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

Brandi J. Wendel
Court Division Administrator

November 28, 2017

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

RE: STATE OF NEVADA vs. BENNETT GRIMES
S.C. CASE: 74419
D.C. CASE: C-11-276163-1

Dear Ms. Brown:

In response to the e-mail dated November 28, 2017, enclosed is a certified copy of the Findings of Fact, Conclusions of Law and Order filed November 20, 2017 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #12649
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

BENNETT GRIMES,
#2762267

Defendant.

CASE NO: C-11-276163-1

DEPT NO: XII

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 5, 2017
TIME OF HEARING: 10:30 AM

THIS CAUSE having come on for hearing before the Honorable MICHELLE LEAVITT, District Judge, on the 5th day of October, 2017, the Petitioner being present, REPRESENTED BY JAMIE J. RESCH, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through AGNES M. BOTELHO, 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:

FINDINGS OF FACT, CONCLUSIONS OF LAW

On September 14, 2011, the State of Nevada charged Bennett Grimes ("Defendant") by way of Information as follows: Count 1 – Attempt Murder With Use of a Deadly Weapon In Violation of Temporary Protective Order (Felony – NRS 200.010, 200.030, 193.330, 193.165,

193.166), Count 2 – Burglary In Violation of Temporary Protective Order (Felony – NRS 205.060, 193.166), and Count 3 – Battery With Use of a Deadly Weapon Constituting Domestic Violence Resulting In Substantial Bodily Harm In Violation of Temporary Protective Order (Felony – NRS 200.481.2e, 193.166). On September 21, 2011, the State filed an Amended Information amending Count 2 to Burglary While In Possession of a Firearm In Violation of a Temporary Protective Order.

A jury trial commenced on October 10, 2012, and on October 15, 2012, a Clark County jury returned a verdict of guilty on each of the three charges.

On February 12, 2013, Defendant was sentenced as follows: on Count 1 to a maximum of 20 years with a minimum parole eligibility of 8 years in the Nevada Department of Corrections (NDOC), plus a consecutive term of a maximum of 15 years with a minimum parole eligibility of 5 years in the NDOC for use of a deadly weapon; on Count 2 to a maximum of 20 years with a minimum parole eligibility of 8 years in the NDOC, to run concurrent to Count 1; and on Count 3 to a maximum of 20 years with a minimum parole eligibility of 8 years in NDOC, to run consecutive to Counts 1 and 2. Defendant received 581 days credit for time served. The District Court entered the Judgment of Conviction on February 21, 2013.

On March 18, 2013, Defendant filed a Notice of Appeal. On February 27, 2014, the Nevada Supreme Court issued an Order of Affirmance in Defendant's appeal. The date of remittitur was March 24, 2014.

On September 9, 2013, Defendant filed a Motion to Correct Illegal Sentence. On September 23, 2013, the State opposed that Motion. This Court heard the Motion on September 26, 2013, but continued the hearing so that the parties could file replies. On October 3, 2013, Defendant filed a Reply, the State filed a Sur-reply, and the Court heard additional argument. This Court indicated that a decision would issue via minute order. On February 26, 2015, this Court denied Defendant's Motion to Correct Illegal Sentence via minute order. On May 1, 2015, a written order denying the same was filed.

On February 20, 2015, Defendant filed a pro se Petition for Writ of Habeas Corpus claiming his trial counsel was ineffective. On April 21, 2015, Defendant was appointed

counsel. On July 21, 2016, at Defendant's request, the District Court set a briefing schedule ordering Defendant's Supplemental Petition for Writ of Habeas Corpus due on August 18, 2016, the State's Response due on October 29, 2016, and Defendant's Reply due on November 9, 2016. The matter was set for hearing on November 15, 2016.

On August 25, 2016, Defendant filed three pro se motions to add additional grounds to and request an evidentiary hearing on his February 20, 2015, Petition for Writ of Habeas Corpus. The State opposed those three motions on September 8, 2016. On September 15, 2016, this Court struck those motions as fugitive documents.

On September 23, 2016, Defendant filed a motion to discharge his attorney. That motion was denied on October 18, 2016.

On November 15, 2016, this Court ordered Defendant's attorney withdrawn from the case and appointed instant counsel. On January 17, 2017, this Court set a briefing schedule for the Petition for Writ of Habeas Corpus. On May 16, 2017, Defendant filed a Supplemental Petition for Writ of Habeas Corpus. ("Petition") The State responded on July 17, 2017. Defendant filed his Reply on August 7, 2017. On August 24, 2017, the Court ordered an evidentiary hearing on the issue regarding Count 3. The hearing took place on October 5, 2017. At the hearing, Roger Hillman, Nadia Hojjat, and Debora Westbrook testified.

I. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's

representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

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

cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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a. Trial Counsel Was Not Deficient For Not Moving To Dismiss Count 3 At Trial

Petitioner argues that trial counsel was deficient for failing to move the court to dismiss Count 3. Petition at 21. Petitioner fails to demonstrate that counsel was deficient.

First, Petitioner's position is illogical and fails to demonstrate that counsel was deficient. Petitioner begins his argument by citation to authority that states that counsel's deficiency is to be judged in light of the law existing "at the time" of the challenged conduct. Petition at 20 (quoting Smith v. Murray, 477 U.S. 527, 536 (1986)). According to Petitioner, the law existing during trial suggested that Petitioner could not be adjudicated guilty of both Count 1 and Count 3 because they were redundant.[1] Petition at 15; see generally Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013. If that is the case, then counsel was not deficient for failing to move to vacate Count 3 during trial because (1) Petitioner had not yet been convicted and such a motion may have been redundant anyway, and (2) counsel was under the reasonable belief that Petitioner could not be adjudicated of it anyway. At the time of trial, waiting to challenge Count 3 until it became a live issue was a reasonable strategic decision that is now "almost unchallengeable." Dawson, 108 Nev. at 117, 825 P.2d at 596.

Indeed, if Petitioner's argument is correct, "counsel's failure to anticipate a change in the law does not constitute ineffective assistance of counsel even where 'the theory upon which the court's later decision is based is available, although the court had not yet decided the issue.'" Nika v. State, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008). Put differently, if Petitioner is right that the law at the time prevented Petitioner from being adjudicated guilty of both Count 1 and 3, then counsel had no reason to raise the issue during trial and cannot be ineffective for failing to do so. Alternatively, if Petitioner is wrong and Jackson merely

[1] The State does not concede that this was actually the state of the law existing at the time, and has previously argued that Jackson v. State, 128 Nev. Adv. Op. 55, 291 P.3d 1274 (2012), merely clarified existing law. State's Opposition to Defendant's Motion to Correct Illegal Sentence, filed September 23, 2013, State's Surreply in Support of Opposition to Defendant's Motion to Correct Illegal Sentence, filed October 3, 2013.

clarified, but did not change, the law, then counsel cannot have been ineffective for failing to argue incorrect law.

Second, even if Petitioner could show that counsel was deficient, Petitioner cannot demonstrate prejudice sufficient to warrant relief. Absolutely nothing in the record demonstrates that this Court would have entertained a motion to dismiss Count 3 at that time, despite counsel's affidavit that this Court "repeatedly stated that Mr. Grimes could not be adjudicated guilty of both Counts 1 and 3." Petition at 18. Indeed, reviewing the trial transcripts indicates that *absolutely nowhere on the record* did this Court indicate as much. Nowhere in the trial transcripts is there even a passing comment to a discussion that was had off the record. Further, even if this Court *had* entertained such a motion, there is nothing to indicate that the motion would have been granted *prior to the jury ever finding Petitioner guilty on any count* other than counsel's statements after the fact. Further still, even if such a motion had been entertained, and even if this Court had granted it, the result would have been error under Jackson.

Either way, based on the law Petitioner claims was in effect during trial, Petitioner cannot demonstrate that counsel was deficient for failing to move to dismiss Count 3 because the decision to wait until it was a live issue was "[w]ithin the range of competence demanded of attorneys in criminal cases." Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975).

b. Appellate Counsel Was Not Deficient For Challenging The Sentence Via A Motion To Correct Illegal Sentence

Petitioner argues that counsel was deficient for raising a challenge to the sentence in a Motion To Correct Illegal Sentence rather than on appeal. Petition at 21-22.[2]

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

[2] Petitioner appears to argue that arguments during sentencing and within the Motion To Correct Illegal Sentence were the actions of post-conviction counsel. Petition 21-22. The State will respond as if that is the case, but the arguments apply equally if these actions should more properly be attributed to trial counsel.

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.

While counsel certainly *could have* raised the issue on appeal, counsel gave two persuasive reasons to think that it was a better strategic decision to raise the issue first in this Court.

First, Counsel was engaged in the "winnowing out" of weaker arguments in favor of those that could have provided more relief. Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Each of the grounds raised on appeal could have resulted in a new trial or reversal of Petitioner's conviction, while the Jackson issue could have, at most, overturned a portion of Petitioner's sentence by vacating Count 3. Given both the professional diligence and competence required on appeal, counsel was justified in presenting the arguments with the potential to vacate Petitioner's entire conviction rather than diluting those arguments, or cutting them entirely, in favor of a complex issue that would have required the vast portion of a fast track brief; After all, even here counsel has spent 27 pages briefing the issue.

Second, Counsel's reasoning that the issue required additional briefing, and the belief that this Court would be best equipped to decide the issue on the first instance in light of arguments already presented during sentencing, was reasonable. Having already heard the arguments of counsel (and, if Petitioner's unsupported arguments are believed, having

discussed the issue off the record with counsel) this Court was readily familiar with the issue and, if the sentence were illegal, could more easily correct it. Further, if counsel was unsuccessful, the denial of the Motion to Correct Illegal Sentence could be, and in fact was, appealed. Therefore, counsel was not deficient in deciding not to include the issue within the limited confines of a fast track brief.

Petitioner also argues that counsel was deficient for actually raising the issue within a Motion to Correct Illegal Sentence. Petition at 22. As Petitioner states, a motion to correct illegal sentence is appropriate when challenging the facial illegality of a sentence. Id. (quoting Edwards v. State, 112 Nev. 704, 918 P.2d 321, 324 (1996)). Indeed, Petitioner *extensively* argued that adjudicating him guilty of both Count 1 and Count 3 was facially illegal. see generally Defendant's Motion To Correct Illegal Sentence, filed September 9, 2013, Defendant's Reply In Support Of Motion To Correct Illegal Sentence, filed October 3, 2013, Transcript of Proceedings: Sentencing, Thursday, February 7, 2013, Fast Track Statement, Appeal 67598, filed July 2, 2015, *and especially* Reply To Fast Track Statement, Appeal 67598, filed September 29, 2015. Counsel was correct that the Motion to Correct Illegal Sentence spawned extensive briefing, far outside that permitted even by a non-fast-track appeal, and numerous hearings by this Court. That this Court denied Petitioner's claims, on the merits, does not make counsel ineffective for choosing to present the argument through that vehicle. And, while the Nevada Supreme Court eventually found that "Grimes does not allege the facial invalidity of the sentence," that finding was clearly at odds with the Reply To Fast Track Statement that extensively and clearly *did* argue the facial invalidity of the sentence. Cf. Order of Affirmance Appeal 67598, filed February 26, 2016; Reply To Fast Track Statement, Appeal 67598, p. 5-8, filed September 29, 2015.

Once again, just because this Court denied Petitioner's argument on the merits, and the Nevada Supreme Court held that this Court did not abuse its discretion in doing so, a bad outcome does not demonstrate either deficiency or prejudice. Indeed, given the extensive record created by the Motion to Correct Illegal Sentence, in addition to that created during Appeal 67598, had the Nevada Supreme Court found Petitioner's arguments had merit it could

easily have decided so by recognizing Petitioner's argument in the Reply To Fast Track Statement and agreeing that facial invalidity was argued in order to reach the substantive merits. Instead, the Nevada Supreme Court decided to let this Court's decision stand with little to no additional comment.

Because appellate counsel was not deficient, and because even if appellate counsel were deficient the record indicates that the Nevada Supreme Court was unlikely to grant Petitioner relief and Petitioner therefore cannot demonstrate prejudice, Petitioner's claims are denied.

c. Counsel Was Not Deficient For Not Arguing That A Steak Knife Was Not A Deadly Weapon When Petitioner Stabbed The Victim 21 Times With One

A "deadly weapon" is "[a]ny instrument which, if used in the ordinary manner contemplated by its design and construction, will or is likely to cause substantial bodily harm or death; or [a]ny weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing substantial bodily harm or death." NRS 193.165(6)(a)-(b).

Petitioner cites to Knight v. State, 116 Nev. 140, 993 P.2d 67, 72 (2000), for the proposition that Petitioner could reasonably argue that a steak knife is not a deadly weapon. Petition at 27. This argument is preposterous. While a steak knife, without more, might not necessarily be a deadly weapon, here Petitioner stabbed the victim 21 times with the weapon and left scars so severe that this Court, at sentencing, stated that the scars remained visible years later:

> I sat up here and watched that woman testify and looked over at her and saw that – just looking at her, not even trying, and I saw the horrible horrendous scars left on her, like, area that you can see just in normal clothing. Horrific scars that she has to live with the rest of her life. I think the girl's lucky that she's alive, if you want my opinion. How many times was she stabbed? ... I mean, 21 times. 21 times.

Transcript of Proceedings Sentencing, February 12, 2013 p. 7. Further, the jury convicted Petitioner of attempted murder. Judgment of Conviction, February 21, 2013. By definition, the jury must have believed that Petitioner was attempting to kill the victim in order to convict

him of attempted murder. In that context, anything at all, from a pencil to a pillow, could be considered a deadly weapon. Petitioner's counsel was already placed in the exceedingly difficult position of arguing that Petitioner did not intend to kill the victim because he somehow failed to kill her after stabbing her 21 times. Transcript of Proceedings Jury Trial - Day 4, p. 20 ln. 21-25, October 15, 2012. Further arguing that the method in which the knife was used was not likely to lead to death or substantial bodily harm risked the jury believing that no arguments counsel made could be credible.

Trial counsel was not deficient for failing to make a futile argument. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, even if counsel were somehow deficient, Petitioner cannot demonstrate prejudice because no reasonable juror could have believed both that Petitioner attempted to murder the victim with a steak knife and that the steak knife was not, as used, a deadly weapon. Therefore, Petitioner's claim is dismissed.

d. Appellate Counsel Was Not Deficient For Deciding Not To Argue That This Court Erroneously Denied Appellant's Motion To Dismiss For Failure To Gather Evidence

Petitioner argues that appellate counsel should have argued, during the first appeal, that this Court erred in denying his Motion To Dismiss For Failure To Gather Evidence. Petition at 28-30. The law cited in Section b, supra, ln. 1-15 applies once again.

Appealing this issue would have been frivolous, and was appropriately "winnow[ed] out." Jones, 463 U.S. at 751-52, 103 S. Ct. at 3313. Petitioner concedes that any DNA or fingerprint evidence was properly preserved, even until trial. Petition at 29. Further, Petitioner has not demonstrated that the State had any obligation whatsoever to test the knife for DNA or fingerprints. Petitioner does not contend that the State prevented him from testing the knife at any time. Instead, Petitioner simply chose not to. Given that Petitioner did not test the knife, despite its availability, Appellate counsel could not reasonably argue that the State was under any obligation to perform Petitioner's discovery for him.

If, however, Petitioner is arguing that Appellate counsel should have claimed ineffective assistance of counsel in the first appeal, based on Petitioner's failure to test the

knife, such a claim still fails because an ineffective assistance of counsel claim is not appropriately raised on appeal. Franklin, 110 Nev. at 752, 877 P.2d at 1059. Therefore, such a claim would have been summarily denied, if it were even considered at all, by the Nevada Supreme Court.

Finally, this Court did not err in denying the motion in the first instance. A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Were the knife tested, only two outcomes were possible. First, Petitioner's DNA and/or fingerprints could have been found on the knife – an outcome not beneficial for the Petitioner and one that would not have led to a more favorable outcome at trial. Second, the DNA and/or fingerprint test could have been inconclusive and/or could have failed to identify the DNA and/or fingerprint on the knife as Petitioner's. In fact, given that Petitioner merely received a scratch on his finger, while he stabbed the victim 21 times with the knife, in all probability at least the apparent blood on the knife was the victim's, not the Petitioner's. As such, Petitioner fails to demonstrate how testing the knife would have led to a better outcome at trial. Petitioner makes a bare assertion that, had Appellate counsel raised the issue, Petitioner would have somehow "enjoyed a more favorable outcome" on appeal, but utterly fails to indicate how the Nevada Supreme Court could have found as much given that (1) the knife was available for Petitioner to test, (2) the State was under no obligation to test the knife, and (3) the knife was not actually tested. Petition at 29-30. Such a bare assertion is insufficient to warrant relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Therefore, Petitioner's claim is denied.

II. CUMULATIVE ERROR DOES NOT APPLY BECAUSE THERE WERE NO ERRORS

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel.[3] The Nevada Supreme Court has never held that instances of ineffective assistance

[3] Once again, any alleged cumulative error outside of the context of an ineffective assistance of counsel claim is not properly brought in a Petition for Writ of Habeas Corpus and should be denied. " Franklin, 110 Nev. at 752, 877 P.2d at 1059. "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an

of counsel can be cumulated. However, even if they could be, it would be of no moment as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Here, the issue of guilt was not close because Petitioner stabbed the victim 21 times in front of numerous people, including a police officer. Transcript of Proceedings Jury Trial - Day 2, p. 25-26, October 11, 2012. Additionally, there was no error, so there is nothing to cumulate. While the crimes of which Petitioner was convicted are serious, serious crimes of which a defendant is convicted absent error are not sufficient, by themselves, to warrant relief. While Petitioner addresses the fact that the Nevada Supreme Court found some errors on appeal, all errors which the Nevada Supreme Court found were harmless beyond a reasonable doubt and did not affect the integrity of Petitioner's conviction. Therefore, Petitioner's claim is denied.

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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, 117 Nev. at 646-47, 29 P.3d at 523.

ORDER

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

DATED this 9th day of November, 2017.

DISTRICT JUDGE

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

BY _____ FOR
CHARLES W. THOMAN
Deputy District Attorney
Nevada Bar #12649

CERTIFICATE OF SERVICE

I certify that on the 20th day of NOV, 2017, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

JAMIE RESCH, ESQ.
jresch@convictionsolutions.com

BY _____
Secretary for the District Attorney's Office

jm/L2

Clerk of the Courts
Steven D. Grierson

200 Lewis Avenue
Las Vegas, NV 89155-1160
(702) 671-4554

November 28, 2017 Case No.: C-11-276163-1

CERTIFICATION OF COPY

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):

Findings of Fact, Conclusions of Law and Order filed 11/20/2017

now on file and of

In witness whereof, I have hereunto set my hand and affixed the seal of the Eighth Judicial District Court at my office, Las Vegas, Nevada, at 12:41 PM on November 28, 2017.

STEVEN D. GRIERSON, CLERK OF THE COURT