

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLENFORD BUDD,
Appellant,

v.

THE STATE OF NEVADA,
Respondent.

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Case No. 66815

RESPONDENT'S ANSWERING BRIEF

**Appeal from the District Court's Findings of Fact, Conclusions of Law and
Order denying Post-Conviction Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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**Appeal from the District Court's Findings of Fact, Conclusions of Law and
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STATEMENT OF THE ISSUE(S)

1. Whether the district court properly denied Appellant's ineffective assistance of counsel claims?
2. Whether the district court properly denied Appellant's cumulative error claim?
3. Whether the district court properly found that Appellant was not prejudiced based on the overwhelming evidence of guilt?

STATEMENT OF THE CASE

On May 29, 2003, the State filed a Criminal Complaint against Glenford Budd (hereinafter "Appellant") charging him with three counts of Murder with Use of a Deadly Weapon. 1 Appellant's Appendix (hereinafter "AA") 5-6. The State subsequently filed an Information reflecting these charges on June 26, 2003. 1 AA

24-26. The following month, on July 25, 2003, the State filed its Notice of Intent to Seek Death Penalty.¹ 1 AA 99-100.

On December 5, 2005, Appellant's jury trial began, and on December 13, 2005, the jury found Appellant guilty on all three counts as alleged in the Information. 6 AA 1300-01. On December 14, 2005, the penalty phase of Appellant's jury trial began, and 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. 8 AA 1738-40.

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 with 995 days credit for time served. 10 AA 2011-12. The Judgment of Conviction was filed on March 1, 2006. Id. On March 23, 2006, Appellant filed a Notice of Appeal. 11 AA 2517-18. On January 9, 2007, the Nevada Supreme Court affirmed

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

Appellant's conviction. 11 AA 2561-66. Remittitur issued on February 6, 2007. 11 AA 2567.

On September 21, 2007, Appellant filed a pro per post-conviction Petition for Writ of Habeas Corpus. 12 AA 2709-49. The State filed a Response to Appellant's Petition on November 27, 2007. 12 AA 2797-2807. The district court denied Appellant's Petition on November 30, 2007 and filed its Findings of Fact, Conclusions of Law and Order on January 7, 2008. 12 AA 2808-15. Appellant filed a Notice of Appeal on January 23, 2008. 12 AA 2825-27. On September 25, 2009, the Nevada Supreme Court reversed this Court's denial of Appellant's Petition on grounds that Appellant should have been appointed post-conviction counsel; the Nevada Supreme Court remanded the case to the district court. 12 AA 2830-36. Remittitur issued on October 20, 2009. 12 AA 2836.

Represented by counsel, Appellant filed a First Supplemental Post-Conviction Petition for Writ of Habeas Corpus. 13 AA 2847-2915. Appellant subsequently filed a Second, Third, and Fourth Supplemental Petition. 13 AA 2919-27, 2986-89, 3000-36. After the State filed its respective Responses, the district court conducted a hearing on January 31, 2014, and ordered a limited evidentiary hearing on Grounds B and C. 13 AA 2928-58, 3093. At the evidentiary hearing on August 22, 2014, Appellant's prior counsel, Howard Brooks, Esq., was sworn and testified. 13 AA 3041-90, 3093. Ultimately, the district court found that Mr. Brooks was not

ineffective and denied Appellant's Petition. 13 AA 2093-99. The district court then filed its Findings of Fact, Conclusions of Law and Order on October 17, 2014. 13 AA 3091-3103.

Appellant appealed the denial of his Petition and filed the instant Opening Brief (hereinafter "AOB") on March 27, 2015. The State responds as follows and requests that this Court affirm the district court's Findings of Fact, Conclusions of Law and Order.

STATEMENT OF THE FACTS

On May 26, 2003, detectives from the Las Vegas Metropolitan Police Department (LVMPD) were on patrol in the Saratoga Palms East Apartments in Las Vegas, Clark County, Nevada. 6 AA 1116. The apartment complex had been plagued with high levels of drug and gang activity. 6 AA 1116-17. Thus, police drove through the complex slowly and with their windows down to detect the sound of gunshots or other criminal activity. 6 AA 1120.

At approximately midnight, detectives heard three gunshots. 6 AA 1122. Within minutes, police were able to determine that the shots had come from Apartment 2068. 6 AA 1125-29. Detectives climbed the stairs to find the first of three victims, Jason Moore, lying dead on the front doorstep. 6 AA 1129. Detectives later found Dajon Jones dead in a front bedroom. 6 AA 1130. Finally, detectives found the third victim, Derrick Jones, lying in the hallway clinging to life. 6 AA

1131. Following a search of the house, described as smoke-filled and having the smell of a shooting range, police secured the crime scene. 6 AA 1170-71, 1182. Ultimately, police identified Appellant as the shooter.

At the scene, crime scene analysts found 11 bullet casings from a single nine millimeter semi-automatic handgun. 6 AA 1207-15, 1219. The bullets from this gun either remained in or passed through the three victims. 6 AA 1207-15. On May 28, 2003, autopsies were performed on all three victims. 5 AA 1077-78. The medical examiner found that Dajon Jones suffered from two fatal gunshot wounds to the neck. 5 AA 1083-87. Derrick Jones suffered from seven wounds, including four to the back; two of the gunshot wounds, both to the head, were fatal. 5 AA 1087-91. Jason Moore suffered from three gunshot wounds, including wounds to both the head and neck; two of the gunshot wounds were fatal. 5 AA 1079-80. Evidence of marijuana use was found during the autopsies of Jason, Dajon, and Derrick. 5 AA 1092.

Appellant fled the scene and went into hiding, altering his appearance by cutting his hair. 7 AA 1436, 1440. Appellant initially told police that he went to the apartment to inquire about his stolen one-half pound of marijuana. 7 AA 1390. He told police that he heard a gunshot and fled the apartment along with Lazon Jones. Id. Lazon Jones contradicted Appellant's statement.

Lazon testified that he, Derrick, Dajon, and Jason were with Appellant all day on May 26, 2003. 5 AA 1018-19. During the day, Appellant, known by Lazon as “A.I.”, was involved in altercations with both Derrick and Jason. 5 AA 1019-20. When Jason and Appellant got into a confrontation, Appellant told him “he wasn’t going to fight him; he was going to put some slugs in him.” 5 AA 1020. That night, the group was in Apartment 2068. 5 AA 1050. Appellant went to the store to get alcohol. 5 AA 1053-54. However, he came back with a single can. 5 AA 1058. Appellant went into the room where Dajon was lying down. 5 AA 1024. Lazon heard Appellant say, “Where’s my stuff at?” Id. He then heard three gunshots. Id. Lazon fled the apartment and called 911. 5 AA 1025-32. After shooting Jason Moore on the front doorstep, Appellant fled the scene. 6 AA 1235-39. In the interim, Derrick Jones was shot and killed. See 5 AA 1083-87. As Appellant ran from the scene, Lazon saw that he still held a gun in his hand. 5 AA 1034.

While on the run, Appellant admitted to his uncle, Winston Budd, that he had shot three people. 7 AA 1434. Further, Appellant cut his distinctive braids after the shooting. 7 AA 1436. When his uncle told Appellant to turn himself in, Appellant said that he “prefer to run.” 7 AA 1437. Appellant was eventually arrested. Id.

After being booked into the Clark County Detention Center (CCDC) to await trial, Appellant made contact with another inmate, Greg Lewis. 7 AA 1311. Appellant and Lewis knew each other before the incident. Id. During Appellant’s

incarceration at CCDC, Appellant admitted to Lewis that he had shot and killed the three victims because they stole his half pound of marijuana. 7 AA 1313-16. Lewis contacted the police to reveal what he had learned. 7 AA 1317-18. Lewis was not promised anything in exchange for his statement to police. 7 AA 1319, 1393. The District Attorney's Office did write to the Parole Board to inform them of Lewis' assistance in solving the triple homicide, but this did not result in a reduced sentence or his release. 7 AA 1322-23.

Appellant did not know about Lewis' cooperation, and in fact, sent a letter addressed to Lewis that included lyrics to a song Appellant wrote about the murders.² 7 AA 1324-25. He titled the song "Killer in Me" and hoped to have the song released on the "Murda Music CD" upon his release. 7 AA 1334. The letter contained the following 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
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

²Lewis identified Appellant's general handwriting based on a prior letter Appellant had sent to him. 7 AA 1324. Further, Appellant's distinctive handwriting used on the lyrics, which he admitted was done to prevent "snitches" from reading, was recognized by Lewis from a prior event where he observed Appellant use that style of handwriting. 7 AA 1327, 1334-35.

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.

7 AA 1334.

SUMMARY OF THE ARGUMENT

Appellant generally argues that the district court erred in denying his Petition because his counsel was ineffective in four ways. First, Appellant contends that his counsel was ineffective in challenging the rap song letter admitted at trial. However, this claim is without merit because Appellant's counsel challenged the letter on foundational grounds, which was objectively reasonable. Further, it was objectively reasonable not to retain an expert because the expert could likely have found incriminating information regarding the handwriting on the letter.

Second, Appellant contends that his counsel was ineffective for not calling Tamara Steel in support of their premeditation defense. However, this claim is without merit because counsel reasonably decided that her testimony would not be

useful since she did not see the shooting, and her testimony would have been based on statements she heard from other individuals.

Third, Appellant claims that his counsel was ineffective for not zealously representing him at trial. This claim is also without merit as Appellant fails to demonstrate that his counsel's strategy not to object to every issue and focus on gaining credibility with the jury was objectively unreasonable.

Fourth, Appellant claims that his counsel was ineffective for making an unauthorized admission at trial. However, this claim is likewise without merit because Appellant's counsel did not make an admission, but instead, acknowledged that while the State would present evidence against Appellant, it would fail to meet its burden beyond a reasonable doubt. Moreover, Appellant fails to demonstrate prejudice in regards to any of these four claims because the State presented overwhelming evidence demonstrating that Appellant systematically murdered three young men, and despite this evidence, counsel's representation spared Appellant from receiving the death penalty.

Appellant also raises two final claims that are equally without merit. In regards to Appellant's cumulative error claim, Appellant fails to demonstrate that any errors occurred. Lastly, while Appellant claims that the district court inappropriately applied harmless error analysis, this claim is without merit because the district court did not apply harmless error analysis, but instead, merely

considered whether Appellant was prejudiced, under a Strickland analysis, based on the overwhelming evidence presented against him at trial. As such, this Court should affirm the district court's Findings of Fact, Conclusions of Law and Order.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Appellant alleges that the district court erred in denying his Petition because his counsel was ineffective for (1) not filing a Motion in Limine regarding Defendant's rap song or, alternatively, for not retaining a handwriting expert to challenge the authentication of Defendant's handwriting (AOB 38-44); (2) not properly investigating Appellant's case in order to provide a defense to premeditation (AOB 45-49); (3) not zealously representing Appellant by "fail[ing] to subject the State's case to the adversarial process" (AOB 49-55); and (4) pursuing an "unauthorized trial strategy" that included an alleged admission of guilt (AOB 55-61). However, the district court properly denied Appellant's Petition as he failed to show that he received ineffective assistance of counsel.

Nevada has adopted the standard outlined in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), for determinations regarding the effectiveness of counsel. Under Strickland, in order to assert a claim for ineffective assistance of counsel, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two-pronged test. Strickland 466 U.S. at 686–

687, 104 S.Ct. at 2063-64; see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show first, that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 131 S.Ct. 770, 778, 178 L.Ed.2d 624 (2011). Further, "[e]ffective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)).

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, 103 P.3d 35 (2004). The role of a court in considering alleged ineffective assistance of counsel

is “not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (citing Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977)).

In considering whether trial counsel was effective, the court must determine whether counsel made a “sufficient inquiry into the information . . . pertinent to his client’s case.” Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996) (citing Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2066). Then, the court will consider whether counsel made “a reasonable strategy decision on how to proceed with his client’s case.” Id., 921 P.2d at 280 (citing Strickland, 466 U.S. at 690–91, 104 S.Ct. at 2066). Counsel’s strategy decision is a “tactical” decision and will be “virtually unchallengeable absent extraordinary circumstances.” Id., 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.

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

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

The court "need not consider both prongs of the test if the defendant makes an insufficient showing on either one." Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004). Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. "[O]verwhelming evidence of guilt is relevant to the question of whether a client had ineffective counsel." Ford v. State, 105 Nev. 850, 852, 784 P.2d 951, 952 (1989) (citing Strickland, 466 U.S. at 697, 10 S.Ct. at 2069).

Finally, claims 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"

or “naked” allegations are not sufficient, nor are those belied and repelled by the record. Id., 686 P.2d at 225; see also NRS 34.735(6).

A. APPELLANT FAILS TO DEMONSTRATE THAT HIS COUNSEL WAS INEFFECTIVE IN CHALLENGING THE RAP SONG LETTER

Appellant first alleges that the district court erred in denying his Petition because his counsel was ineffective for failing to file a Motion in Limine regarding the rap song, or in the alternative, retain an expert “to conduct a handwriting analysis on the rap song letter.” AOB 40. Moreover, he contended that a handwriting expert could have been used to challenge the authentication of the letter, which was established through Lewis. AOB 40-42.

In his Petition, Appellant did not specifically challenge his counsel’s decision not to file a Motion in Limine, but instead, simply explained that no Motion was ever filed to exclude the rap song. 13 AA 93. This statement is within the context of Appellant’s argument alleging that his counsel was ineffective for failing to object to the admission and authentication of the rap song, but not specifically alleging ineffective assistance of counsel based on failing to file such a Motion. See 13 AA 2893-95. As such, Appellant cannot raise this issue for the first time on appeal.³

³Even if this Court considered this claim, as demonstrate below, Appellant fails to demonstrate that (1) any Motion would not have been futile since the letter was more probative than prejudicial (2) his counsel’s decision to attack the foundation of the

Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992).

As such, the district court did not specifically address this Motion in Limine issue in its Findings of Fact, Conclusions of Law and Order, but instead addressed Appellant's argument regarding his counsel's failure to object. See 13 AA 3093-94. In doing so, the district court found that counsel's decision to object based on a lack of foundation was a reasonable strategy, and counsel was not ineffective for deciding not to object based on a prejudice argument. 13 AA 3093. The district court further found that counsel's decision not to object to the authentication of the letter by Lewis was objectively reasonable because Lewis was familiar with Appellant's handwriting and any objection would have been futile. 13 AA 3093-94.

Appellant further raised in his Petition that his counsel should have retained a handwriting expert to challenge the authenticity of the rap song letter. 13 AA 2912. At the evidentiary hearing, defense counsel was thoroughly questioned on the rap song. Defense counsel explained his strategy regarding the rap song, in the context of the other overwhelming evidence:

. . . we felt that we had a case where the evidence of guilt was overwhelming. We wanted the jury to see the defense as being completely open and transparent and not

letter during trial was an objectively unreasonable strategy, and (3) he suffered prejudice as a result of his counsel's decision not to file a Motion in Limine given the overwhelming evidence against Appellant. Thus, Appellant's counsel was not ineffective in this regard.

obstructionist. So I did not want to be fighting about things coming into evidence, when it was obvious what happened in the guilt phase

13 AA 3052. In fact, defense counsel acknowledged that he believed the main issue in this case was whether or not Appellant would receive the death penalty. Id. As such, defense counsel explained that he did not miss objections, but “chose not to engage on issues that [he] thought were going nowhere.” 13 AA 3052-53. Further, defense counsel explained that he still objected to the rap song under a “foundation” argument, and believed this was the best way to exclude the evidence. 13 AA 3071. Finally, defense counsel testified that a “big concern” of his was that if he had hired a handwriting expert, that the expert would have concluded that the rap song was written by Appellant. 13 AA 3073. Counsel stated that this would have destroyed one of his main arguments that he relied on during trial, which was that Greg Lewis was lying about the letter. Id. Ultimately, defense counsel explained that any other objection to the letter would not have been successful and would have resulted in a loss of credibility with the jury. 13 AA 3074.

As such the district court found that Appellant “fails to show that a handwriting expert would have revealed any exculpatory evidence, and given the overwhelming evidence against [Appellant], an expert would likely have discovered incriminating evidence,” which would have further limited defense counsel’s argument. 13 AA 3098. Thus, the district court found that Appellant failed to show

his counsel's representation was objectively unreasonable and that he was prejudiced as a result. Id.

Appellant fails to show that his counsel was objectively unreasonable in his decision to challenge the letter based on foundation and for not hiring an expert. At trial, counsel contemporaneously objected to the State's reference at a bench conference and subsequently made a complete record of the objection outside the jury's presence. 5 AA 996, 1006-07. Counsel explained that his objection was based on a "lack of foundation for the letter." 5 AA 1006. In fact, through his objection, counsel forced the State to accept the risk of a mistrial if the letter was not later admitted into evidence. 5 AA 1006-07. Additionally, Appellant even repeatedly acknowledges the foundation issues with regard to the rap letter, AOB 42-44, thus directly supporting counsel's decision to object based on foundation. As such, it was clearly a reasonable strategic decision to challenge the letter in this manner. Doleman, 112 Nev. at 846, 921 P.2d at 280.

Appellant, moreover, fails to demonstrate any likelihood that an objection to the letter based on its prejudicial effect would not have been futile. Relevant evidence is admissible so long as the probative value is not *substantially* outweighed by the danger of *unfair* prejudice. NRS 48.035(1). The letter at issue contained a rap song in which Appellant implicated himself in the killings. 7 AA 1334. Such evidence was highly probative of Appellant's culpability, and considering counsel

had the opportunity to cross-examine the informant about the letter and its reliability, the risk of *unfair* prejudice was low. As such, any objection based on prejudice would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103

Even if counsel erred in not objecting based on the risk of unfair prejudice, Appellant fails to demonstrate that, but for the alleged error, there is a reasonable probability that he would have received a more favorable outcome at trial. Considering the overwhelming direct and circumstantial evidence of Appellant's guilt beyond the letter, as detailed above, there is no reasonable probability that Appellant would have had a more favorable outcome at trial had the letter not been admitted.⁴ As such, the district court properly found that Appellant's counsel was not ineffective regarding his decision to object to the letter based on foundational grounds.

Even so, Appellant asserts that counsel should have objected to the foundational basis for the witness' handwriting comparison that authenticated the letter, but "[n]onexpert opinion as to the genuineness of handwriting is sufficient for

⁴To the extent that Appellant similarly claims that counsel was ineffective for failing to object on prejudice grounds when the letter was actually admitted at trial during the testimony of Greg Lewis, the analysis is the same because, of course, whether it was proper for the State to comment on the letter during its opening statement depends on whether the letter was likely to be admitted as evidence. As explained above, the probative value of the letter was not substantially outweighed by the danger of unfair prejudice, and thus any objection on such grounds would have been futile.

authentication or identification if it is based upon familiarity not acquired for purposes of the litigation.” NRS 52.035. As such, the witness’ testimony that he recognized Appellant’s handwriting from previous correspondence satisfied the NRS 52.035 authentication requirement, so objecting to the authentication would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Counsel reasonably used the only available means to challenge the credibility of the witness’ authentication, cross-examination. Moreover, when the State sought to have the witness read a typed duplicate of the handwritten letter, counsel appropriately objected. 7 AA 1331-33. Therefore, counsel’s performance was objectively reasonable, and Defendant fails to demonstrate that, had counsel objected to the letter based on danger of unfair prejudice, there is a reasonable probability Defendant would have received a more favorable outcome at trial.

Lastly, while Appellant claims that counsel was deficient in not hiring a handwriting or fingerprint expert to contest the jailhouse letter/rap song, AOB 41-44, Appellant fails to demonstrate that any such expert analysis would have revealed exculpatory evidence. To the contrary, considering the overwhelming evidence of Appellant’s guilt, counsel would have assumed incredibly high risk that such experts would have discovered *incriminating* evidence. Counsel specifically argued to the jury that the State had very little physical evidence that Appellant committed the killings, and further, that Greg Lewis actually wrote the incriminating letter. 8 AA

1565-69. Thus, had counsel obtained fingerprint and handwriting experts, he would have manufactured physical evidence that counsel could have reasonably expected would, at a minimum, undermine his argument, and possibly even directly link Appellant to a letter admitting the crimes. Instead, Appellant's counsel was able to argue that the State failed to meet its burden of proof because it could have had the handwriting analyzed. 8 AA 1570. Therefore, counsel's tactical decision not to hire experts who might have implicated Appellant was objectively reasonable. Moreover, as Appellant fails to show that such experts would have discovered exculpatory evidence, Appellant fails to demonstrate prejudice under Strickland. Accordingly, the district court properly found that counsel was not ineffective for failing to retain experts.

**B. APPELLANT FAILED TO DEMONSTRATE THAT HIS
COUNSEL WAS INEFFECTIVE REGARDING A
PREMEDITATION DEFENSE**

Appellant argues that the district court erred in finding that his counsel was not ineffective for deciding not to further investigate a premeditation defense. AOB 47-49. Specifically, Appellant claims that his counsel should have further investigated Tamara Steel and the information received from her, which included that Appellant had been under the influence of PCP during the murders. AOB 47. Appellant claims that his counsel should have utilized this information to allege a defense to premeditation. AOB 48-49.

Appellant raised this issue in his Petition to the district court. 13 AA 2895-96. At the evidentiary hearing, defense counsel stated that Steel’s testimony would not have been helpful because “she was not present at the scene” and “her knowledge of events surrounding the killings . . . were solely from what people told her.” 13 AA 3054. Further, counsel admitted that there was extensive evidence of premeditation in this case, and the State could have easily rebutted this allegation from Tamara Steel. 13 AA 3069-71. The district court found that Appellant’s argument was “rendered moot based on the overwhelming evidence of [Appellant’s] guilt, including evidence that [he] threatened to kill one of the victims and later confessed to his uncle why he killed the victims.” 13 AA 3094. The district court thus concluded that Appellant failed to show that his counsel was ineffective as a result. Id.

“[T]he trial lawyer alone is entrusted with decisions regarding legal tactics such as deciding what witnesses to call [Counsel], not the client, 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) (citation omitted).

Here, Appellant’s counsel acted objectively reasonable in not calling Tamara Steel as a witness. The mere fact that Appellant claims a witness would have testified that he was on PCP is not sufficient to show that counsel’s performance was

unreasonable. Appellant offers no evidence that this alleged witness would have even cooperated with the defense, which she was under no obligation to do, or that the alleged witness had any credibility whatsoever. Counsel reasonably determined that her testimony would have been based on statements from other individuals, as she was not present at the time of the killings. As such, counsel's decision not to call her as a witness was objectively reasonable.⁵

The State, moreover, provided ample evidence of premeditation that would have overwhelmingly contradicted the alleged witness' purported claim. First, on the day of the killings, Appellant accused one of the victims, Derrick Jones, of stealing Appellant's "weed." 5 AA 1019. Later that day, when Appellant got into a confrontation Derrick during a basketball game, Appellant said "that he wasn't going to fight [the victim]; he was going to put some slugs in him." 5 AA 1020. Only a few hours later, while all hanging out at the apartment, Appellant told the victims he was leaving to get something to drink, and only a few minutes later, Appellant came

⁵Further, Appellant alleges his counsel should have further investigated Tamara Steel. AOB 48-49. When a defendant contends that his attorney was ineffective because he did not adequately investigate the case, he must show how a better investigation would have rendered a more favorable outcome probable. Molina, 120 Nev. at 192, 87 P.3d at 538. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. United States v. Porter, 924 F.2d 395, 397 (1st Cir. 1991). However, Appellant fails to demonstrate what evidence this would have revealed and how it would have led to a more favorable outcome, and as such, fails to demonstrate that his counsel was ineffective in this regard.

back and shot all three victims. 5 AA 1021-27. Moreover, the day after the killings, Appellant admitted to his uncle, Winston Budd, that he killed people because they stole his marijuana. 7 AA 1434.

Therefore, considering the overwhelming evidence of premeditation, even if this alleged witness testified, there is no reasonable probability that the result of the trial would have been different. Thus, the district court properly found that Appellant's counsel was not ineffective in this regard.

C. APPELLANT'S COUNSEL ZEALOUSLY ADVOCATED FOR APPELLANT, SAVING HIM FROM THE DEATH PENALTY

Appellant next argues that the district court erred in denying his Petition because his counsel was ineffective for failing to "zealously advocate" for him and "entirely failed to subject the State's case to the adversarial process."⁶ AOB 51. Appellant likewise argued in his Petition that his counsel did not zealously advocate for him. 13 AA 2900-01. The district court found that Appellant failed to demonstrate that his counsel was ineffective for not zealously advocating for him.⁷ 13 AA 3095.

⁶Basically, Appellant makes numerous allegations about his counsel's representation including failing to object, informing the jury that Appellant and Lewis were in jail together, admitting Appellant's guilt to the jury, failing to present any defense witnesses, among other accusations and repeated allegations. AOB 52-55.

⁷Appellant specifically argued in his Petition that his counsel failed to zealously advocate for him because (1) his counsel made a record at trial that he had some cooperation issues with Appellant and Appellant's family, and (2) his counsel argued

Appellant simply fails to demonstrate that his counsel did not zealously advocate for him. His counsel was very candid at the evidentiary hearing regarding his strategic decisions at trial. Appellant's counsel acknowledged that "the evidence of guilt was overwhelming," thus, he "wanted the jury to see the defense as being completely open and transparent and not obstructionist." 13 AA 3052. As a result, counsel "did not want to be fighting about things coming into evidence, when it was obvious what happened in the guilt phase." Id. He further explained that given the overwhelming evidence of guilt, his focus was mainly on saving Appellant's life and avoiding the death penalty. Id. Thus, while Appellant raises a number of things that he claims his counsel did not do – such as, objecting to a variety of things at trial – counsel clearly made a strategic decision not to raise every possible objection and instead, to be "completely open and transparent." This is a reasonable strategy because (1) there was overwhelming evidence of Appellant's guilt; and (2) Appellant's counsel wanted to maintain and gain credibility with the jury, in hopes that they would spare Appellant from a death sentence. In fact, counsel testified regarding his concern about losing credibility:

I think that we tried to – had we tested a lot of things in the trial phase and it's entirely possible we would've lose some credibility. And I think that our credibility was enhanced by not doing that and I think that we had more credibility in the penalty phase by not doing that.

for the State regarding the availability of Appellant's uncle. 13 AA 2900-01. The district court found that these claims were without merit. 13 AA 3095.

13 AA 3074. Thus, it is clear that Appellant's counsel had a reasonable strategy behind his decisions not to object to every objectionable issue.⁸

Further, even if his counsel's representation had been unreasonable, Appellant fails to demonstrate that, but for these errors, the outcome of his case would have been different. In fact, even though there was overwhelming evidence demonstrating that Appellant planned, premeditated, and deliberated the execution of three young men, Appellant's counsel saved Appellant from receiving the death penalty. 8 AA 1738-40. As such, it is clear that Appellant was not prejudiced by his counsel's zealous advocacy, but instead, benefitted from it as he is not currently sitting on death row.

**D. APPELLANT FAILED TO DEMONSTRATE THAT HIS
COUNSEL WAS INEFFECTIVE REGARDING THE ALLEGED
UNAUTHORIZED ADMISSION**

Appellant contends that his counsel was ineffective when he made an "unauthorized admission of guilt" at trial. AOB 59, 61. The alleged concession consisted of counsel explaining to the jury that "some evidence will show that [Appellant] killed these three people." AOB 59.

⁸Moreover, Appellant also provides several bare allegations regarding other alleged errors on his counsel's behalf. AOB 52-54. However, Appellant fails to demonstrate that his counsel's strategic decision to focus on avoiding the death penalty was unreasonable, given the overwhelming evidence of Appellant's guilt.

Appellant previously raised this same claim in his Petition. 13 AA 2903-06. However, the district court denied this claim, finding that after making the above statement, Appellant counsel “then explained that the evidence was insufficient to overcome reasonable doubt.” 13 AA 3096. The district court found that this “was an objectively reasonable strategy given the overwhelming evidence against [Appellant].” Id. The district court also found that Appellant failed to demonstrate prejudice. Id.

At trial, after the State presented its opening statements, the defense gave its opening statement, and stated:

[The State] says the evidence will show that [Appellant] killed these three people. Let me make it absolutely clear, some evidence will show that [Appellant] killed these three people.

5 AA 999. However, the defense continued on to discredit this evidence, explaining that the State’s witnesses were too far away to accurately see what happened and had a motive “to create false stories to protect themselves.” Id. Ultimately, the defense explained that when taken as a whole, there is reasonable doubt that Appellant committed these crimes. 5 AA 1000. In regards to this issue at the evidentiary hearing, defense counsel disagreed that his statement during opening alleviated any of the State’s burden, and explained that it “was simply a recognition of what the evidence would in fact show.” 13 AA 3056.

Appellant incorrectly construes defense counsel's statement as an "admission." AOB 59-60. When taken in context, counsel took a reasonable strategic approach in his opening statement to preserve credibility with the jury by acknowledging that the State had at least "some" evidence to implicate Defendant. 5 AA 999. This is consistent with counsel's testimony at the evidentiary hearing that the defense trial strategy was to be "completely open and transparent." 13 AA 3052. Counsel then proceeded to explain that the State's evidence was not sufficient to overcome reasonable doubt. 5 AA 1000. Thus, counsel's strategy was objectively reasonable in light of the overwhelming evidence of Defendant's guilt.

Even if this Court considered counsel's statements to be an admission, this does not constitute ineffective assistance of counsel. Indeed, the United States Supreme Court specifically stated that a strategy wherein a Defendant concedes guilt at a capital trial is not the functional equivalent of a guilty plea. Florida v. Nixon, 543 U.S. 175, 188, 125 S.Ct. 551, 560-61 (2004). Moreover, counsel is not automatically deemed ineffective in executing such a strategy without first obtaining the client's express consent. Id. at 186-87, 125 S.Ct. at 560. "Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is

overwhelming and the crime heinous.”⁹ Id. at 191, 125 S.Ct. at 562. Accordingly, Appellant’s counsel’s strategy was objectively reasonable under circumstances where there was overwhelming evidence of Appellant’s guilt, including eyewitness testimony, Appellant’s admission to his uncle, and a rap song written by Appellant confessing to the three murders. Moreover, Appellant fails to show that an alternative strategy would have been reasonably likely to render a more favorable outcome considering that after Appellant systematically murdered three young men, his counsel’s performance spared Appellant from the death penalty.

II. APPELLANT FAILS TO DEMONSTRATE CUMULATIVE ERROR

Appellant argues that the district court erred in denying his cumulative error claim. AOB 64-65. Even if this Court finds that his individual claims do not constitute error, Appellant contends that the cumulative effect of these claims justify relief. AOB 64 (citing Evans v. State, 117 Nev. 609, 647-48, 28 P.3d 498, 524 (2001)).

⁹Appellant relies on United States v. Swanson, 943 F.2d 1070 (1991), to support his claim that his counsel was ineffective for admitting Appellant’s guilt in opening statements. However, Swanson is not akin to Appellant’s case because in Swanson, defense counsel conceded that “there was no reasonable doubt that his client robbed the bank.” 943 F.2d at 1074. This is completely inconsistent with the facts of Appellant’s case, wherein his counsel merely acknowledged that there is evidence against Appellant, and in fact argued that there *was* reasonable doubt. As such, Appellant’s reliance on Swanson is misplaced and unpersuasive.

Appellant similarly alleged cumulative error in his Petition. 13 AA 2913. The district court denied this claim finding that “Appellant has failed to provide any claims to warrant relief, thus there is no cumulative effect.” 13 AA 3098. Moreover, the district court found that “[t]his is merely a bare allegation and therefore [Appellant’s] claim is denied.”¹⁰ Id.

Without expressly endorsing an approach for cumulative error in the context of ineffective assistance of counsel claims, this Court has acknowledged that other courts have held that “multiple deficiencies in counsel’s performance may be cumulated for purposes of the prejudice prong of the Strickland test when the individual deficiencies otherwise would not meet the prejudice prong.” McConnell v. State, 125 Nev. 243, 259 n.17, 212 P.3d 307, 318 n.17 (2009) (utilizing this approach to note that the defendant is not entitled to relief). However, the doctrine of cumulative error is strictly applied, and a finding of cumulative error is extraordinarily rare. State v. Hester, 979 P.2d 729, 733 (N.M. 1999); Derden v. McNeel, 978 F.2d 1453, 1461 (5th Cir. 1992).

¹⁰Appellant also claims that “[t]he State argued in the post-conviction proceedings that [Appellant] was required to argue the factors of cumulative error,” specifically whether the issue of guilt was close, the quantity and character of the error, and the gravity of the crime charged.” AOB 63 (citing Valdez v. State, 124 Nev. 1172, 196 P.3d 465 (2008)). Appellant then went on to argue that these factors have only been used “in cases appealing directly from the judgment of conviction and not from habeas corpus proceedings.” AOB 63. However, in the State’s response to Appellant’s Petition, the State merely pointed out, as an alternative argument, that Appellant had not addressed these cumulative error factors. 13 AA 2957.

In order for cumulative error analysis to apply, a defendant must first make a threshold showing that his counsel's performance was deficient and counsel's representation fell below an objective standard of reasonableness. State v. Theil, 655 N.W.2d 305, 323 (Wis. 2003); State v. Sheahan, 77 P.3d 956, 976 (Idaho 2003); State v. Savo, 108 P.3d 903, 916 (Alaska 2005); State v. Maestas, 299 P.3d 892, 990 (Utah 2012). In fact, logic dictates that cumulative error cannot exist where the defendant fails to show that any violation or deficiency existed under Strickland. McConnell, 125 Nev. at 259, 212 P.3d at 318; United States v. Franklin, 321 F.3d 1231, 1241 (9th Cir. 2003); Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007); Pearson v. State, 12 P.3d 686, 692 (Wyo. 2000); Hester, 979 P.2d at 733. Further, in order to cumulate errors, the defendant must not only show that an error occurred regarding his counsel's representation, but that at least two errors occurred. Rolle v. State, 236 P.3d 259, 276-77 (Wyo. 2010); Hooks v. Workman, 689 F.3d 1148, 1194-95 (10th Cir. 2012).

If the defendant can show that two or more errors existed in his counsel's representation, then he must next show that cumulatively, the errors prejudiced him. McConnell, 125 Nev. at 259 n.17, 212 P.3d at 318 n.17; Doyle v. State, 116 Nev. 148, 163, 995 P.2d 465, 474 (2000); State v. Novak, 124 P.3d 182, 189 (Mont. 2005); Savo, 108 P.3d at 916; People v. Walton, 167 P.3d 163, 169 (Colo. App. 2007). A defendant only shows that prejudice exists when he has shown that the cumulative

effect of the errors “were sufficiently significant to undermine [the court’s] confidence in the outcome of the . . . trial.” In re Jones, 917 P.2d 1175, 1193 (Cal. 1996); Collins v. Sec’y of Pennsylvania Dep’t of Corr., 742 F.3d 528, 542 (3d Cir. 2014). “[M]ere allegations of error without proof of prejudice” are insufficient to demonstrate cumulative error. Novak, 124 P.3d at 189. Further, “in most cases errors, even unreasonable errors, will not have a cumulative impact sufficient to undermine confidence in the outcome of the trial, especially if the evidence against the defendant remains compelling.” Theil, 665 N.W.2d at 322-23; see also State v. Maestas, 299 P.3d 892, 990 (2012) (holding that errors resulting in no harm are insufficient to demonstrate cumulative error). Further, cumulative error is not appropriate when a review of “the record as a whole demonstrates that a defendant received a fair trial.” State v. Martin, 686 P.2d 937, 943 (N.M. 1984).

Thus, in order to demonstrate cumulative error, a defendant must show: (1) his counsel made multiple errors that were objectively unreasonable, and (2) the cumulative effect of these errors prejudiced the defendant to the extent that the court’s confidence in the outcome of the case is undermined.

As demonstrated above, Appellant has failed to make a single showing that his counsel’s representation was objectively unreasonable. Further, even if Appellant had made such a showing, he has certainly not shown that the cumulative effect of these errors was so prejudicial as to undermine the court’s confidence in

the outcome of Appellant's case. Collins, 742 F.3d at 542. Therefore, his claim of cumulative error is without merit.¹¹

III. THE DISTRICT COURT PROPERLY FOUND THAT APPELLANT WAS NOT PREJUDICED, AND DID NOT APPLY A HARMLESS ERROR STANDARD

Appellant notes that the district court determined that he was not prejudiced “because of the overwhelming amount of evidence presented.” AOB 66. As such, Appellant contends that the district court erred when it “failed to acknowledge or apply the heightened standard of beyond a reasonable doubt for proving harmlessness on constitutional errors.” Id.

Appellant seems to relying on Chapman v. California, 386 U.S. 18, 23-24, 87 S.Ct. 824, 827-28 (1967), and Ramiez v. State, 114 Nev. 550, 562-63, 958 P.2d 724, 731-32 (1998), when arguing that the district court failed to find counsel's errors harmless beyond a reasonable doubt. The State does not contest that if a district court finds an error of constitutional magnitude, then the district court must then find the error harmless beyond a reasonable doubt, otherwise the error is not harmless.

¹¹Appellant relies on this Court's holding in Evans to argue that “grounds that cannot prove error in segregation from one another can culminate in a larger picture of overall ineffectiveness.” AOB 65. However, Appellant misinterprets and misapplies Evans. In Evans, this Court held that the defendant had in fact raised claims of error, but failed to show that the cumulative effect of these errors had prejudiced him. 117 Nev. at 647-48, 28 P.3d at 524. Thus, Evans does not apply to Appellant's case as he fails to show first, that any errors occurred, and second, that he was prejudiced as a result.

Ramiez, 114 Nev. at 562-63, 958 P.2d at 731-32. However, here, Appellant failed to demonstrate any errors – in fact, the district court specifically found that Appellant “did not receive ineffective assistance of counsel.” 13 AA 3099. Further, to the extent that Appellant contends that the district court applied harmless error analysis when it found that there was overwhelming evidence, Appellant misapprehends the district court’s findings, which merely addressed the evidence against Appellant in the context of a prejudice analysis under Strickland. See 13 AA 3093-99. Thus, when ruling on each claim, the district court found that Appellant had not demonstrated that (1) his counsel’s representation was objectively unreasonable, and (2) he suffered prejudice as a result. Strickland, 466 U.S. at 687–688, 694, 104 S.Ct. at 2065, 2068. Accordingly, the district court properly found that Appellant failed to demonstrate prejudice under Strickland based on the overwhelming evidence against him.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the district court’s Findings of Fact, Conclusions of Law and Order.

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Dated this 26th day of June, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 7,932 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of June, 2015.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 26th day of June, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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