EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

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Steven D. Grierson
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December 26, 2019

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

RE: STATE OF NEVADA vs. TOMMY LAQUADE STEWART
S.C. CASE: 80084
D.C. CASE: C-15-305984-1

Dear Ms. Brown:

Pursuant to your Order Directing Entry and Transmission of Written Order, dated December 13, 2019, enclosed is a certified copy of the Findings of Fact, Conclusions of Law, and Order filed December 23, 2019 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

Heather Ungermann, Deputy Clerk

FCL
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TOMMY STEWART,
#2731067

Defendant.

CASE NO: C-15-305984-1

DEPT NO: XXI

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DATE OF HEARING: APRIL 23, 2019
TIME OF HEARING: 9:30 AM

This cause having come on for hearing before the Honorable Valerie Adair, District Judge, on October 10, 2019, the Petitioner being represented by Travis D. Akin, Esq., the Respondent being represented by STEVEN B. WOLFSON, District Attorney, through TALEEN R. PANDUKHT, 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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STATEMENT OF THE CASE

On February 18, 2015, Tommy Stewart ("Petitioner") was charged by way of Criminal Complaint with Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 2 – Burglary While In Possession of a Firearm (Category B Felony – NRS 205.060); Count 3 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); Count 4 – First Degree Kidnapping With Use of a Deadly Weapon (Category A Felony – NRS 200.310, 200.320, 193.165); and Count 5 – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210).

Petitioner's preliminary hearing was held on April 16, 2015, and he was bound over for trial. On April 25, 2016, the State filed an Information charging Petitioner with four counts: Count 1 – Conspiracy to Commit Robbery; Count 2 – Burglary While in Possession of a Firearm; Count 3 – Robbery with Use of a Deadly Weapon; and Count 4 – First Degree Kidnapping with Use of a Deadly Weapon.

On March 7, 2016, Petitioner filed a "Motion to Suppress Defendant's Statement." In his motion, Petitioner alleged that the Miranda[1] warning provided by the Las Vegas Metropolitan Police Department ("LVMPD") was legally insufficient. The motion was denied on March 10, 2016.

Petitioner's jury trial began on March 14, 2016. Prior to jury selection, Petitioner again tried to raise the issue of the legal sufficiency of the LVMPD Miranda warning. The District Court denied Petitioner's renewed motion. On March 17, 2016, the jury found Petitioner guilty on all counts.

On May 10, 2016, the District Court held a sentencing hearing, adjudged Petitioner guilty, and sentenced him as follows: Count 1 – a maximum of 60 months with minimum parole eligibility of 13 months; count 2 – a maximum of 96 months with a minimum parole eligibility of 22 months, concurrent with Count 1; Count 3 – to a maximum of 20 years with a minimum parole eligibility of 8 years, concurrent with Count 2; and Count 4 – life with the

[1] Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966).

eligibility of parole with a minimum parole eligibility of five years, concurrent with Count 3; and 452 days' credit for time served. The Judgment of Conviction was filed on May 17, 2016.

Petitioner filed a Notice of Appeal on May 25, 2016. On May 4, 2017, the Nevada Supreme Court issued its Order of Affirmance. Remittitur issued on June 12, 2017.

On April 13, 2018, Petitioner filed a Petition for Writ of Habeas Corpus (post-conviction), and on April 25, 2018, Petitioner filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing ("Motion"). Counsel was appointed.

On June 6, 2018, Petitioner filed his First Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). On June 14, 2018, Petitioner filed his Second Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). On July 18, 2018, Petitioner filed his Third Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). On July 27, 2018, Petitioner filed his Fourth Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). On February 20, 2019, Petitioner, through counsel, filed Fifth Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). The State filed its Response on April 3, 2019. On April 23, 2019, the Court held a hearing on the Petition and took the matter under advisement. The Court now rules as follows:

STATEMENT OF THE FACTS

The Presentence Investigation Report ("PSI") indicates the facts of this case are as follows:

> On January 20, 2015, the female victim called 911 to report that two males wearing zip-up hoods had forced themselves into her residence and approached her from behind. One of the suspects had a firearm and yelled, "Don't yell or I'll kill you!" The victim was forced to go to her bedroom and lie down on the ground. One of the suspects stayed with the victim while the other suspect took her purse from her. They began asking where she kept her money, wallet, phone, and jewelry. One suspect asked if she was hiding money in her bra or panties, so she took his hands and ran them under her bra and panties. Although she stated she was not sexually assaulted, he groped her by feeling and fondling her against her will, while he had his hands under her bra and panties. The suspects ransacked the rest of the residence and stole the victim's laptop, camera, iPhone, two empty prescription bottles, and $2.00 cash. Before leaving, they again threatened her by saying, "If you call the police, we will kill you."

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> A latent print was located on the victim's jewelry box, which matched to defendant Tommy Laquade Stewart. Additionally, the victim positively identified Mr. Stewart in a photo lineup.
> On February 14, 2015, officers located Mr. Stewart at a gas station and observed him reach into his waistband, retrieve a handgun and toss it into the rear passenger area of a vehicle. Officers took Mr. Stewart into custody. A search of the vehicle revealed two firearms that consisted of an unregistered 9mm semi-automatic handgun, and a stolen .45 caliber semi-automatic handgun.

PSI at 5.

ANALYSIS

I. THIS COURT STRIKES PETITIONER'S FOUR PRO-PER SUPPLEMENTAL PETITIONS AS THEY WERE FILED WITHOUT LEAVE OF COURT

After filing his first Petition for Writ of Habeas Corpus on April 13, 2018, Petitioner filed four supplemental petitions without first requesting leave of this Court. Each will be stricken.

NRS 34.750(3) allows appointed counsel to file a supplemental petition after appointment. "No further pleadings may be filed except as ordered by the court." Id. (5). The Nevada Supreme Court has addressed when the district courts can allow a litigant to file a supplemental petition, holding that leave can be granted only if the petitioner shows good cause to explain the delay in raising a claim. Barnhart v. State, 122 Nev. 301, 303-04, 130 P.3d 650, 652 (2006). Any finding of good cause must be made "explicitly on the record" and enumerate "the additional issues which are to be considered." Id. at 303, 130 P.3d at 652. Barnhart affirmed a district court's decision to deny leave to expand the issues because "[c]ounsel for petitioner provided no reason why that claim *could* not have been pleased in the supplemental petition. Id. at 304, 130 P.3d at 652 (emphasis added).

This Court should strike each of the supplemental petitions filed by Petitioner in proper person. Petitioner never sought leave from this court to file supplements to his timely first petition. Although his counsel was entitled to file a supplement by NRS 34.750(3) once he was appointed, that entitlement to file a supplement is explicitly a right of appointed counsel.

Furthermore, none of Petitioner's pro-per supplemental petitions make any attempt to show good cause for failing to raise the issue in the initial petition. Barnhart precludes

Petitioner from filing supplemental petitions in perpetuity without good cause for neglecting to include the new claims in the initial petition, and the record is void of any explicit findings of this court to allow for the rogue filings.

Because Petitioner was not entitled to supplement his initial petition and never sought this Court's leave, his four rogue supplemental filings will each be dismissed.

II. THE CLAIMS IN PETITIONER'S SUPPLEMENTAL PETITIONS ARE MERITLESS

This Court finds each of Petitioner's claims nevertheless fail to provide relief as the claims themselves are either waived or otherwise meritless. Furthermore, the claim raised in Petitioner's fifth Supplemental Petition by his appointed counsel is also meritless. The instant petition and each of its supplements are therefore denied.

A. Petitioner received effective assistance from 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).

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.

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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.

1. Petitioner's claim that Appellate Counsel was ineffective for failing to challenge the sufficiency of the record is belied by the record

Petitioner first argues that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence based on his acquittal of the deadly-weapon enhancement. This claim fails to satisfy either Strickland prong.

As an initial matter, any claim that Petitioner's appellate counsel did not challenge the sufficiency of the evidence of First-Degree Kidnapping and Robbery is belied by the record, as each was raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The Supreme Court found each argument meritless. State v. Stewart, __ Nev. __, __, 393 P.3d 685, 687-88 (2017). Furthermore, Count 1 - Conspiracy to Commit Robbery, did not—and could not—allege the use of a deadly weapon. Accordingly, the only count which has not already been challenged on appeal and for which the State alleged the use of a firearm was Count 2 - Burglary.

Appellate counsel made the virtually unchallengeable strategic decision to only raise claims if they were likely to succeed. Doleman v. State, 112 Nev. 843, 848, 921 P.2d 278, 281 (1996). It is not unreasonable to "winnow out" weaker arguments. Jones, 463 U.S. at 751-52, 103 S.Ct. at 3313.

Petitioner claims that because the jury declined to find him guilty of using a deadly weapon, the underlying crimes themselves were unsupported. First Sup. Pet. at 1. This argument fails on its own terms. Petitioner was found guilty of Conspiracy to Commit Robbery, Burglary, Robbery, and First-degree Kidnapping. JOC at 1-2. None of those crimes

require the State to prove that Petitioner used a deadly weapon. NRS 200.380; NRS 205.060; NRS 200.310; NRS 199.480. Instead, if the State proves that (1) a crime was committed and (2) a deadly weapon was used to commit the crime, then the existence of the weapon enhances the punishment for the crime. NRS 193.165. The jury found that Petitioner committed each crime without a deadly weapon. Neither finding precludes the other. Accordingly, it would have been fruitless to challenge the sufficiency of the evidence in this manner. Attorneys are not ineffective for failing to bring fruitless claims. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Furthermore, Petitioner cannot show that he was prejudiced by this alleged error. Each of Petitioner's counts run concurrent with one another. JOC at 2. The sufficiency of the evidence of the counts with the longest sentences has already been raised by Petitioner on appeal and found meritless. Stewart, __ Nev. at __, 393 P.3d at 687-88. Accordingly, even if there was some merit to Petitioner's claim, he will not serve a day longer in prison for either Count 1 or Count 2. He was not prejudiced by appellate counsel's decision.

Next, Petitioner claims that the evidence was insufficient to convict him because the victim never identified him. Although it is true that the victim struggled to identify him, she was able to narrow a "photographic lineup" to two potential suspects, "one of whom was Stewart." Id. at __, 393 P.3d at __. From this, police located Petitioner and "detained him for further questioning." Id. The police informed Petitioner of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630 (1966), and then informed Petitioner that his fingerprints had been found at the scene of the crime. Id. at __, 393 P.3d at __. Petitioner then admitted to "being in Lumba's apartment on the night in question with another man and admitted to stealing her personal effects." Id.

Petitioner argues that neither the fingerprint evidence nor the confession was reliable enough evidence for the State to meet its burden, but this fails. As previously mentioned, the Nevada Supreme Court has already found that there was sufficient evidence to convict Petitioner. In addressing the sufficiency of the evidence presented at trial, it reasoned:

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> The jury heard evidence that Stewart took Lumba's personal property against her will by means of force, violence, or fear of injury. Further, the jury heard evidence that Lumba's movement substantially exceeded the movement necessary to complete the robbery and/or substantially increased the harm to her. Indeed, Lumba was accosted as she entered her residence, taken to the back bedroom, guarded at gunpoint, face down, while Stewart and the other suspect rummaged through her house and stole her belongings. Whether Lumba's movement was incidental to the robbery, and whether the risk of harm to her was substantially increased, are questions of fact to be determined by the jury in "all but the clearest of cases." Curtis D., 98 Nev. at 274, 646 P.2d at 548. This is not one of the "clearest of cases" in which the jury's verdict must be deemed unreasonable; indeed, a reasonable jury could conclude that Stewart forcing Lumba from her front door into her back bedroom substantially exceeded the movement necessary to complete the robbery and that guarding Lumba at gunpoint substantially increased the harm to her. We conclude that the evidence presented to the jury was sufficient to convict Stewart of both robbery and first-degree kidnapping.

Stewart, __ Nev. __, __, 393 P.3d 685, 687-88 (2017).

Petitioner's argument that his own confession was insufficient is unavailing. He complains that his confession about what was stolen did not comport with what was stolen, but that evidence was before the jury, which nevertheless found him guilty. First Supp. Pet. at 15-16. It is for the jury to weigh the evidence, not Petitioner and not, as important here, this Court. Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979). "Where there is substantial evidence to support a jury verdict, [the verdict] will not be disturbed on appeal." Smith v. State, 112 Nev. 1269, 927 P.2d 14, 20 (1996); Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981). Because the Nevada Supreme Court was unlikely to play the role of the factfinder on appeal, Petitioner cannot show that he was prejudiced by his counsel. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

The evidence presented against Petitioner at trial was overwhelming. Any claim that the evidence was insufficient would have failed—the Supreme Court affirmed two of Appellant's convictions when the sufficiency of the evidence was challenged. Accordingly, appellate counsel was not ineffective for failing to challenge the sufficiency of the evidence

on the conspiracy and burglary charges.

2. Appellate counsel was not ineffective for failing to raise a meritless claim under the Double Jeopardy Clause

Petitioner next claims that his Burglary, Robbery, and First-degree Kidnapping convictions should have been challenged on appeal for violating the Double Jeopardy Clause. First Supp. Pet. at 21-22. Under his theory, his counsel should have federalized the claim and raised a double jeopardy inquiry. Id. That argument, however, would have been fruitless, and Petitioner's claim of ineffective assistance accordingly fails.

As an initial matter, any claim that appellate counsel was ineffective for not raising a challenge to Petitioner's robbery and kidnapping convictions under Mendoza v. State, 122 Nev. 267, 274-75, 130 P.3d 176, 180 (2006), is belied by the record, as this claim was raised on direct appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Moreover, Petitioner cannot show that he would have been prejudiced even if the claim was not raised because this issue was squarely rejected by the Nevada Supreme Court in a published opinion. Stewart, __ Nev. __, __, 393 P.3d 685, 687-88 (2017). "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.

Petitioner's claims under the double jeopardy clause are similarly meritless. The prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." Peck v. State, 116 Nev.

840, 847, 7 P.3d 470, 475 (2000); citing State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998); see also Gordon v. District Court, 112 Nev. 216, 220, 913 P.2d 240, 243 (1996). Petitioner alleges that his appellate counsel should have argued that his convictions violate the Double Jeopardy Clause under the third abuse. This fails.

To determine whether two statutes penalize the "same offence," the Nevada Supreme Court applies the test articulated in *Blockburger v. United States*.[2] Jackson v. State, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012). The *Blockburger* test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." Id. (quoting *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993)).

Applying Blockburger, Burglary, Robbery, and First-degree Kidnapping cannot properly be called the same offence as each requires an element not contained in the other. Burglary requires that a criminal enter a building with the intent to commit an enumerated felony. NRS 205.060(1). Like burglary, kidnapping is a specific intent crime, requiring that a person who " seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever" have the intent to "old or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act." NRS 200.310. Robbery requires the taking of personal property "by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the person or property of a member of his or her family, or of anyone in his or her company at the time of the robbery." NRS 200.380. Because

[2] 284 U.S. 299, 304, 52 S.Ct. 180 (1932).

these elements are unique to their respective crimes, any argument that the charges raised against Petitioner violated Double Jeopardy would have failed. Counsel was not ineffective for failing to raise a meritless claim. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For this same reason, Petitioner cannot show that he was prejudiced by his counsel's decision to not challenge the charges. Any challenge would have failed, and the results of Petitioner's trial would have been the same. Furthermore, Petitioner has failed to show that he would have gained a more favorable standard of review had his appellate counsel federalized the arguments, further weighing against a finding of prejudice. See Browning v. State, 120 Nev. 347, 365, 91 P.3d 39, 52 (2004); see also Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

Because a claim under the Double Jeopardy Clause would have been meritless, Petitioner has failed to show that his counsel was ineffective for raise it. This claim is, thus, denied.

3. Petitioner's claim that trial counsel was ineffective for failing to investigate LVMPD's forensic policies is suitable only for summary denial

Petitioner's next claim is that his trial counsel was ineffective for failing to investigate LVMPD's forensic policies, but Petitioner has not shown what investigating these policies would have done to affect the outcome of his case. Instead, he makes only the bare and naked assertion that there is a "reasonable likelihood of a different result." First Supp. Pet. at 23.

Petitioner's self-serving claim is wholly unsupported and therefore insufficient to demonstrate either prong of Strickland. Petitioner alleges that "touch DNA" could have been found to demonstrate his innocence. First Supp. Pet. at 25-26. He further alleges that he "expects to find" that the database against which the fingerprints were ran would "produce numerous candidates" but this is a bare and naked assertion which is flatly belied by the record:

> Q ... [W]as there only one potential match that you came up with in this case?
> A In this case, yes.
> Q And that was to Tommy Stewart?
> A Correct

Tr. Transcript (Mar. 15, 2016) at 40; First Supp. Pet. at 28. Furthermore, 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, and Petitioner has failed to make that showing. Molina, 120 Nev. at 192, 87 P.3d at 538.For these reasons, this claim is suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

4. Petitioner's claim that trial counsel was ineffective for failing to allege that the State did not gather evidence is suitable only for summary denial

Petitioner next claims that his trial counsel was ineffective for failing to challenge the State's "failure to preserve evidence and or the State's destruction of touch DNA evidence." First Supp. Pet. at 31.

This claim fails to show that counsel was ineffective because it is based on the naked assertion—unsupported by a single citation to the record—that the State either actively destroyed or passively failed to preserve or gather evidence. As such, it should be summarily denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Petitioner cannot show either deficient performance or prejudice with this naked assertion. Generally, law enforcement officials have no duty to collect all potential evidence. Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). To challenge the professional discretion of law enforcement regarding the decision whether to gather evidence, a defendant must meet a two-prong test. Id. First, a defendant must show that the evidence was constitutionally "material," meaning that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceeding would have been different. Id.; Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). If the ungathered evidence is found material, this Court must then determine whether the failure to gather the evidence was the result of mere negligence, gross negligence, or bad faith. Daniels, 114 Nev. at 267, 956 P.2d at 115.

Dismissal is only appropriate where the failure to gather was due to bad faith. Id. As for evidence which was gathered and subsequently lost or destroyed, the Nevada Supreme Court has held that "the test for reversal on the basis of lost evidence requires appellant to show either 1) bad faith or connivance on the part of the government, Or 2) prejudice from its

loss." Crockett v. State, 95 Nev. 859, 865, 603 P.2d 1078, 1081 (1979).

Petitioner has failed to show that his counsel was ineffective because he has failed to show that the State destroyed, lost, or failed to gather evidence. The State introduced evidence of the fingerprints taken from a jewelry box at trial. Tr. Transcript (Mar. 15, 2016) at 9-15, 26-27. The prints were placed on "latent print cards." Id. at 12. Those prints were examined and ran through a database which returned several of Petitioner's known prints. Id. at 26-27. Petitioner's known prints were then manually compared with the prints found on the coin bank. Id. at 28-29. Petitioner's prints from the database were also admitted as evidence for the jury to make an independent comparison. Id. Because the jury was presented with evidence of the fingerprints, his claim that they were lost or destroyed is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. There is nothing in the record or in the First Supplemental Petition to suggest that touch DNA ever existed at the crime scene. Instead, the investigator testified that fingerprints are not always left even when something is touched and that a person's skin condition could determine whether he or she leaves a fingerprint at all. Tr. Transcript (Mar. 15, 2016) at 22.

When, as here, a petitioner contends his attorney was ineffective because he did not adequately investigate, 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. Petitioner has not made this required showing here because his claim is unsupported by any record citation to show that (1) Petitioner left touch DNA at the scene; (2) the State failed to gather it; or (3) that if the State did gather the touch DNA, it later lost or destroyed it. Hargrove, 100 Nev. at 502, 686 P.2d at 225. This entire claim is based on speculation, and Petitioner has therefore failed to demonstrate either deficient performance or prejudice.

Furthermore, even assuming for the sake of argument that there was touch DNA which could have been found, Petitioner still would not be able to demonstrate that he was prejudiced because he ultimately confessed to the crimes which were committed. Even if touch DNA had been found, it would neither have rebutted Petitioner's valid confession nor the fingerprint which was entered into evidence at trial. At most, the presence of touch DNA would have

meant that the box had been touched at some undefined point by someone else.

Petitioner has failed to make more than a bare assertion that his counsel was ineffective because he failed to investigate whether there was touch DNA which the State failed to gather. Without more, this claim fails and is denied.

5. Trial Counsel's decision to not call an expert witness is a virtually unchallengeable strategic decision

Petitioner next argues that his counsel was ineffective for "not consulting or hiring an expert to review the collection, testing or conclusion of the State's analysis and conclusion related to the fingerprint on the jewelry box" and not having the fingerprint independently tested. First Supp. Pet. at 33. He further claims that independent testing of the fingerprints would have proven that the fingerprints were not his. Id. As with Petitioner's other claims, this is a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Beyond this, however, Petitioner cannot show that his counsel was ineffective for failing to call an expert. Counsel has the primary responsibility of determining what witnesses to call. Rhyne, 118 Nev. at 8, 38 P.3d at 167. This determination is strategic and virtually unchallengeable. Doleman, 112 Nev. at 848, 921 P.2d at 281.

Beyond this, however, it is unclear what an independent expert would have found that would have changed the outcome of Petitioner's case. At the heart of Petitioner's claim is a challenge to the investigation conducted by his attorney. 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, 120 Nev. at 192, 87 P.3d at 538. This Petitioner fails to do. Petitioner alleges that an independent investigator could have compared his fingerprints and DNA with that found on the jewelry box, but then makes only the bare, naked assertion that the investigation would have "impeached" the State's case by showing that the fingerprints were not his. First Supp. Pet. at 33. This assertion, without more, is insufficient to demonstrate prejudice—it is asking this Court to speculate about the independent findings of a yet-to-be-identified expert witness. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Furthermore, this claim, like previous claims,

fails to show prejudice because Petitioner's confession, which the jury heard at trial, was independently sufficient to support his conviction.

Because this claim is based only on the bare, naked assertions that another investigation would have rebutted the State's case, it should is denied.

6. Neither trial nor appellate counsel were ineffective for failing to challenge the testimony of the fingerprint expert who conducted the initial report

Petitioner next complains that his trial and appellate counsel were ineffective for failing to challenge evidence that a non-testifying expert agreed with the testifying expert's findings. First Supp. Pet. at 35-37. These claims fail for several reasons. Petitioner has failed to show either deficient performance or prejudice from his trial counsel's decision to not object. Petitioner claims that his rights under the Confrontation Clause as interpreted in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309-10, 129 S. Ct. 2527, 2531 (2009) were violated. First Supp. Pet. at 35-36. The record belies this claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

"An expert witness testifying about the contents of a report prepared by another person who did not testify 'effectively admit[s] the report into evidence,' and violates the Confrontation Clause, unless the testifying expert only presents independent opinions based on the report's data" Kiles v. State, Docket No. 72726, 433 P.3d 1257 (Order of Affirmance, Jan. 31, 2019) (unpublished) (citing *Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010)).

Here, the State called Heather Gouldthorpe, a forensic scientist at the Las Vegas Metropolitan Police Department Forensic Lab in the Latent Print Unit, to testify. Tr. Trial (Day 2) at 20. She explained the process by which she determined that a fingerprint left at the scene was Petitioner's. Id. at 20-26. She first ran prints from the crime scene through the Automated Fingerprint Identification System (AFIS). Id. at 20, 24, 27. In this case, she ran three fingerprints through AFIS. Id. at 24. One of them returned Petitioner's name as the only potential hit. Id. at 24, 27, 40. Once the database returned Petitioner's previously filed prints, Gouldthorpe performed a "manual comparison" to verify if there is a match. Id. at 27. On cross

examination, she described how she manually compared the prints:

> So, what I do is I get the latent prints and I get the exemplar prints or known prints and then I look at the data in the latent print and I look at -- I find a area that I target as my initial target group, my initial search area, and then I look at the ridges and see if I can find any corresponding ridge details and ridge endings in the known prints. When I do find correspondence I then, basically, I just go ridge by ridge and I look at all the details and see if I have enough to come to a correct conclusion. And once I do have enough information then I can, if I have enough that corresponds, then I can issue a conclusion of identification.

Id. at 33.

At the end of that process, she reached a conclusion and wrote a report indicating that her manual comparison resulted in a match—the fingerprint was Petitioner's. Id. at 27, 30. She then sent for verification and "technical review by another forensic scientist in the unit." Id. at 27. In this case, the technical review was performed by Kathryn Aoyama. Id. at 31. The results of Aoyama's technical review were never addressed at trial, and the jury was never told whether Aoyama's review confirmed or verified Gouldthorpe's findings. Petitioner seemingly acknowledges this by arguing that the mere introduction of testimony to suggest that a review was performed "inferenc[ed] by reference" a statement. Pet. at 35. Because the testing was completed by Gouldthorpe, and it was Gouldthorpe who testified, Melendez-Diaz was not violated. Trial counsel was not ineffective for failing to object to this meritless issue. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

Appellate counsel was not ineffective for failing to raise this claim on appeal. Because trial counsel had not objected at the time of the alleged error, it would have been subject to plain-error review on appeal. Vega, 126 Nev. at 340, 236 P.3d at 638 (reviewing an unpreserved Confrontation Clause claim for plain error). As addressed above, this claim would have been meritless at trial. Because there was no error committed at trial, Petitioner would have been unable to demonstrate plain error on appeal. Gouldthorpe testified in depth about the conclusions that she independently made following her manual comparison of fingerprints known to belong to Petitioner with those found at the scene of the crime on the jewelry box—they were a match. Tr. Trial (Day 2) at 27, 30. She never testified about the results of the

technical review or if her findings were verified, but even if she had, the results of the technical review would have been "either repetitive or inconsequential." Vega, 126 Nev. at 341, 236 P.3d at 638. She had drawn her conclusions and submitted a report prior to sending the prints to another analyst for a technical review, and she did not rely on any data prepared by Aoyama. Accordingly, even if this claim had been raised on appeal, it would have failed to demonstrate plain error. Counsel was not ineffective for failing to raise a meritless claim on appeal. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For these reasons, Grounds VII and VIII of the First Supplemental Petition are denied.

7. Trial counsel was not ineffective for failing to impeach Petitioner's confessions

Petitioner next claims that his trial counsel was ineffective for failing to either impeach his confession through an expert witness or seeking to suppress it. First Supp. Pet. at 38-39.

As an initial matter, trial counsel did seek to suppress Petitioner's statement in a Motion to Suppress. Mot. to Suppress (Mar. 7, 2016). As such, any claims to the contrary are belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent that Petitioner is saying that a motion was filed but failed to challenge the voluntary nature of his confession, this claim nevertheless fails, as the grounds to raise in the motion were strategic and virtually unchallengeable. Doleman, 112 Nev. at 846, 921 P.2d at 280.

To show ineffectiveness, Petitioner makes the bare and naked assertion that he was "high on alcohol, extasy and marijuana" when he gave his statement. First Supp. Pet. at 38. This self-serving claim is not supported by anything in the record. Accordingly, it cannot be used to show ineffective assistance. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Because the allegation that he was intoxicated is itself unsupported, Petitioner's claim that his trial counsel should have called an expert witness to testify about the effects of drugs at the time of the interview fails. Any expert testimony about what drugs can do to a person would have been irrelevant without first demonstrating that Petitioner was under the influence at the time. Trial counsel's performance was not deficient under these circumstances. Furthermore, counsel was not deficient because the theories and witnesses that an attorney

decides to present to the jury are virtually unchallengeable. Wainwright v. Sykes, 433 U.S. 72, 93, 97 S. Ct. 2497, 2510 (1977) (holding that counsel "has the immediate and ultimate responsibility of deciding ... which witnesses, if any, to call, and what defenses to develop); Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002); Doleman, 112 Nev. at 846, 921 P.2d at 280.

Not only does this claim rely on Petitioner's unsupported and self-serving assertion that he was intoxicated when he confessed, but it also seeks to challenge something which the Nevada Supreme Court has said is unchallengeable. Petitioner's claim is denied.

8. Neither Petitioner's Trial Counsel nor his Appellate Counsel were ineffective for failing to request an instruction on second-degree kidnapping

The only two claims properly before this Court are two interrelated claims of ineffective assistance raised by his appointed counsel in his Fifth Supplemental Petition. These claims allege that Petitioner was entitled to an instruction on second-degree kidnapping and that (1) trial counsel was ineffective for failing to request an instruction and (2) appellate counsel was ineffective for failing to raise the issue on appeal.[3] Fifth Supp. Pet. at 8-10. Each claim fails.

In Nevada, a defendant "may be found guilty ... of an offense *necessarily included* in the offense charged." NRS 175.501. The Nevada Supreme Court has long recognized that this statute entitles a defendant to an instruction on lesser-included offenses. Alotaibi v. State, 133 Nev. __, __, 404 P.3d 761, 764 (Nev. 2017) (en banc), cert. denied, 138 S. Ct. 1555 (2018) (citing Rosas v. State, 122 Nev. 1258, 1267–69, 147 P.3d 1101, 1108–09 (2006)).

To determine if an uncharged offense is a lesser-included offense of a charged offense, courts "apply the 'elements test' from Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932)." Id. Under Blockburger, an offense is "necessarily included in the charged offense if all of the elements of the lesser offense are included in the elements of the greater offense such that the offense charged cannot be committed without committing the lesser offense"

[3] These two claims—trial and appellate ineffective assistance claims for failing to seek a lesser-included jury instruction—are the subject of Petitioner's rogue Third and Fourth Supplemental Petitions, respectively. In this section, the State is responding to the claims in those filings as well.

Id. (internal citations and punctuations omitted).

Petitioner cites NRS 200.310 and then makes the naked assertion that all of the elements of second-degree kidnapping are included in first-degree kidnapping, boldly claiming that "[a]ny argument to the contrary is simply ridiculous." Fifth Supp. Pet. at 7. Yet despite Petitioner's conclusive statement, a close reading of the elements of second-degree kidnapping as defined by the legislature reveals that it has an element which first-degree kidnapping does not.

"It is axiomatic that the state must prove every element of a charged offense beyond a reasonable doubt." Watson v. State, 110 Nev. 43, 45, 867 P.2d 400, 402 (1994); see NRS 175.191. NRS 200.310 defines the elements which must be proved for both first- and second-degree kidnapping.

> It provides:
> 1. A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person, and a person who leads, takes, entices, or carries away or detains any minor with the intent to keep, imprison, or confine the minor from his or her parents, guardians, or any other person having lawful custody of the minor, or with the intent to hold the minor to unlawful service, or perpetrate upon the person of the minor any unlawful act is guilty of kidnapping in the first degree which is a category A felony.
> 2. A person who willfully and without authority of law seizes, inveigles, takes, carries away or kidnaps another person *with the intent to keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will,* is guilty of kidnapping in the second degree which is a category B felony.

Id. (emphasis added).

The emphasized mental element of second-degree kidnapping is not an element of first-degree kidnapping. The State here proved that Petitioner was guilty of first-degree kidnapping without ever needing to first prove that at the time he kidnapped the victim, he had the intent

to "keep the person secretly imprisoned within the State, or for the purpose of conveying the person out of the State without authority of law, or in any manner held to service or detained against the person's will." NRS 200.310(2). Instead, the State had to prove that Petitioner had the intent to "hold or detain, or who holds or detains, the person for ransom, or reward, or for the purpose of committing sexual assault, extortion or robbery upon or from the person, or for the purpose of killing the person or inflicting substantial bodily harm upon the person, or to exact from relatives, friends, or any other person any money or valuable thing for the return or disposition of the kidnapped person." Id. (1). Because each of the two degrees of kidnapping requires a separate and distinct mental state, second-degree kidnapping is not a lesser-included offense and Petitioner was not entitled to an instruction on second-degree kidnapping.

To be sure, the two crimes are related—they have nearly the same actus reus—but Petitioner's proffered reading of the statute requires this Court to either (1) read the mental state required to commit second-degree murder into NRS 200.310(1) when the Legislature has not included it; or (2) ignore the fact that a defendant's mental state is an element of the defense. Either reading is untenable. See Paramount Ins., Inc. v. Rayson & Smitley, 86 Nev. 644, 649, 472 P.2d 530, 533 (1970) (addressing the general rule that statutes are to be read to avoid surplusage). Because Blockburger requires *all* of the elements of an offense to be included in the greater offense, second-degree kidnapping cannot properly be called a lesser-included offense of first-degree kidnapping.

Because of this, trial counsel was not ineffective for failing to request an instruction on Second Degree Kidnapping. Any request would have been futile because the State introduced overwhelming evidence of several enumerated felonies as required by NRS 200.310. Failing to make futile objections is not deficient performance. Ennis, 122 Nev. at 706, 137 P.3d at 1103. The same reasoning preludes a finding of Strickland prejudice. Because any request to include an instruction on Second-Degree Kidnapping would have been denied under the facts of the instant case, Petitioner cannot now show that the outcome of his trial would have been different had his trial counsel requested the instruction.

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On the same note, the ineffective-assistance challenge which Petitioner raises in his Fourth Supplemental Petition—and which his counsel raises in the Fifth—against his appellate counsel for not challenging the jury instructions is meritless. Counsel made the reasonable decision to not raise a losing issue on appeal when there were other claims which potentially had merit. Petitioner's appellate counsel was not ineffective for the same reason as his trial counsel was not ineffective—second-degree kidnapping is not a lesser-included offense of first-degree kidnapping. The requisite mental states differ.

For these reasons, this Court finds the claims in Petitioner's Third through Fifth Supplemental Petitions for Writ of Habeas Corpus meritless and denies each.

B. Petitioner's other claims are procedurally barred because he failed to raise them on appeal

Petitioner claims that the State improperly withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 84 S.Ct. 1194 (1963) and that his right to a fair trial was violated because the jury did not receive proper instructions. First Supp. Pet. at 30, Second Supp. Pet. at 2-3. These claims should have been raised on appeal, and Petitioner's failure waived the claim for all subsequent habeas proceedings. NRS 34.724(2)(a); NRS 34.810(1)(b); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 nev. 148, 979 P.2d 222 (1999).

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings...[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, 110 Nev. at 752, 877 P.2d at 1059 (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, 117 Nev. at 646-47, 29 P.3d

at 523.

"[T]he statutory rules regarding procedural default are mandatory and cannot be ignored when properly raised by the State." State v. Dist. Ct. (Riker), 121 Nev. 225, 233, 112 P.3d 1070, 1075 (2005). In Riker, the Nevada Supreme Court reversed the district court's decision not to bar the defendant's untimely and successive petition:

> Given the untimely and successive nature of [defendant's] petition, the district court had a duty imposed by law to consider whether any or all of [defendant's] claims were barred under NRS 34.726, NRS 34.810, NRS 34.800, or by the law of the case . . . [and] the court's failure to make this determination here constituted an arbitrary and unreasonable exercise of discretion.

Id. at 234, 112 P.3d at 1076. The Court justified this holding by noting that "[t]he necessity for a workable system dictates that there must exist a time when a criminal conviction is final." Id. at 231, 112 P.3d 1074 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180–81, 69 P.3d 676, 681–82 (2003) (holding that parties cannot stipulate to waive, ignore or disregard the mandatory procedural default rules nor can they empower a court to disregard them).

Absent a showing of good cause and prejudice, Petitioner cannot overcome the procedural bar to his claim. See Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988).

"To establish good cause, [a petitioner] *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) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012).

To establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] 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)).

1. Petitioner has failed to show good cause or prejudice for failing to raise the Brady claim

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 v. State, 131 Nev. __, __, 351 P.3d 725, 728 (2015), cert. denied, __ U.S. __, 136 S.Ct. 2019 (2016) (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. Leslie, 131 Nev. at __, 351 P.3d at 729. Of importance to this matter, Brady violations cannot be premised upon speculation or hoped-for conclusions. Strickler v. Greene, 527 U.S. 263, 286, 119 S.Ct. 1936, 1950-51 (1999); Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

Further, the mere fact that information was known to the government and was not previously disclosed is insufficient to constitute good cause to overcome a procedural bar. In Williams, the High Court emphasized that the focus is on the defendant's diligence and not the availability of information:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence ... depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.

Williams, 529 U.S. 420, 434-35, 120 S.Ct. 1479, 1490 (2000).

McCleskey, Strickler, Banks and Williams make it clear that good cause to excuse a procedural default because of a Brady claim is not shown when the "newly discovered" information was reasonably available at an earlier date through a diligent investigation. This rule is clearly seen in the application of those cases by federal and state courts. In Bell v. Bell, 512 F.3d 223, 228-29, cert. denied, 555 U.S. 822, 129 S.Ct. 114 (6th Cir. 2008), one of the witnesses at trial was a convicted felon informant who was housed with the defendant. Prior to trial, the State did not disclose that the witness allegedly received favorable treatment on pending criminal charges and was requesting assistance with housing and prison conditions as well as parole eligibility. Id. The Sixth Circuit concluded that the public sentencing records and criminal history of the witness were reasonably available, and Bell had sufficient information to warrant further pre-trial or post-conviction discovery but failed to do so. Id. at 236-237. Bell concluded there could be no Brady violation and therefore no good cause because the information was available. Id.

In Matthews v. Ishee, 486 F.3d 883, 890-891 (6th Cir. 2007), witnesses allegedly received favorable plea bargains about two weeks after they testified. Matthews argued this was evidence of a pre-existing deal that should have been disclosed. Matthews, 486 F.3d at 884. Matthews asserted that because the prosecution argued there were no deals during closing argument, it was reasonable not to investigate as to the witness and due diligence was satisfied.

Id. at 890-891. The Court rejected this reasoning. Id. The Court noted the information was a matter of public record and information in Matthew's possession would lead a reasonable person to investigate further regardless of the closing arguments. Id. Because the claim was reasonably available, Brady did not apply and it did not constitute good cause to overcome the procedural bars. Id.

State courts with case law or statutes like Nevada's also hold that the failure of the prosecution to disclose information is not governmental interference or an external impediment that prevents counsel from filing a claim if the claim was reasonably available through due diligence. The Pennsylvania Supreme Court found Brady, Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763 (1972), and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959), claims were barred where defense failed to demonstrate they were not discoverable through due diligence at an earlier date. Commonwealth v. Breakiron, 781 A.2d 94, 98-100 (Penn. 2001). Likewise, the Florida Supreme Court held a Brady claim did not excuse procedural bars where the claim was reasonably discoverable through due diligence at an earlier date or proceedings. Bolender v. State, 658 So.2d 82, 84-85 (Fla. 1995). Accord, State v. Sims, 761 N.W.2d 527 (Neb. 2009) (timeliness determined from when defendant knows or should have known facts supporting claim); Graham v. State, 661 S.E. 2d 337 (S.C. 2008) (time runs from date petitioner knew or should have known of facts giving rise to claim).

Here, the State furthered its case against Petitioner by introducing evidence of a fingerprint taken from the crime scene which matched Petitioner's known fingerprints in a database. Tr. Transcript (Mar. 15, 2016) at 9-15, 26-29. Petitioner knew about the fingerprints at the time of trial, and he could have raised this claim on direct appeal. He cannot show good cause for failing to bring the claim then. Moreover, Petitioner has failed to demonstrate that he was prejudiced because his claim that Brady evidence existed and was withheld is nothing more than a bare and naked assertion without any support in the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The record is bare of any reference to touch DNA stemming from the investigation[4], and Petitioner cannot carry his burden under Brady by presenting this Court

[4] In fact, trial counsel explicitly relied on the lack of DNA evidence to further his defense

"with a mere hoped-for conclusion" that there was touch DNA available for the State to collect and that it would have been exculpatory had it been collected. Leonard, 117 Nev. at 68, 17 P.3d at 407.

Petitioner's bare claim that the State withheld exculpatory evidence under Brady is nothing more than a hoped-for conclusion which cannot demonstrate either good cause or prejudice to overcome prejudice, especially when considered with Petitioner's valid confession of the crimes. Therefore, Ground 4 of the First Supplemental Petition is denied.

2. Petitioner has failed to show good cause or prejudice for failing to raise the challenge to his jury instructions

Petitioner has similarly failed to show either good cause or prejudice for failing to raise his jury-instruction challenge.

The law and facts on which he relies were available to him at the time of direct appeal. The law mandating instruction on lesser-included offenses was last amended in 2007:

> The defendant may be found guilty or guilty but mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

NRS 175.501; *Rosas v. State*, 122 Nev. 1258, 1267–69, 147 P.3d 1101, 1108–09 (2006), abrogated on other grounds by Alotaibi v. State, 404 P.3d 761 (Nev. 2017), cert. denied, 138 S. Ct. 1555 (2018). Petitioner's failure to raise this claim which has been available to him throughout the course of trial precludes this Court's review.

Similarly, for the reasons listed above, Petitioner cannot show that he was prejudiced

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that there was no gun:

> Well, this is one of the guns that was found in addition to the other handgun which was a black semi-automatic handgun.
>
> Now I submit to you this is nothing more than a red herring. There's no DNA, there's no fingerprints. There's nothing to actually connect these two guns -- and mind you, there was not any testimony whatsoever throughout these proceedings that there was more than one gun.

Tr. Transcript (Day 3) at 17.

by this claim because Second Degree Kidnapping is not a lesser-included offense of First-Degree Kidnapping. Furthermore, even if this Court were to find error in the failure to include an instruction for false imprisonment, that error was not prejudicial because the Nevada Supreme Court has already found that there was enough evidence presented at trial to affirm his conviction for First Degree Kidnapping. Stewart, __ Nev. at __, 393 P.3d at 688.

Petitioner failed to raise this claim at the time of his direct appeal even though the necessary law and facts were available to him. As such, it is procedurally barred. Petitioner has failed to show good cause or prejudice to overcome the procedural bar, and for this reason, the sole claim raised in the Second Supplemental Petition is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING BECAUSE EACH OF HIS CLAIMS CAN BE RESOLVED USING THE CURRENT RECORD

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent *unless an evidentiary hearing is held.*
> 2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
> 3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

(emphasis added).

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the

record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 562 U.S. 86, 104-05, 131 S.Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision-making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S.Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S.Ct. 2052, 2065 (1994).

The record before the Court is sufficiently developed to address each of Petitioner's claims. As discussed, each claim is either meritless, unchallengeable, or procedurally barred. Furthermore, any remaining claims are belied by the record. For these reasons, this Court finds that an evidentiary hearing is not warranted and denies Petitioner's motion.

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ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and Request for Evidentiary Hearing shall be, and are, hereby denied.

DATED this 18th day of December, 2019.

DISTRICT JUDGE

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

BY
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I certify that on the 18th day of December, 2019, I mailed and e-mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

TRAVIS D. AKIN, ESQ.
E-Mail: travisakin8@gmail.com

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ELY STATE PRISON
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ELY, NEVADA 89301

BY
J. ROBERTSON
Secretary for the District Attorney's Office

15F02411X/JEV/jr/L-1

Clerk of the Courts
Steven D. Grierson

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

December 26, 2019 Case No.: C-15-305984-1

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 12/23/2019

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 8:29 AM on December 26, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT