fails to show that a handwriting expert would have revealed any exculpatory evidence, and given the overwhelming evidence against Defendant, an expert would likely have discovered incriminating evidence. This further would have limited Defendant's counsel from arguing the lack of evidence that Defendant committed the killings and wrote the letter. Therefore, Defendant fails to show that his counsel's representation was objectively unreasonable and that Defendant was prejudiced.

Id. at 8. As such, the doctrine of res judicata bars this claim. The decisions of the district court are final decisions absent a showing of changed circumstances, and relitigation of claims is barred by the doctrine of res judicata. See Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's applicability in the criminal context); see also York v. State, 342 S.W. 528, 553 (Tex. Crim. Appl. 2011). As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Finally, Petitioner reraises the argument from the underlying Petition that the State failed to disclose a deal with Greg Lewis. This claim is belied by the record. In affirming Petitioner's Judgment of Conviction, the Nevada Supreme Court noted:

> Greg Lewis, who knew Budd before the killings, was in the same jail housing unit as Budd after Budd's arrest. Lewis testified that Budd told him he shot three people but a fourth had gotten away. Lewis notified homicide detectives of this information. Several days later, he also gave detectives a letter he had received from Budd in which Budd implicated himself in the killings. Lewis and a detective testified that no promises were made to Lewis to obtain his information or testimony, but the jury was informed that an assistant district attorney wrote a letter to the parole board noting Lewis's cooperation in the investigation

Order of Affirmance, Budd v. State, Docket No. 46977, at 4-5 (filed January 9, 2007) (emphasis added).

Given that the District Court informed the jury of this letter, common sense dictates not only that the State disclosed this information, but that this letter's existence cannot establish prejudice sufficient to overcome the procedural bars. The jury heard about this letter and still found Petitioner guilty. The Nevada Supreme Court knew about this letter and still concluded that there was sufficient evidence of Petitioner's guilt. Therefore, this Court finds that any claim of prejudice fails.

5. Trial Counsel Was Not Ineffective for Failing to Object to Prosecutorial Misconduct as There Was No Prosecutorial Misconduct

Petitioner argues that trial counsel failed to object on grounds of prosecutorial misconduct when the State argued during opening statements that the jury would hear testimony from Tracy Richards and Winston Budd when neither testified at trial. Petitioner reraises this argument from the underlying Petition. A prosecutor has "a duty to refrain from making statements in opening arguments that cannot be proved at trial." Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997). Furthermore, "[e]ven if the prosecutor overstates in his opening statement what he is later able to prove at trial, misconduct does not lie unless the prosecutor makes these statements in bad faith." Id. at 1312-1313, 949 P.2d at 270. Under the standard above, the prosecutor did not commit prosecutorial misconduct.

The State noticed both Tracey Richards and Winston Budd as witnesses and therefore had a good faith belief they would be testifying. Notice of Witnesses, at 2 (filed September 28, 2004). However, when it became clear on the last day of trial that Tracey Richards would not be testifying, counsel moved for a mistrial and the District Court denied that request:

> MR. BROOKS: Second issue, Judge, is during opening statements, Mr. Kane … said that, "say we presume testimony of Tracey Richards," and Mr. Kane explained what she would say if she testified.
> […]
> No such evidence was actually presented by the State during trial. Tracey Richards did not testify.

> Under these circumstances, Judge, the jury has been exposed to the State making factual statements not supported by the record, statements of a highly inculpatory and prejudicial nature. Therefore, because this caused us due process, we asked for a mistrial.
> THE COURT: Mr. Kane, do you wish to be heard?
> MR. KANE: Judge, we had contacted and served Tracey prior to trial period throughout the trial she was in phone contact with my investigator, and on several occasions promised to come to court, and never did.
>
> As the trial approached its close, I was faced with a couple of choices: one was, of course, to get an arrest warrant and go out and pick her up; one was to lay a foundation for her unavailability an read her testimony into the record -- as we already did that with Mr. Budd and as he testified both as to admissions by the defendant, the defendant's changed appearance and his preparations for flight -- I deemed it not necessary to go to those lengths to get her testimony into the record. So, I made a choice not to call her and not to have a warrant issued and go out and have her picked up or read her testimony into the record.
>
> If the Court feels that any curative action is necessary, I suggest one of two on alternatives. We can either into a stipulation on the record that Tracey Richards was unavailable as a witness, or I can move to reopen the case; if Mr. Brooks is so concerned about it, I'll lay a foundation for her unavailability and we will read her preliminary hearing testimony into the record. Whichever makes the defendant happy.
> […]
> MR. BROOKS: Judge, I will simply say that what I desire, as far as a remedy, is that the defense -- well, I've asked for a mistrial. If the Court is not inclined to grant a mistrial, then I would ask that the defense be allowed to comment in the closing argument that the State mentioned this evidence and the State did not present the evidence.

Reporter's Transcript of Jury Trial – Volume 6, at 4-6.

Accordingly, the record is clear that the State had a good faith belief that Tracey Richards would testify at trial when the state noted during opening statements that she would be testifying. Given that trial counsel is not psychic, there is no way he could have known during opening statements that Tracey Richards would not be available to testify. Indeed, had counsel objected during opening statements, the District Court would have overruled that

objection because the State had a good faith belief that Tracey Richards would be testifying. Counsel cannot be deemed deficient for failing to make futile arguments. Ennis 122 Nev. at 706, 137 P.3d at 1103. Once counsel was aware of this information, he acted diligently in moving for a mistrial. That the district denied that motion further establishes that any earlier challenge would have also been futile. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

Second, Petitioner's claim that Winston Budd did not testify at trial and that the State engaged in misconduct by informing the jury about the substance of is testimony during opening statements is belied by the record. Petitioner admits that Winston Budd's preliminary hearing testimony was read into the record. Accordingly, the jury heard Winston Budd's testimony, specifically testimony that Petitioner told Winston Budd he committed the murders he was standing trial for. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

6. Trial Counsel Was Not Ineffective for Failing to Object to Judicial Misconduct as There Was No Judicial Misconduct

Petitioner argues that Trial Counsel provided ineffective assistance of counsel by failing to object to this Court's decision to not *sua sponte* declare a mistrial. A trial court will only grant a mistrial on its own motion when there is presentation of evidence so inherently prejudicial that the declaration of a mistrial is necessary. Baker v. State, 89 Nev. 87, 88, 506 P.2d 1261 (1973). Here, there was absolutely no cause for declaring a mistrial. As explained above, the record is clear that the State had no idea Tracey Richards would not be testifying at trial when they stated during opening statements that she would testify. Therefore, the court cannot have erred for failing to *sua sponte* declare a mistrial based on information it did not know. As such, trial counsel cannot be ineffective for failing to make a futile motion. Ennis, 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

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7. Trial Counsel Was Not Ineffective for Failing to Object to Certain Jury Instructions

Petitioner argues that his trial counsel was ineffective for failing to object to the wording of Jury Instructions Seven (7) and Nineteen (19). Regarding Jury Instruction Seven (7), Petitioner block quotes the instruction but never explained what is wrong with the instruction. His failure to do so results in no need to address this claim on its merits. Maresca, 103 Nev. at 673, 748 P.2d at 6. To the extent this Court is willing to consider this claim, the jury instruction is correct under Byford v. State, 116 Nev. 215, 235-37, 994 P.2d 700, 713-15 (2000). As such, this is denied.

Petitioner then argues that he was entitled to an instruction that a biased witness can be discredited. Petitioner reraises this argument from the underlying Petition. The language Petitioner desires is substantially covered by Jury Instruction Nineteen (19).

In its entirety, Jury Instruction Nineteen 19 reads:

> The credibility or believability of a witness should be determined by his manner upon the stand, his or her relationship to the parties, his or her fears, motives interests or feelings, his or her opportunity to have observed the matter to which he testified, the reasonableness of his statements and the strength or weakness of his recollections.
> If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of his or her testimony which is not proved by other evidence.

This instruction essentially covers the same information Petitioner desires. Since the District Court is not obligated to use a defendant's exact wording, Petitioner cannot establish that he was entitled. As such, any objection would have been futile. Ennis 122 Nev. at 706, 137 P.3d at 1103. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

8. Appellate Counsel Did Not Provide Ineffective Assistance of Counsel

Petitioner argues that appellate counsel was ineffective for not challenging the reasonable doubt instruction. At trial, the Court gave the following instruction as to reasonable doubt:

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense.
>
> A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel and abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt, to be reasonable, must be actual, not mere possibility or speculation.
>
> If you have reasonable doubt as to the guilty of the Defendant, he is entitled to a verdict of not guilty.

Petitioner believes the clause, "after the entire comparison and consideration of all the evidence" shifted the burden on the defense to present evidence for the jury to compare. Petitioner next believes that the clause, "are in such a condition that they can say they feel and abiding conviction of the truth of the charge" lowered the State's burden of proof because it allows the jury to convict a defendant if they merely believe the state. Petitioner further believes that the last sentence of the second paragraph put the burden on Petitioner to prove that there is no truth to the charge. Finally, Petitioner argues that the third paragraph misled the jury into believing that reasonable doubt was actual, not reasonable doubt.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order

to satisfy Strickland's second prong, the defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Id.

The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

Here, any claim of ineffective assistance of appellate counsel for failing to challenge the reasonable doubt instruction would have failed. NRS 175.211 explicitly requires courts to issue this instruction and none other:

> Definition of reasonable doubt; no other definition to be given to juries.
>
> 1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> 2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

Specifically, the Nevada Supreme Court has found this instruction to be constitutional time and time again. Jeremias v. State, 134 Nev. 46, 412 P.3d 43 (2018); Garcia v. State, 121 Nev. 327, 331, 113 P.3d 826, 838 (2005)(finding that "the reasonable doubt instruction required by NRS 175.211 is not unconstitutional); Buchanan v. State, 119 Nev. 201, 221, 69 P.3d 694, 708 (2003)("This court has repeatedly reaffirmed the constitutionality of Nevada's

reasonable doubt instruction); Noonan v. State, 115 Nev. 184, 189, 980 P.2d 637, 640 (1999). This is particularly true where, as here, the jury was also instructed on the presumption of innocence and the State's burden of proof. Leonard v. State, 114 Nev. 1196, 1209 969 P.2d 288, 298 (1998). The Ninth Circuit has also deemed this instruction constitutional. Ramirez v. Hatcher, 136 F.3d 1209, 1211 (9th Cir. 1998). As this instruction comported with the law, any challenge to its legality on appeal would have failed and appellate counsel could not have been deemed ineffective for failing to raise it. As such, this Court finds that Petitioner fails to establish prejudice sufficient to overcome the procedural bars.

9. Petitioner Cannot Demonstrate Cumulative Error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. However, the Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

Even if applicable, a finding of cumulative error in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the petitioner fails to demonstrate any single violation of Strickland. Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Since Petitioner has not demonstrated any claim warranting relief under Strickland, there are no errors to cumulate.

Under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive a defendant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986)); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). The relevant factors to consider in determining "whether error is harmless or prejudicial include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'" Id., 101 Nev. at 3, 692 P.2d at 1289.

Here, Petitioner failed to show cumulative error because there were no errors to cumulate. Petitioner failed to show how any of the above claims constituted ineffective assistance of counsel. Instead, all of Petitioner's claims are either procedurally barred, waived, or otherwise meritless. As such, this Court finds that Petitioner failed to establish cumulative error

10. Petitioner's Challenge to His Sentence Fails

Petitioner argues that the three additional and/or consecutive life sentences for the deadly weapon enhancement constitute an illegal sentence.

Petitioner committed the instant offense on May 26, 2003, was convicted on December 13, 2005, and sentenced on February 22, 2006. The District Court sentenced Appellant as follows: Count 1 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon; Count 2 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 1; and Count 3 – life without the possibility of parole, plus an equal and consecutive life without the possibility of parole for use of a deadly weapon, to run consecutive to Count 2.

To the extent that Petitioner argues that some fact increased his penalty without being submitted to the jury, this claim belied by the record. The jury returned a verdict that included three findings of guilty of murder with use of a deadly weapon:

> We the jury in the above entitled case, find the Defendant, Glenford Anthony Budd, as follows:
>
> > Count 1 -- Murder with Use of a Deadly Weapon (Victim – Dajon Jones), Guilty of First Degree Murder with Use of a Deadly Weapon.
> >
> > Count 2 -- Murder with Use of a Deadly Weapon (Victim – Derrick Jones) Guilty of First Degree Murder with Use of a Deadly Weapon.
> >
> > Count 3 -- Murder with Use of a Deadly Weapon (Victim – Jason Moore) Guilty of First Degree Murder with Use of a Deadly Weapon.

Reporter's Transcript of Jury Trial – Volume 5, at 90. Given that the jury found Petitioner guilty, any argument under Apprendi is meritless.

Petitioner then argues because NRS 193.165, the statute governing the sentence allowed for the deadly weapon enhancement, was amended in 2007—after Petitioner was convicted and sentenced—he should get the benefit of that amendment. At the time Petitioner committed the offense, was convicted, and sentenced, NRS 193.165 required an "equal and consecutive sentence" be imposed as a deadly weapon sentence enhancement. NRS 193.165 (2006), *amended* by Assembly Bill 510 (effective July 1, 2007). NRS 193.165 was amended after Petitioner was sentenced. The changed language does not apply retroactively to offenses committed prior to the changes in statute. State v. Second Judicial District Court, 124 Nev. 564, fn. 11, 188 P.3d 1079, fn. 11 (2008). Accordingly, in compliance with the language of NRS 193.165 in effect in 2006, Petitioner's equal and consecutive sentences of life without the possibility of parole for all three deadly weapon enhancements were correct and does not amount to cruel and unusual punishment. As such, this Court finds that Petitioner's claim is meritless and therefore cannot constitute prejudice sufficient to overcome the procedural bars.

11. Petitioner is Not Entitled to Relief Based on McCoy

Petitioner claims that the U.S. Supreme Court decision in McCoy v. Louisiana, 138 S. Ct. 1500 (2018), which was issued over a decade after Petitioner's Judgment of Conviction was affirmed, applies retroactively to his case, and establishes that his counsel committed structural error when he conceded Petitioner's guilt at trial. Petitioner reraises this argument from the underlying Petition. As an initial matter, Petitioner's has not identified where counsel allegedly conceded his guilt during trial. Such a bare and naked claim cannot establish prejudice. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner is re-arguing the claim made in his Supplemental Petitions that counsel conceded Petitioner's guilt during opening statements when counsel stated that "some evidence will show that [Petitioner] killed these three people," the District Court has already rejected that claim, holding that counsel did not concede Petitioner's guilt:

> 23. Defendant claims in Ground J that his counsel was ineffective and violated his right to remain silent when he stated during the opening statement that "some evidence will show that [Defendant] killed these three (3) people," which Defendant claims was an admission of guilt without his consent. RT, 12/8/05, at 58. However, Defendant's counsel then explained that the evidence was insufficient to overcome reasonable doubt, which was an objectively reasonable strategy given the overwhelming evidence against Defendant. Moreover, Defendant did not receive the death penalty, thus Defendant cannot show that he suffered prejudice.

Findings of Fact, Conclusions of Law and Order, at 6 (filed October 17, 2014).

Additionally, the McCoy cannot help Petitioner overcome the mandatory procedural bars. McCoy does not apply to post-conviction habeas proceedings, does not stand for the proposition Petitioner claims it does, is not retroactive, and was not a new rule.

First, McCoy was decided on direct appeal, and the Court explicitly stated that it was not analyzing the claim under a Strickland analysis. McCoy, 138 S.Ct. at 1511. As such, it is improper to raise a McCoy claim in a Petition for Writ of Habeas Corpus as habeas petitions are limited to effective assistance of counsel and voluntariness of pleas. Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

Second, McCoy does not require counsel to obtain their client's consent before conceding their guilt, as Petitioner claims. Instead, McCoy held that "it is unconstitutional to allow defense counsel to concede guilt over the defendant's *intransigent and unambiguous objection*" and that such an error is structural. 138 S.Ct. at 1511. (emphasis added). A review of the law leading up to McCoy further dispels Petitioner's claim. Fifteen years ago, the US Supreme Court held that no "blanket rule demand[s] the defendant's explicit consent" to the strategic concession of guilt. Florida v. Nixon, 543 U.S. 175, 192 (2004). Instead, the Court held that when counsel informs the defendant of the strategy and the defendant thereafter neither approves nor protests the strategy, the strategy may be implemented. Id. at 181. Almost a decade later, the Nevada Supreme Court analyzed Nixon and explicitly adopted its rationale. Armenta-Carpio v. State, 129 Nev. 531, 306 P.3d 395 (2013). The Court noted that Nixon had "expressly rejected" framing the concession of guilt as the functional equivalent of a guilty plea. Id. (citing Nixon, 543 U.S. at 188, 125 S.Ct. at 561). As such, unless the defendant vociferously and unambiguously objects to counsel admitting guilt, it is Nixon, and not McCoy, that governs. The rule announced in McCoy did not create any new rights except when a defendant does object in such a manner. While it appears that Petitioner testified in his defense, Petitioner does not allege that he objected to counsel's argument. Therefore, McCoy would not even apply to Petitioner's claim.

Third, McCoy is not retroactive and neither the US Supreme Court nor the Nevada Supreme Court has held as much. With narrow exception, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Teague v. Lane, 489 U.S. 288, 310, 109 S. Ct. 1060, 1075 (1989). In Colwell v. State, the Nevada Supreme Court delineated a three-step analysis to determine retroactivity: 1) determine if a holding established a new constitutional rule; 2) if a rule is new but not constitutional, it does not apply retroactively; and 3) if the rule is not new, then it applies to finalized cases on collateral review and retroactivity is not at issue. 118 Nev. 807, 819-22, 59 P.3d 463, 471-73 (2002). New constitutional rules will apply in cases in which there is a final judgment only if: 1) The rule establishes that it is unconstitutional to proscribe certain conduct

or impose certain punishment based on the class of offender or the status of the offense; or 2) The rule establishes a procedure "without which the likelihood of an accurate conviction is seriously diminished." Id. at 820, 59 P.3d at 472.

While McCoy was a new constitutional rule, as Petitioner's conviction was final at the time McCoy was announced, unless one of the exceptions provided for in Colwell applies, it is not retroactive. McCoy does not fit under either exception. It did not establish that it is unconstitutional to proscribe certain conduct or impose certain punishments based on the class of offender; and it does not impose a new procedural rule designed to improve the accuracy of criminal convictions. McCoy demands that defendants assert the right clearly and straightforwardly before it can be applied and does not alter procedure. McCoy, 138 S.Ct at 1507. Next, McCoy was based more on the Sixth amendment right to a jury trial, rather than concern about the relative accuracy of judicial vs. jury findings. Therefore, as Petitioner's conviction was final when McCoy was decided, and McCoy does not fall under either of the exceptions articulated in Colwell, it is not retroactive and cannot amount to good cause.

Fourth, McCoy is not new law in Nevada. Two decades prior to McCoy, the Nevada Supreme Court held that if counsel undermines the "client's testimonial disavowal of guilt during the guilt phase of the trial," counsel is ineffective. Jones v. State, 110 Nev. 730, 739, 877 P.2d 1052, 1057 (1994). This is precisely the rule announced in McCoy. In fact, the McCoy Court explained that many state supreme courts had already held as the Nevada Supreme Court held in Jones: that counsel may not admit guilt when the defendant "vociferous[ly] and repeated[ly] protest[s]." Id. Accordingly, McCoy provides nothing that was not already available under Nevada law. Any claim based on Petitioner's alleged objection to conceding guilt has been available to him under Jones since 1994. Petitioner cannot now claim that he has good cause to raise this claim which has therefore been available to him for 25 years.

As McCoy is inapplicable to Petitioner's claim, this Court finds that it cannot conceivably establish prejudice sufficient to overcome the procedural bars.

///

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus and Fifth Supplemental Petition for Writ of Habeas Corpus shall be, and it is, hereby denied.

DATED this _____ day of January, 2022.

Dated this 21st day of January, 2022

Michael A. Cherry

DISTRICT JUDGE

57A D4A 6746 E47B
Michael Cherry
District Court Judge

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

BY /s/ Jonathan E. VanBoskerck
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that service of the above and foregoing, was made this 20th day of January 2022, by email to:

Matthew D. Carling, Esq.
CedarLegal@gmail.com

BY: /s/ Stephanie Johnson
Employee of the District Attorney's Office

03F09137X/EE/APPEALS/sj/MVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Glenford Budd, Plaintiff(s)	CASE NO: A-21-835835-W
vs.	DEPT. NO. Department 3
William Hutchings, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus **COURT MINUTES** **August 04, 2021**

A-21-835835-W Glenford Budd, Plaintiff(s)
vs.
William Hutchings, Defendant(s)

August 04, 2021 **8:30 AM** **All Pending Motions**

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT: Iscan, Ercan E Attorney

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...EX PARTE MOTION FOR APPOINTMENT OF ATTORNEY AND REQUEST FOR EVIDENTIARY HEARING

COURT ORDERED, motion GRANTED; chambers to reach out to Drew Christensen to appoint new counsel. COURT FURTHER ORDERED, petition CONTINUED; matter SET for confirmation of counsel.

NDC

8/11/21 8:30 AM - CONFIRMATION OF COUNSEL / PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**August 11, 2021**

A-21-835835-W Glenford Budd, Plaintiff(s)
vs.
William Hutchings, Defendant(s)

August 11, 2021 **8:30 AM** **All Pending Motions**

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT:

Carling, Matthew D.	Attorney
Waters, Steven L	Attorney

JOURNAL ENTRIES

- CONFIRMATION OF COUNSEL...PETITION FOR WRIT OF HABEAS CORPUS

Matthew Carling Esq., CONFIRMED as counsel. COURT ORDERED, petition CONTINUED for Mr. Carling to review the pleadings and to determine how long it would take to file a supplement.

NDC

8/18/21 8:30 AM - PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**August 18, 2021**

A-21-835835-W Glenford Budd, Plaintiff(s)
vs.
William Hutchings, Defendant(s)

August 18, 2021 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Trujillo, Monica **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Rebeca Gomez

REPORTER:

PARTIES PRESENT:

Carling, Matthew D.	Attorney
Thomas, Morgan B.A.	Attorney

JOURNAL ENTRIES

- COURT ORDERED, Mr. Carling's Supplemental DUE 10/20/21; State's Response DUE 11/17/21; Mr. Carling's Reply, if any, DUE 12/1/21; matter CONTINUED.

NDC

12/8/21 8:30 AM - PETITION FOR WRIT OF HABEAS CORPUS

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**January 19, 2022**

A-21-835835-W Glenford Budd, Plaintiff(s)
vs.
William Hutchings, Defendant(s)

January 19, 2022 **8:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Cherry, Michael A. **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Grecia Snow

RECORDER: Norma Ramirez

REPORTER:

PARTIES PRESENT:

Carling, Matthew D.	Attorney
Zadrowski, Bernard B.	Attorney

JOURNAL ENTRIES

- Parties submitted. COURT ORDERED, petition DENIED. Court FINDS the petition was procedurally barred. State to prepare the Order.

NDC

Certification of Copy

State of Nevada
County of Clark } **SS:**

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; CIVIL COVER SHEET; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT MINUTES

GLENFORD BUDD,

Plaintiff(s),

vs.

WILLIAM HUTCHINGS, WARDEN,

Defendant(s),

Case No: A-21-835835-W

Dept No: III

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 5 day of April 2022.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Fl.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

April 5, 2022

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

RE: GLENFORD BUDD vs. WILLIAM HUTCHINGS, WARDEN
D.C. CASE: A-21-835835-W

Dear Ms. Brown:

Please find enclosed a Notice of Appeal packet, filed April 5, 2022. Due to extenuating circumstances minutes from the date(s) listed below have not been included:

March 28, 2022

We do not currently have a time frame for when these minutes will be available.

If you have any questions regarding this matter, please contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk