THE State of Nevada
Plaintiff,
v.
TOMMY Stewart,
Defendant.

Case No C-15-305984-1
Dept No XXI

NOTICE OF APPEAL

TO: THE State of Nevada
STEVEN B. Wolfson, District Attorney, Clark County, Nevada
and Department NO XXI of The EIGHTH JUDICIAL
District court of The State of Nevada, IN and The
County of Clark.
Through and by his counsel Travis D. Akin, Esq.,
NOTICE is hereby given that, Defendant Tommy Stewart,
presently incarcerated in the Nevada Department of
Corrections, appeals to the Supreme Court of the State
of Nevada from the Judgment entered against Said
Defendant on the 23th day of April, 2019 whereby
he was denied his Post conviction appeal.
Dated this 1st day of Jan, 2020

Tommy Stewart #1048467
Tommy Stewart

TOMMY STEWART #1048467
P.O. BOX 1989
ELY, NV 89301

LAS VEGAS NV 890

02 JAN 2020 PM 3 L

USA FOREVER

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

89101-630000

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

STATE OF NEVADA,

Plaintiff(s),

vs.

TOMMY STEWART
aka TOMMY LAQUADE STEWART,

Defendant(s),

Case No: C-15-305984-1

Dept No: XXI

CASE APPEAL STATEMENT

1. Appellant(s): Tommy Stewart

2. Judge: Valeria Adair

3. Appellant(s): Tommy Stewart

Counsel:

Tommy Stewart #1048467
P.O. Box 1989
Ely, NV 89301

4. Respondent: The State of Nevada

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.

Las Vegas, NV 89101
(702) 671-2700

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

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

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

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

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: April 17, 2015

10. Brief Description of the Nature of the Action: Criminal

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

11. Previous Appeal: Yes

    Supreme Court Docket Number(s): 70069, 80084

12. Child Custody or Visitation: N/A

Dated This 7 day of January 2020.

Steven D. Grierson, Clerk of the Court

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

cc: Tommy Stewart

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. C-15-305984-1

State of Nevada
vs
Tommy Stewart

§	Location:	**Department 21**
§	Judicial Officer:	**Adair, Valerie**
§	Filed on:	**04/17/2015**
§	Case Number History:	
§	Cross-Reference Case Number:	**C305984**
§	Defendant's Scope ID #:	**2731067**
§	ITAG Case ID:	**1668281**
§	Lower Court Case # Root:	**15F02411**
§	Lower Court Case Number:	**15F02411X**
§	Supreme Court No.:	**70069** **80084**

CASE INFORMATION

Offense	Statute	Deg	Date
1. CONSPIRACY TO COMMIT ROBBERY Arrest: 02/14/2015	200.380	F	01/20/2015
2. BURGLARY	205.060.2	F	01/20/2015
Filed As: BURGLARY WHILE IN POSSESSION OF A FIREARM	F	4/24/2015	
3. ROBBERY	200.380	F	01/20/2015
Filed As: ROBBERY WITH USE OF A DEADLY WEAPON	F	4/24/2015	
4. FIRST DEGREE KIDNAPPING	200.310.1	F	01/20/2015
Filed As: FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON	F	4/24/2015	

Case Type: **Felony/Gross Misdemeanor**

Case Status: **05/13/2016 Closed**

Statistical Closures
05/13/2016 Jury Trial - Conviction - Criminal

DATE — CASE ASSIGNMENT

Current Case Assignment

Case Number	C-15-305984-1
Court	Department 21
Date Assigned	03/14/2016
Judicial Officer	Adair, Valerie

PARTY INFORMATION

		Lead Attorneys
Defendant	**Stewart, Tommy**	**Pro Se**
Plaintiff	**State of Nevada**	**Wolfson, Steven B** 702-671-2700(W)

DATE — EVENTS & ORDERS OF THE COURT — INDEX

EVENTS

04/17/2015 Criminal Bindover
Criminal Bindover

04/24/2015 Information
Information

05/05/2015 Transcript of Proceedings

Reporter's Transcript of Preliminary Hearing 04/16/15

05/20/2015 Motion to Compel
Defendant's Motion to Compel Disclosure of Brady Material

05/22/2015 Notice of Witnesses and/or Expert Witnesses
Notice of Expert Witnesses

05/26/2015 Response
State's Response to Defendant's Motion to Compel Disclosure of Brady Material

05/26/2015 Motion to Continue
Notice of Motion and Motion to Continue

05/29/2015 Opposition
Opposition to State's Motion to Continue

06/03/2015 Notice
Notice of Intent to Seek Punishment as a Habitual Criminal

06/05/2015 Notice of Witnesses and/or Expert Witnesses
Notice of Witnesses

06/08/2015 Petition for Writ of Habeas Corpus
Petition for Writ of Habeas Corpus ad Subjugation

06/09/2015 Motion
Motion to Exclude Irrelevant and Prejudicial Evidence

06/10/2015 Ex Parte
Ex Parte Motion and Order for Release of Evidence

06/17/2015 Order for Petition for Writ of Habeas Corpus

03/07/2016 Motion to Suppress
Motion to Suppress Defendant's Statement

03/08/2016 Opposition
State's Opposition to Defendant's Motion to Suppress Defendant's Statement

03/09/2016 Opposition to Motion
State's Opposition to Defendant's Motion to Suppress Defendant's Statement

03/14/2016 Jury List

03/17/2016 Order
Order Denying Defendant's Motion to Suppress Defendant's Statement

03/17/2016 Instructions to the Jury

03/17/2016 Verdict

03/17/2016	Amended Jury List
03/28/2016	Notice of Appeal (criminal)
03/30/2016	Case Appeal Statement *Case Appeal Statement*
04/21/2016	Notice of Rescheduling *Notice of Rescheduling of Hearing*
04/27/2016	Application to Proceed in Forma Pauperis Filed By: Defendant Stewart, Tommy
05/02/2016	PSI
05/02/2016	PSI - Victim Impact Statements
05/12/2016	Criminal Order to Statistically Close Case *Criminal Order to Statistically Close Case*
05/17/2016	Judgment of Conviction *JUDGMENT OF CONVICTION (JURY TRIAL)*
05/19/2016	Notice of Appeal (criminal) *Notice of Appeal*
05/19/2016	Case Appeal Statement *Case Appeal Statement*
05/31/2016	Request *Appellant's Request for Rough Draft Transcripts*
07/05/2016	Recorders Transcript of Hearing *RE: Rough Draft Partial Trial Transcript Day 1 and Motion Argument*
07/05/2016	Recorders Transcript of Hearing *RE: Rough Draft Transcript Day 2 Partial Jury Trial Transcript and Motion Argument*
06/08/2017	Notice of Motion *Notice of Motion*
06/08/2017	Memorandum *Memorandum*
06/08/2017	Notice of Motion *Notice of Motion*
06/08/2017	Motion *Motion to Withdraw Counsel*

06/08/2017 Motion
Motion for Production of Documents, Papers, Pleadings and Tangible Property of Defendant

06/12/2017 NV Supreme Court Clerks Certificate/Judgment - Affirmed
Nevada Supreme Court Clerk's Certificate Judgment - Affirmed

07/18/2017 Proof of Service
Proof Of Service Of Defendant's File

07/26/2017 Order
Filed By: Plaintiff State of Nevada
Order Granting Defendant's Motion for Production of Document Papers, Pleadings and Tangible Property of Defendant

08/02/2017 Motion
Filed By: Defendant Stewart, Tommy
Motion to Compel Cousel, Jess Marchese ESQ. to Produce All Documents, Papers, Pleadings and Tangible Property to Petitioner Tommy Stewart

09/19/2017 Memorandum
Filed By: Defendant Stewart, Tommy
Memorandum

10/25/2017 Motion
Filed By: Defendant Stewart, Tommy
Second Motion to Compel Counsel, Jess Marchese ESQ to Produce all Document Papers, Pleadings and Tangible Property to Petitioner Tommy Stewart

12/07/2017 Notice of Motion
Filed By: Defendant Stewart, Tommy
Notice of Motion

12/07/2017 Notice of Motion
Filed By: Defendant Stewart, Tommy
Notice of Motion and Motion for Transcripts at State Expense

12/22/2017 Recorders Transcript of Hearing
Recorder's Partial Transcript Jury Trial Day 1 - Opening Statements. Heard March 14, 2016

12/28/2017 Recorders Transcript of Hearing
Recorder's Partial Transcript Jury Trial Day 3 - Closing Arguments. Heard March 16, 2016

12/28/2017 Recorders Transcript of Hearing
Recorder's Transcript of Hearing: Sentencing. Heard May 10, 2016

01/09/2018 Filed Under Seal
Filed By: Defendant Stewart, Tommy
Financial Certificate

01/24/2018 Order for Production of Inmate
Party: Plaintiff State of Nevada
Order for Production of Inmate

02/20/2018 Order
Filed By: Plaintiff State of Nevada
Order Denying and Granting in Part Defendant's Pro Per Motion for Transcripts at State Expense

04/04/2018 Order Transferring Jurisdiction
Filed by: Defendant Stewart, Tommy
Order Transferring Jurisdicition to the Eighth Judicial District Court

04/13/2018 Order for Petition for Writ of Habeas Corpus

04/25/2018 Motion for Appointment
Filed By: Defendant Stewart, Tommy
Motion for the Appointment of Counsel

06/01/2018 Response
Filed by: Plaintiff State of Nevada
State's Response to Defendant's Petition for Writ of Habeas Corpus (Post-Conviction)

06/06/2018 Petition for Writ of Habeas Corpus
Filed by: Defendant Stewart, Tommy
Petitioners 1st Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)

06/06/2018 Motion for Appointment
Filed By: Defendant Stewart, Tommy
Motion to Appoint Counsel Request for Evidentiary Hearing

06/14/2018 Petition
Filed by: Defendant Stewart, Tommy
Petitioner's Second Supplemental Petition for A Writ of Habeas Corpus (post conviction)

06/27/2018 Opposition
Filed By: Plaintiff State of Nevada
State's Opposition to Defendant's Motion for the Appointment of Counsel and Request for Evidentiary Hearing

07/18/2018 Petition
Filed by: Defendant Stewart, Tommy
Petitioner's 3rd Supplemental Petition for a Writ of Habeas Corpus (Post Conviction)

07/27/2018 Petition
Filed by: Defendant Stewart, Tommy
Petitioner's 4th Supplemental Petition for a Writ of Habeas Corpus (Post Conviction)

10/30/2018 Motion
Filed By: Defendant Stewart, Tommy
Motion for Extension

12/29/2018 Motion
Filed By: Defendant Stewart, Tommy
Motion for Extension (Second)

02/20/2019 Supplemental
Filed by: Defendant Stewart, Tommy
Supplemental Petition for Post-Conviction Writ of Habeas Corpus

04/03/2019 Response
Filed by: Plaintiff State of Nevada
State's Response to Defendant's First Through Fifth Supplemental Petition for Writ of Habeas Corpus

11/06/2019 Notice of Appeal (criminal)
Notice of Appeal

11/19/2019 Case Appeal Statement
Filed By: Defendant Stewart, Tommy
Case Appeal Statement

12/02/2019 Motion
Filed By: Defendant Stewart, Tommy
Motion for Withdrawal of Attorney of Record or in the Alternative Request for Records/Court Case Documents

12/02/2019 Notice of Motion
Filed By: Defendant Stewart, Tommy

12/02/2019 Motion for Appointment of Attorney
Filed By: Defendant Stewart, Tommy
Ex Parte Motion for Appointment of Counsel

12/23/2019 Finding of Fact and Conclusions of Law
Filed By: Plaintiff State of Nevada
Findings of Fact, Conclusions of Law, and Order

12/26/2019 Notice of Entry
Filed By: Plaintiff State of Nevada
Notice of Entry of Findings of Fact, Conclusions of Law, and Order

01/06/2020 Notice of Appeal (criminal)
Notice of Appeal

01/07/2020 Case Appeal Statement
Filed By: Defendant Stewart, Tommy
Case Appeal Statement

DISPOSITIONS

05/04/2015 **Plea** (Judicial Officer: Adair, Valerie)

1. CONSPIRACY TO COMMIT ROBBERY
   Not Guilty
   PCN: Sequence:

2. BURGLARY WHILE IN POSSESSION OF A FIREARM
   Not Guilty
   PCN: Sequence:

3. ROBBERY WITH USE OF A DEADLY WEAPON
   Not Guilty
   PCN: Sequence:

4. FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON
   Not Guilty
   PCN: Sequence:

05/10/2016 **Disposition** (Judicial Officer: Adair, Valerie)
1. CONSPIRACY TO COMMIT ROBBERY
Guilty
PCN: Sequence:

2. BURGLARY
Guilty
PCN: Sequence:

3. ROBBERY
Guilty
PCN: Sequence:

4. FIRST DEGREE KIDNAPPING
Guilty
PCN: Sequence:

05/10/2016 **Adult Adjudication** (Judicial Officer: Adair, Valerie)
1. CONSPIRACY TO COMMIT ROBBERY
01/20/2015 (F) 200.380 (DC50147)
PCN: Sequence:

Sentenced to Nevada Dept. of Corrections
Term: Minimum:13 Months, Maximum:60 Months

05/10/2016 **Adult Adjudication** (Judicial Officer: Adair, Valerie)
2. BURGLARY
01/20/2015 (F) 205.060.2 (DC50424)
PCN: Sequence:

Sentenced to Nevada Dept. of Corrections
Term: Minimum:22 Months, Maximum:96 Months
Concurrent: Charge 1

05/10/2016 **Adult Adjudication** (Judicial Officer: Adair, Valerie)
3. ROBBERY
01/20/2015 (F) 200.380 (DC50137)
PCN: Sequence:

Sentenced to Nevada Dept. of Corrections
Term: Minimum:8 Years, Maximum:20 Years
Concurrent: Charge 2
Comments: Sentenced under the Small Habitual Criminal Statute

05/10/2016 **Adult Adjudication** (Judicial Officer: Adair, Valerie)
4. FIRST DEGREE KIDNAPPING
01/20/2015 (F) 200.310.1 (DC50051)
PCN: Sequence:

Sentenced to Nevada Dept. of Corrections
Term: Life with the possibility of parole after:5 Years
Concurrent: Charge 3
Credit for Time Served: 452 Days
Fee Totals:

Administrative Assessment Fee $25	25.00
Genetic Marker Analysis AA Fee $3	3.00

Fee Totals $ 28.00
COURT FURTHER ORDERED, the $150.00 DNA Analysis fee including testing to determine genetic markers Waived, if previously collected.

HEARINGS

05/04/2015 **Initial Arraignment** (9:30 AM) (Judicial Officer: De La Garza, Melisa)
Plea Entered;
Journal Entry Details:
Genevieve Craggs, Certified Law Student, present for the State of Nevada. DEFT. STEWART ARRAIGNED, PLED NOT GUILTY, and INVOKED the 60-DAY RULE. COURT ORDERED, matter set for trial. COURT ORDERED, pursuant to Statute, Counsel has 21 days from today for the filing of any Writs; if the Preliminary Hearing Transcript has not been filed as of today, Counsel has 21 days from the filing of the Transcript. CUSTODY 6/10/15 8:00 A.M. CALENDAR CALL (DEPT 8) 6/15/15 9:30 A.M. JURY TRIAL (DEPT 8) ;

06/01/2015 **Motion to Compel** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Defendant's Motion to Compel Disclosure of Brady Material
Motion Granted;
Journal Entry Details:
COURT ORDERED, Brady and statutory GRANTED. Ms. Ross stated there were two specific items she requested. Ms. Ross stated she received the photographs used during the interview on Friday. However, she was still waiting for the lift card of the fingerprint. State advised she would issue an administrative subpoena for the lift card. Ms. Ross stated she would meet with State to do a file review if there was anything outstanding. COURT SO NOTED. CUSTODY ;

06/03/2015 **Motion to Continue** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
State's Motion to Continue
Motion Granted;
Journal Entry Details:
COURT ORDERED, Motion to Continue DENIED; trial date extended as Court's calendar was full between now and the 24th. Ms. Ross stated Defendant invoked his speedy trial rights and she was in the process of hiring an expert witness. If Defendant waived his speedy trial right she would be requesting a continuance. Upon Court's inquiry, Defendant stated he does not wish to waive his right to a speedy trial. COURT ORDERED, trial date VACATED and RESET; counsel to start picking a jury on the 25th. CUSTODY 6/25/15 8:00 AM JURY TRIAL ;

06/10/2015 **Calendar Call** (8:00 AM) (Judicial Officer: Becker, Nancy)
Matter Heard;
Journal Entry Details:
Court noted this matter has a firm setting of June 25, 20015. Ms. Ross stated she was not ready to proceed; the State just filed a Notice of Habitual Criminal Treatment and she still had outstanding evidence. Ms. Ross further stated Defendant has not waived his right to a speedy trial. Ms. Lexis stated the Court informed Defendant that his lawyer was not ready to proceed to trial; the Court asked Defendant if he would waive his right to a speedy trial and he refused. Ms. Lexis stated as to the Motion in Limine she was not planning on introducing that evidence at this point; therefore, it was moot. State advised it was her understanding counsel has everything except the fingerprint lift card; it was subpoenaed and she will make it available as soon as possible. Court advised the Information was filed in April; clearly that would not be a speedy right violation. Court informed the Defendant a speedy trial does not mean he can go to trial in 60 days. It means he can go to trial in a reasonable amount of time based upon each case. Court advised there was no requirement Defendant be required to waive his speedy trial rights to continue the trial; the only issue was if the continuance was warranted. Based on representations, COURT ORDERED, trial date VACATED and RESET. Court advised the State if their officer was not available to place the matter back on calendar within the next week. CUSTODY 7/29/15 8:00 AM CALENDAR CALL 8/3/15 9:30 AM JURY TRIAL ;

06/15/2015 *CANCELED* **Jury Trial** (9:30 AM) (Judicial Officer: Smith, Douglas E.)
Vacated

06/22/2015 **Motion** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Motion to Exclude Irrelevant and Prejudicial Evidence
Motion Granted; Defendant's Motion to Exclude Irrelevant and Prejudicial Evidence
Journal Entry Details:

Ms. Ross advised State indicated they are not opposing the motion and do not intend to illicit testimony regarding pawn shops and requested motion be granted. Ms. Lexis concurred. COURT ORDERED, Motion GRANTED.

CUSTODY;

06/22/2015 **Minute Order** (9:00 AM) (Judicial Officer: Smith, Douglas E.)
Order for Petition for Writ of Habeas Courpus
Vacate; Order Re: June 17, 2015 Order for Petition for Writ of Habeas Corpus
Journal Entry Details:
Defendant in this case filed a Petition for Writ of Habeas Corpus. The Court signed an order that ordered the State to respond to Defendant s petition and set a hearing. However, after speaking to counsel for both parties, it is the Court s understanding that Defendant is currently represented by the Public Defender s Office and yet filed the petition himself without going through counsel. Therefore, the Court finds the petition was improperly filed and Defendant needs to file motions through his attorney. Defendant s counsel now has a copy of the petition and will decide how the defense will choose to proceed with the petition. COURT ORDERED, its June 17, 2015 order requiring the State to respond to Defendant s petition VACATED. Furthermore, COURT ORDERED, the August 10, 2015 hearing VACATED. CLERK'S NOTE: The above minute order has been distributed to: Tierra Jones at tierra.jones@clarkcountyda.com; Katrina Ross at katrina.ross@clarkcountynv.gov. /lg 6-22-15 ;

06/25/2015 *CANCELED* **Jury Trial** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Vacated

07/29/2015 **Calendar Call** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Matter Heard;
Journal Entry Details:
Following Conference at the Bench, COURT ORDERED, Public Defender WITHDRAWN due to a conflict of interest. State advised they would have been ready to go to trial. COURT ORDERED, trial date VACATED and matter SET for status check. CUSTODY 8/12/15 8:00 AM STATUS CHECK: APPOINTMENT OF COUNSEL ;

08/03/2015 *CANCELED* **Jury Trial** (9:30 AM) (Judicial Officer: Smith, Douglas E.)
Vacated

08/10/2015 *CANCELED* **Petition for Writ of Habeas Corpus** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Vacated

08/12/2015 **Status Check** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
STATUS CHECK: APPOINTMENT OF COUSNEL / RESET TRIAL
Matter Heard;
Journal Entry Details:
Mr. Marchese accepted appointment of counsel; Public Defender WITHDRAWN. Ms. Ross provided a copy of the file to Mr. Marchese. COURT ORDERED, trial date VACATED and RESET. CUSTODY 3/2/16 8:00 AM CALENDAR CALL 3/14/16 9:30 AM JURY TRIAL ;

03/02/2016 **Calendar Call** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Matter Heard;
Journal Entry Details:
The State announced ready for no more than four Trial days and five to eight witnesses (one out of state). Mr. Marchese agreed. COURT ORDERED, Trial date VACATED and matter REFERRED to OVERFLOW. CUSTODY 3/11/16 8:30 AM OVERFLOW IN DC 18 (8) / 4 TRIAL DAYS / 5-8 WITNESSES, ONE OUT OF STATE;

03/09/2016 **At Request of Court** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Motion to Suppress Defendan's Statement

MINUTES
Motion Denied;
Journal Entry Details:
State's Opposition to Defendant's Motion to Suppress Defendant's Statement FILED IN OPEN COURT Ms. Jones advised Mr. Marchese was in Henderson. COURT ORDERED, Motion DENIED; Overflow date of 3/11/2016 STANDS. State to prepare findings of fact and conclusions of law consistent with their opposition. CUSTODY;

03/11/2016 **Overflow** (8:30 AM) (Judicial Officer: Barker, David)
OVERFLOW IN DC 18 (8): A.LEXIS/J.MARCHESE / 4 TRIAL DAYS / 5-8 WITNESSES, ONE OUT OF STATE

Trial Date Set;
Journal Entry Details:
Court confirmed trial will take 4 days with 5 - 8 witnesses, one out of state. COURT ORDERED, matter SET for trial. CUSTODY 3/14/16 9:00 AM JURY TRIAL - DC 21;

03/14/2016 *CANCELED* **Jury Trial** (9:00 AM) (Judicial Officer: Adair, Valerie)
Vacated - per Secretary

03/14/2016 **Jury Trial** (9:00 AM) (Judicial Officer: Adair, Valerie)
03/14/2016-03/16/2016
Trial Continues;
Trial Continues;
Trial Continues;
Journal Entry Details:
IN THE PRESENCE OF THE JURY. Defense RESTED. The Court instructed the jury on the law of the case. Closing arguments by Ms. Jones. Closing arguments by Mr. Marchese. Closing arguments by Ms. Lexis. At the hour of 11:55 AM the jury retired to deliberate. Evening recess. MATTER CONTINUED.;
Trial Continues;
Trial Continues;
Trial Continues;
Journal Entry Details:
Testimony and exhibits presented per worksheet. The Stated RESTED. OUTSIDE THE PRESENCE OF THE JURY. The Court admonished the defendant regarding his constitutional right to not be compelled to testify on his own behalf. Argument by Mr. Marchese regarding the weapon in the Corolla. Ms. Jones stated it goes to identification and is absolutely relevant. COURT FINDS, it ties the defendant in with the gun used in the crime. Jury instructions settled on the record. Evening recess. MATTER CONTINUED.;
Trial Continues;
Trial Continues;
Trial Continues;
Journal Entry Details:
IN THE PRESENCE OF THE JURY. Introductions by counsel. Roll of jurors called by the clerk. Jury selected and SWORN. Information read by the clerk. Opening statements by Ms. Tierra. Mr. Marchese WAIVED opening statements. Testimony and exhibits presented per worksheet. Evening recess. MATTER CONTINUED.;

03/14/2016 *CANCELED* **Jury Trial** (9:30 AM) (Judicial Officer: Smith, Douglas E.)
Vacated - per Judge

03/16/2016 *CANCELED* **Jury Trial** (10:00 AM) (Judicial Officer: Adair, Valerie)
Vacated - per Secretary

03/17/2016 **Jury Trial** (9:00 AM) (Judicial Officer: Adair, Valerie)
Verdict for Plaintiff;
Journal Entry Details:
At the hour of 12:10 PM the jury returned with the following verdict. Count 1 - Guilty of Conspiracy to Commit Robbery; Count 2 - Guilty of Burglary; Count 3 - Guilty of Robbery; Count 4 - Guilty of First Degree Kidnapping. COURT ORDERED, matter referred to the Division of Parole and Probation for a presentence investigation report and SET for SENTENCING. FURTHER, defendant REMANDED without bail. CUSTODY 5/5/16 9:30 AM SENTENCING;

03/28/2016 *CANCELED* **Motion to Suppress** (8:00 AM) (Judicial Officer: Smith, Douglas E.)
Vacated - Duplicate Entry
Motion to Suppress Defendant's Statement

05/10/2016 **Sentencing** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant Sentenced;
Journal Entry Details:
Colloquy regarding Deft's Pre-Sentence Investigation (PSI) Report. Arguments by counsel. Certified copies of Judgments of Conviction given to the Court by Ms. Lexis were marked and admitted as a State's Exhibit. DEFT STEWART ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT ROBBERY (F), COUNT 2 - BURGLARY (F), COUNT 3 - ROBBERY (F), and COUNT 4 - FIRST DEGREE KIDNAPPING (F). COURT ORDERED, in addition to the $25.00 Administrative Assessment fee and $3.00 DNA Collection fee, Deft.

SENTENCED on COUNT 1 to a MINIMUM of THIRTEEN (13) MONTHS and MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC), on COUNT 2 to a MINIMUM of TWENTY-TWO (22) MONTHS and MAXIMUM of NINETY-SIX (96) MONTHS in the NDC, COUNT 2 shall run CONCURRENT WITH COUNT 1, on COUNT 3 under the Small Habitual Criminal Statute to a MINIMUM of EIGHT (8) YEARS and MAXIMUM of TWENTY (20) YEARS in the NDC, COUNT 3 shall run CONCURRENT WITH COUNT 2, and on COUNT 4 to LIFE with a MINIMUM parole eligibility after FIVE (5) YEARS in the NDC, COUNT 4 shall run CONCURRENT WITH COUNT 3, with FOUR HUNDRED FIFTY-TWO (452) DAYS credit for time served. COURT FURTHER ORDERED, the $150.00 DNA Analysis fee including testing to determine genetic markers WAIVED, if previously collected. BOND, if any, EXONERATED. NDC;

06/29/2017 **Motion to Withdraw as Counsel** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Motion to Withdraw Counsel

MINUTES
Granted;

SCHEDULED HEARINGS

All Pending Motions (06/29/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)

06/29/2017 **Motion to Produce** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Motion for Production of Documents, Papers, Pleadings and Tangible Property of Defendant
Granted;

06/29/2017 **All Pending Motions** (9:30 AM) (Judicial Officer: Adair, Valerie)
Matter Heard;
Journal Entry Details:
DEFT'S MOTION TO WITHDRAW COUNSEL...DEFT'S MOTION FOR PRODUCTION OF DOCUMENTS, PAPERS, PLEADINGS AND TANGIBLE PROPERTY OF DEFT. COURT GRANTED MOTIONS. The Court's Marshal spoke to Mr. Marchese who said he would send the Deft. everything. NDC;

08/24/2017 **Motion to Compel** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Motion to Compel Counsel, Jess Marchese, ESQ., to Produce All Documents, Papers, Pleadings and Tangible Property to Petitioner Tommy Stewart
Matter Heard;
Journal Entry Details:
Court noted that the Deft. wanted various documents from Mr. Marchese and FINDS as follows: opening and closing statements, if there are transcripts, Mr. Marchese needs to send to the Deft.; all exhibits presented during trial, the Deft. will not receive copies of all the exhibits, only what Mr. Marchese has in the file; transcripts of all court proceedings will not be provided unless the Deft. states a basis; all notes and files used in the investigation, Deft. will receive whatever Mr. Marchese has, nothing from the State; post-conviction discovery, Deft. is not entitled to; statements made in questioning in the interrogation room, if there is a transcript he should have received but he's not entitled to any new post-conviction discovery; Brady material, Deft. is not entitled to any post-conviction discovery unless there is new exculpatory evidence that is discovered there is an on-going obligation to turn over to the Deft. Court noted it would notify Mr. Marchese's office although Mr. Marchese stated he sent the Deft. the entire contents of the file he had. CLERK'S NOTE: The above minute order has been distributed to the Deft. via USPS. jmc 9/15/17;

11/16/2017 **Motion to Compel** (9:30 AM) (Judicial Officer: Adair, Valerie)
Events: 10/25/2017 Motion
Defendant's 2nd Motion to Compel Counsel, Jess Marchese, Esq., to Produce all Documents Papers Pleadings and Tangible Property to Petitioner Tommy Stewart

MINUTES

Motion
Filed By: Defendant Stewart, Tommy
Second Motion to Compel Counsel, Jess Marchese ESQ to Produce all Document Papers, Pleadings and Tangible Property to Petitioner Tommy Stewart
Matter Heard;
Journal Entry Details:

Court advised counsel that Mr. Marchese said he sent the entire contents of the Deft's file to him. Mr. Adras stated that Mr. Marchese said he would send it again. Court directed the court recorder to prepare the requested transcript. Court also advised that the Deft. could have photo copies of discovery that were prison appropriate but that he was not entitled to the notes in the State's file. Court requested Mr. Adras inform Mr. Marchese to file confirmation of sending

the discovery the Deft. doesn't already have. NDC;

01/02/2018 **Motion** (9:30 AM) (Judicial Officer: Adair, Valerie)
01/02/2018, 01/18/2018
Petitioner's Pro Per Motion for Transcripts at State Expense
Matter Continued;
Granted in Part;
Journal Entry Details:
Mr. Geller stated that Mr. Marchese advised him he mailed the file to the Deft. and texted Mr. Geller proof of mailing with USPS on 7/1/17. The Court noted that the Deft. did not make a showing of why he wanted all that he's requesting but GRANTED his request for transcripts of openings, closings and the sentencing hearing. Court DENIED the Deft's request for the transcripts of the statements made and jury admonishments adding there was no reason to provide those. CLERK'S NOTE: The above minute order has been distributed to the Deft. via USPS 1/31/18;
Matter Continued;
Granted in Part;
Journal Entry Details:
Daniel Jenkins, Esq., also present. Deft not present; Mr. Marchese not present. Court stated it will need to confirm that Mr. Marchese is handling the case and ORDERED, matter CONTINUED. Court directed Mr. Chen to prepare a transport order. NDC CONTINUED TO: 1/18/18 9:30 AM;

06/19/2018 **Petition for Writ of Habeas Corpus** (9:30 AM) (Judicial Officer: Barker, David)
06/19/2018, 07/31/2018, 08/28/2018, 09/04/2018, 09/06/2018
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Briefing Schedule and Hearing date already set
Journal Entry Details:
Mr. Akin stated that he was new to the matter and did not have time to review the file. COURT ORDERED, MATTER CONTINUED. NDC CONTINUED TO: 10/18/18 9:30 AM;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Briefing Schedule and Hearing date already set
Journal Entry Details:
Court noted that the Court's Marshal contacted Mr. Akin and he was not aware of the day's hearing. COURT ORDERED, MATTER CONTINUED and directed staff to contact Mr. Akin with the new date. NDC CONTINUED TO: 9/6/18 9:30 AM;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Briefing Schedule and Hearing date already set
Journal Entry Details:
Court noted there was no opposition filed. Ms. Pandukht stated that she thought there would be a briefing schedule set adding that Mr. Akin was not present. COURT ORDERED, MATTER CONTINUED. NDC CONTINUED TO: 9/4/18 9:30 AM;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Briefing Schedule and Hearing date already set
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;
Matter Continued;

Briefing Schedule and Hearing date already set

06/19/2018 **Motion for Appointment of Attorney** (9:30 AM) (Judicial Officer: Adair, Valerie)
06/19/2018, 07/31/2018
Petitioner's Pro Per Motion for the Appointment of Counsel

MINUTES
Matter Continued;
Granted;
Matter Continued;
Granted;

SCHEDULED HEARINGS

All Pending Motions (07/31/2018 at 9:30 AM) (Judicial Officer: Adair, Valerie)

06/19/2018 **All Pending Motions** (9:30 AM) (Judicial Officer: Adair, Valerie)
Matter Heard;
Journal Entry Details:
PETITION FOR WRIT OF HABEAS CORPUS...PETITIONER'S PRO PER MOTION FOR THE APPOINTMENT OF COUNSEL Court noted that the State only responded to the first supplement filed by the Deft. Ms. Overly stated that she was not aware of any additional responses filed. COURT ORDERED, MATTER CONTINUED. NDC CONTINUED TO: 7/31/18 9:30 AM;

06/28/2018 **Motion for Appointment of Attorney** (9:30 AM) (Judicial Officer: Adair, Valerie)
06/28/2018, 07/02/2018
Defendant's Motion to Appoint Counsel Request for Evidentiary Hearing
Decision Pending;
Granted;
Journal Entry Details:
Defendant's Motion to Appoint Counsel is granted. Matter placed on calendar July 31 at 9:30. The Court will contact the Office of Appointed Counsel. NDC 7/31/18 9:30 AM CONFIRMATION OF COUNSEL CLERK'S NOTE: The above minute order has been distributed to counsel via email and to the Deft. via USPS. jmc 7/6/18;
Decision Pending;
Granted;
Journal Entry Details:
Court noted the matter would be placed on chambers calendar for decision. NDC 7/2/18 CHAMBERS CALENDAR (DECISION);

07/31/2018 **Confirmation of Counsel** (9:30 AM) (Judicial Officer: Adair, Valerie)
Counsel Confirmed;

07/31/2018 **All Pending Motions** (9:30 AM) (Judicial Officer: Adair, Valerie)
Matter Heard;
Journal Entry Details:
CONFIRMATION OF COUNSEL....PETITION FOR WRIT OF HABEAS CORPUS...PETITIONER'S PRO PER MOTION FOR THE APPOINTMENT OF COUNSEL Mr. Akin CONFIRMED as counsel for the Deft. Upon inquiry of the Court, Mr. Akin stated he had not been able to review everything. COURT ORDERED, MATTER CONTINUED. NDC CONTINUED TO: 8/28/18 9:30 AM;

09/13/2018 **Hearing** (9:30 AM) (Judicial Officer: Adair, Valerie)
Discuss setting briefing schedule
Briefing Schedule Set;
Journal Entry Details:
Court noted that Mr. Akin was appointed 7/31/18. Mr. Akin stated that he received the file but still needed to meet with the Deft. Court SET the following briefing schedule and hearing date: 10/25/18 - opening brief due; 12/13/18 - response due. 1/10/19 9:30 AM HEARING CLERK'S NOTE: Minutes amended to show briefing schedule. jmc 11/13/18;

11/13/2018 **Motion** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Motion for Extension

Granted;
Journal Entry Details:
Court ORDERED, motion GRANTED and set the following revised briefing schedule: 11/28/18 filing of the petition; 12/13/18 opposition due; 12/28/18 reply due. Court FURTHER SET matter for hearing. NDC 1/10/19 9:30 AM HEARING;

01/08/2019 **Motion** (9:30 AM) (Judicial Officer: Smith, Douglas E.)
Defendant's Motion for Extension (Second)
Briefing Schedule Set;
Journal Entry Details:
Mr. Atkin stated that the Deft. was not present and requested a new briefing schedule. Court gave the following briefing schedule: 2/19/19 motion to be filed; 4/9/19 State's response due; 4/16/19 reply due. Court advised counsel there would be no further extensions and SET hearing date. 4/23/19 9:30 AM HEARING;

04/23/2019 **Hearing** (9:30 AM) (Judicial Officer: Adair, Valerie)
04/23/2019, 04/29/2019
Decision Pending;
Denied;
Journal Entry Details:
Defendant's Petition for Writ of Habeas Corpus and Supplements are denied for the reasons set forth by the State in its Response. The State is directed to prepare a detailed order consistent with its Response. CLERK'S NOTE: The above minute order has been distributed to counsel via email. jmc 4/29/19;

Decision Pending;
Denied;
Journal Entry Details:
Court advised counsel that everything was reviewed. Ms. Pandukht submitted on the briefing submitted. Mr. Atkin argued. Court advised counsel that a decision would issue from chambers. NDC 4/29/19 CHAMBERS CALENDAR - DECISION;

01/02/2020 **Motion** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Pro Per Motion for Withdrawal of Attorney of Record, or In the Alternative, Request for Records/Court Case Documents
Motion Granted;

01/02/2020 **Motion** (9:30 AM) (Judicial Officer: Adair, Valerie)
Defendant's Pro Per Ex Parte Motion for Appointment of Counsel
Motion Denied;

01/02/2020 **All Pending Motions** (9:30 AM) (Judicial Officer: Adair, Valerie)
Matter Heard;
Journal Entry Details:
DEFENDANT'S PRO PER EX PARTE MOTION FOR APPOINTMENT OF COUNSEL...DEFENDANT'S PRO PER MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD, OR IN THE ALTERNATIVE, REQUEST FOR RECORDS/COURT CASE DOCUMENTS COURT ORDERED Defendant's Pro Per Motion for Withdrawal of Attorney of Record, or in the Alternative, Request for Records/Court Case Documents, was hereby GRANTED. COURT FURTHER ORDERED Mr. Akin to provide the Defendant was a copy of the Defendant's file. COURT ORDERED Defendant's Pro Per Ex Parte Motion for Appointment of Counsel, was hereby DENIED, FINDING that Defendant's post-conviction Petition was already denied, and there was no basis for the appointment of counsel. NDC CLERK'S NOTE: A copy of this minute order was mailed to: Tommy Stewart #1048967 [Ely State Prison P.O. Box 1989]. A copy of this minute order was e-mailed to: Travis Akin, Esq. [travisakin8@gmail.com]. (KD 1/2/20);

DATE	FINANCIAL INFORMATION	
	Defendant Stewart, Tommy	
	Total Charges	28.00
	Total Payments and Credits	0.00
	Balance Due as of 1/7/2020	**28.00**

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

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

TOMMY STEWART BAC #1048467
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

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

15F02411X/JEV/jr/L-1

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

TOMMY STEWART,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-15-305984-1

Dept No: XXI

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

PLEASE TAKE NOTICE that on December 23, 2019, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on December 26, 2019.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 26 day of December 2019, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:

Tommy Stewart # 1048467
P.O. Box 1989
Ely, NV 89301

Travis Akin, Esq.
8275 S. Eastern Ave., Suite 200
Las Vegas, NV 89123

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

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

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

TOMMY STEWART BAC #1048467
ELY STATE PRISON
P.O. BOX 1989
ELY, NEVADA 89301

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

15F02411X/JEV/jr/L-1

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 04, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

May 04, 2015 **9:30 AM** **Initial Arraignment**

HEARD BY: De La Garza, Melisa **COURTROOM:** RJC Lower Level Arraignment

COURT CLERK: Monique Alberto
Anntoinette Naumec-Miller
Robin Thomas
Natalie Ortega

RECORDER: Kiara Schmidt

REPORTER:

PARTIES PRESENT:

Ross, Katrina	Attorney
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Genevieve Craggs, Certified Law Student, present for the State of Nevada.

DEFT. STEWART ARRAIGNED, PLED NOT GUILTY, and INVOKED the 60-DAY RULE. COURT ORDERED, matter set for trial. COURT ORDERED, pursuant to Statute, Counsel has 21 days from today for the filing of any Writs; if the Preliminary Hearing Transcript has not been filed as of today, Counsel has 21 days from the filing of the Transcript.

CUSTODY

6/10/15 8:00 A.M. CALENDAR CALL (DEPT 8)

6/15/15 9:30 A.M. JURY TRIAL (DEPT 8)

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 01, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 01, 2015 **8:00 AM** **Motion to Compel**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Louisa Garcia

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Ross, Katrina	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- COURT ORDERED, Brady and statutory GRANTED. Ms. Ross stated there were two specific items she requested. Ms. Ross stated she received the photographs used during the interview on Friday. However, she was still waiting for the lift card of the fingerprint. State advised she would issue an administrative subpoena for the lift card. Ms. Ross stated she would meet with State to do a file review if there was anything outstanding. COURT SO NOTED.

CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 03, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 03, 2015 **8:00 AM** **Motion to Continue**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Louisa Garcia

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Ross, Katrina	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- COURT ORDERED, Motion to Continue DENIED; trial date extended as Court's calendar was full between now and the 24th. Ms. Ross stated Defendant invoked his speedy trial rights and she was in the process of hiring an expert witness. If Defendant waived his speedy trial right she would be requesting a continuance. Upon Court's inquiry, Defendant stated he does not wish to waive his right to a speedy trial. COURT ORDERED, trial date VACATED and RESET; counsel to start picking a jury on the 25th.

CUSTODY

6/25/15 8:00 AM JURY TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 10, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 10, 2015 **8:00 AM** **Calendar Call**

HEARD BY: Becker, Nancy **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Louisa Garcia

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Ross, Katrina	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Court noted this matter has a firm setting of June 25, 20015. Ms. Ross stated she was not ready to proceed; the State just filed a Notice of Habitual Criminal Treatment and she still had outstanding evidence. Ms. Ross further stated Defendant has not waived his right to a speedy trial. Ms. Lexis stated the Court informed Defendant that his lawyer was not ready to proceed to trial; the Court asked Defendant if he would waive his right to a speedy trial and he refused. Ms. Lexis stated as to the Motion in Limine she was not planning on introducing that evidence at this point; therefore, it was moot. State advised it was her understanding counsel has everything except the fingerprint lift card; it was subpoenaed and she will make it available as soon as possible. Court advised the Information was filed in April; clearly that would not be a speedy right violation. Court informed the Defendant a speedy trial does not mean he can go to trial in 60 days. It means he can go to trial in a reasonable amount of time based upon each case. Court advised there was no requirement Defendant be required to waive his speedy trial rights to continue the trial; the only issue was if the continuance was warranted. Based on representations, COURT ORDERED, trial date VACATED and RESET. Court advised the State if their officer was not available to place the matter back on calendar within the next week.

CUSTODY

7/29/15 8:00 AM CALENDAR CALL

8/3/15 9:30 AM JURY TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 22, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 22, 2015 **8:00 AM** **Motion** **Defendant's Motion to Exclude Irrelevant and Prejudicial Evidence**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Tena Jolley

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Ross, Katrina	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Ms. Ross advised State indicated they are not opposing the motion and do not intend to illicit testimony regarding pawn shops and requested motion be granted. Ms. Lexis concurred. COURT ORDERED, Motion GRANTED.

CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 22, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 22, 2015 **9:00 AM** **Minute Order** **Order Re: June 17, 2015 Order for Petition for Writ of Habeas Corpus**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 16D

COURT CLERK: Louisa Garcia

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Defendant in this case filed a Petition for Writ of Habeas Corpus. The Court signed an order that ordered the State to respond to Defendant s petition and set a hearing. However, after speaking to counsel for both parties, it is the Court s understanding that Defendant is currently represented by the Public Defender s Office and yet filed the petition himself without going through counsel. Therefore, the Court finds the petition was improperly filed and Defendant needs to file motions through his attorney. Defendant s counsel now has a copy of the petition and will decide how the defense will choose to proceed with the petition. COURT ORDERED, its June 17, 2015 order requiring the State to respond to Defendant s petition VACATED. Furthermore, COURT ORDERED, the August 10, 2015 hearing VACATED.

CLERK'S NOTE: The above minute order has been distributed to: Tierra Jones at tierra.jones@clarkcountyda.com; Katrina Ross at katrina.ross@clarkcountynv.gov. /lg 6-22-15

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **July 29, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

July 29, 2015 **8:00 AM** **Calendar Call**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Louisa Garcia

RECORDER: Patti Slattery

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Ross, Katrina	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Following Conference at the Bench, COURT ORDERED, Public Defender WITHDRAWN due to a conflict of interest. State advised they would have been ready to go to trial. COURT ORDERED, trial date VACATED and matter SET for status check.

CUSTODY

8/12/15 8:00 AM STATUS CHECK: APPOINTMENT OF COUNSEL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 12, 2015**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

August 12, 2015 **8:00 AM** **Status Check**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Louisa Garcia

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant
Thomson, Megan	Attorney

JOURNAL ENTRIES

- Mr. Marchese accepted appointment of counsel; Public Defender WITHDRAWN. Ms. Ross provided a copy of the file to Mr. Marchese. COURT ORDERED, trial date VACATED and RESET.

CUSTODY

3/2/16 8:00 AM CALENDAR CALL

3/14/16 9:30 AM JURY TRIAL

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 02, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 02, 2016 **8:00 AM** **Calendar Call**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Tena Jolley

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- The State announced ready for no more than four Trial days and five to eight witnesses (one out of state). Mr. Marchese agreed. COURT ORDERED, Trial date VACATED and matter REFERRED to OVERFLOW.

CUSTODY

3/11/16 8:30 AM OVERFLOW IN DC 18 (8) / 4 TRIAL DAYS / 5-8 WITNESSES, ONE OUT OF STATE

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 09, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 09, 2016 **8:00 AM** **At Request of Court**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Keri Cromer

RECORDER: Jill Jacoby

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- State's Opposition to Defendant's Motion to Suppress Defendant's Statement FILED IN OPEN COURT

Ms. Jones advised Mr. Marchese was in Henderson. COURT ORDERED, Motion DENIED; Overflow date of 3/11/2016 STANDS. State to prepare findings of fact and conclusions of law consistent with their opposition.

CUSTODY

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 11, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 11, 2016 **8:30 AM** **Overflow**

HEARD BY: Barker, David **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Athena Trujillo

RECORDER: Cynthia Georgilas

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Court confirmed trial will take 4 days with 5 - 8 witnesses, one out of state. COURT ORDERED, matter SET for trial.

CUSTODY

3/14/16 9:00 AM JURY TRIAL - DC 21

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 14, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 14, 2016 **9:00 AM** **Jury Trial**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Denise Husted

RECORDER:

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- IN THE PRESENCE OF THE JURY. Introductions by counsel. Roll of jurors called by the clerk. Jury selected and SWORN. Information read by the clerk. Opening statements by Ms. Tierra. Mr. Marchese WAIVED opening statements. Testimony and exhibits presented per worksheet. Evening recess. MATTER CONTINUED.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 15, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 15, 2016 **10:45 AM** **Jury Trial**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Testimony and exhibits presented per worksheet. The Stated RESTED. OUTSIDE THE PRESENCE OF THE JURY. The Court admonished the defendant regarding his constitutional right to not be compelled to testify on his own behalf. Argument by Mr. Marchese regarding the weapon in the Corolla. Ms. Jones stated it goes to identification and is absolutely relevant. COURT FINDS, it ties the defendant in with the gun used in the crime. Jury instructions settled on the record. Evening recess. MATTER CONTINUED.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 16, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 16, 2016 **10:00 AM** **Jury Trial**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- IN THE PRESENCE OF THE JURY. Defense RESTED. The Court instructed the jury on the law of the case. Closing arguments by Ms. Jones. Closing arguments by Mr. Marchese. Closing arguments by Ms. Lexis.

At the hour of 11:55 AM the jury retired to deliberate.

Evening recess. MATTER CONTINUED.

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **March 17, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

March 17, 2016 **9:00 AM** **Jury Trial**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Jones, Tierra D.	Attorney
Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- At the hour of 12:10 PM the jury returned with the following verdict.

Count 1 - Guilty of Conspiracy to Commit Robbery;
Count 2 - Guilty of Burglary;
Count 3 - Guilty of Robbery;
Count 4 - Guilty of First Degree Kidnapping.

COURT ORDERED, matter referred to the Division of Parole and Probation for a presentence investigation report and SET for SENTENCING. FURTHER, defendant REMANDED without bail.

CUSTODY

5/5/16 9:30 AM SENTENCING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **May 10, 2016**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

May 10, 2016 **9:30 AM** **Sentencing**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Shelley Boyle

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Lexis, Agnes	Attorney
Marchese, Jess R.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Colloquy regarding Deft's Pre-Sentence Investigation (PSI) Report. Arguments by counsel. Certified copies of Judgments of Conviction given to the Court by Ms. Lexis were marked and admitted as a State's Exhibit. DEFT STEWART ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT ROBBERY (F), COUNT 2 - BURGLARY (F), COUNT 3 - ROBBERY (F), and COUNT 4 - FIRST DEGREE KIDNAPPING (F). COURT ORDERED, in addition to the $25.00 Administrative Assessment fee and $3.00 DNA Collection fee, Deft. SENTENCED on COUNT 1 to a MINIMUM of THIRTEEN (13) MONTHS and MAXIMUM of SIXTY (60) MONTHS in the Nevada Department of Corrections (NDC), on COUNT 2 to a MINIMUM of TWENTY-TWO (22) MONTHS and MAXIMUM of NINETY-SIX (96) MONTHS in the NDC, COUNT 2 shall run CONCURRENT WITH COUNT 1, on COUNT 3 under the Small Habitual Criminal Statute to a MINIMUM of EIGHT (8) YEARS and MAXIMUM of TWENTY (20) YEARS in the NDC, COUNT 3 shall run CONCURRENT WITH COUNT 2, and on COUNT 4 to LIFE with a MINIMUM parole eligibility after FIVE (5) YEARS in the NDC, COUNT 4 shall run CONCURRENT WITH COUNT 3, with FOUR HUNDRED FIFTY-TWO (452) DAYS credit for time served. COURT FURTHER ORDERED, the $150.00 DNA Analysis fee including testing to determine genetic markers WAIVED, if previously collected. BOND, if any,

EXONERATED.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 29, 2017**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 29, 2017 **9:30 AM** **All Pending Motions**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Rogan, Jeffrey	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- DEFT'S MOTION TO WITHDRAW COUNSEL...DEFT'S MOTION FOR PRODUCTION OF DOCUMENTS, PAPERS, PLEADINGS AND TANGIBLE PROPERTY OF DEFT.

COURT GRANTED MOTIONS. The Court's Marshal spoke to Mr. Marchese who said he would send the Deft. everything.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 24, 2017**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

August 24, 2017 **9:30 AM** **Motion to Compel**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Pandukht, Taleen R		Attorney
State of Nevada		Plaintiff

JOURNAL ENTRIES

- Court noted that the Deft. wanted various documents from Mr. Marchese and FINDS as follows:

opening and closing statements, if there are transcripts, Mr. Marchese needs to send to the Deft.;

all exhibits presented during trial, the Deft. will not receive copies of all the exhibits, only what Mr. Marchese has in the file;

transcripts of all court proceedings will not be provided unless the Deft. states a basis;

all notes and files used in the investigation, Deft. will receive whatever Mr. Marchese has, nothing from the State;

post-conviction discovery, Deft. is not entitled to;

statements made in questioning in the interrogation room, if there is a transcript he should have received but he's not entitled to any new post-conviction discovery;

Brady material, Deft. is not entitled to any post-conviction discovery unless there is new exculpatory evidence that is discovered there is an on-going obligation to turn over to the Deft.

Court noted it would notify Mr. Marchese's office although Mr. Marchese stated he sent the Deft. the entire contents of the file he had.

CLERK'S NOTE: The above minute order has been distributed to the Deft. via USPS. jmc 9/15/17

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **November 16, 2017**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

November 16, 2017 9:30 AM Motion to Compel

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Adras, Paul J	Attorney
Pandukht, Taleen R	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court advised counsel that Mr. Marchese said he sent the entire contents of the Deft's file to him. Mr. Adras stated that Mr. Marchese said he would send it again. Court directed the court recorder to prepare the requested transcript. Court also advised that the Deft. could have photo copies of discovery that were prison appropriate but that he was not entitled to the notes in the State's file. Court requested Mr. Adras inform Mr. Marchese to file confirmation of sending the discovery the Deft. doesn't already have.

NDC

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 02, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

January 02, 2018 **9:30 AM** **Motion**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Aja Brown

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Daniel Jenkins, Esq., also present.

Deft not present; Mr. Marchese not present. Court stated it will need to confirm that Mr. Marchese is handling the case and ORDERED, matter CONTINUED. Court directed Mr. Chen to prepare a transport order.

NDC

CONTINUED TO: 1/18/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 18, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

January 18, 2018 **9:30 AM** **Motion**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Bluth, Jacqueline	Attorney
Geller, Warren J.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Geller stated that Mr. Marchese advised him he mailed the file to the Deft. and texted Mr. Geller proof of mailing with USPS on 7/1/17. The Court noted that the Deft. did not make a showing of why he wanted all that he's requesting but GRANTED his request for transcripts of openings, closings and the sentencing hearing. Court DENIED the Deft's request for the transcripts of the statements made and jury admonishments adding there was no reason to provide those.

CLERK'S NOTE: The above minute order has been distributed to the Deft. via USPS 1/31/18

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 19, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 19, 2018 **9:30 AM** **All Pending Motions**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:
Overly, Sarah — Attorney
State of Nevada — Plaintiff

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS...PETITIONER'S PRO PER MOTION FOR THE APPOINTMENT OF COUNSEL

Court noted that the State only responded to the first supplement filed by the Deft. Ms. Overly stated that she was not aware of any additional responses filed. COURT ORDERED, MATTER CONTINUED.

NDC

CONTINUED TO: 7/31/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **June 28, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

June 28, 2018 **9:30 AM** **Motion for Appointment of Attorney**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Court noted the matter would be placed on chambers calendar for decision.

NDC

7/2/18 CHAMBERS CALENDAR (DECISION)

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **July 02, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

July 02, 2018 **3:00 AM** **Motion for Appointment of Attorney**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Defendant's Motion to Appoint Counsel is granted. Matter placed on calendar July 31 at 9:30. The Court will contact the Office of Appointed Counsel.

NDC

7/31/18 9:30 AM CONFIRMATION OF COUNSEL

CLERK'S NOTE: The above minute order has been distributed to counsel via email and to the Deft. via USPS. jmc 7/6/18

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor	**COURT MINUTES**	**July 31, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

July 31, 2018 **9:30 AM** **All Pending Motions**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Lamanna, Brianna K.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- CONFIRMATION OF COUNSEL....PETITION FOR WRIT OF HABEAS CORPUS...PETITIONER'S PRO PER MOTION FOR THE APPOINTMENT OF COUNSEL

Mr. Akin CONFIRMED as counsel for the Deft. Upon inquiry of the Court, Mr. Akin stated he had not been able to review everything. COURT ORDERED, MATTER CONTINUED.

NDC

CONTINUED TO: 8/28/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 28, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

August 28, 2018 **9:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Pandukht, Taleen R	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court noted there was no opposition filed. Ms. Pandukht stated that she thought there would be a briefing schedule set adding that Mr. Akin was not present. COURT ORDERED, MATTER CONTINUED.

NDC

CONTINUED TO: 9/4/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **September 04, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

September 04, 2018 **9:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Einhorn, Kelsey R.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court noted that the Court's Marshal contacted Mr. Akin and he was not aware of the day's hearing. COURT ORDERED, MATTER CONTINUED and directed staff to contact Mr. Akin with the new date.

NDC

CONTINUED TO: 9/6/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **September 06, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

September 06, 2018 **9:30 AM** **Petition for Writ of Habeas Corpus**

HEARD BY: Barker, David **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Jessica Kirkpatrick

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Pandukht, Taleen R	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Akin stated that he was new to the matter and did not have time to review the file. COURT ORDERED, MATTER CONTINUED.

NDC

CONTINUED TO: 10/18/18 9:30 AM

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **September 13, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

September 13, 2018 9:30 AM Hearing

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Scarborough, Michael J.	Attorney
State of Nevada	Plaintiff
Stewart, Tommy	Defendant

JOURNAL ENTRIES

- Court noted that Mr. Akin was appointed 7/31/18. Mr. Akin stated that he received the file but still needed to meet with the Deft. Court SET the following briefing schedule and hearing date:

10/25/18 - opening brief due;
12/13/18 - response due.

1/10/19 9:30 AM HEARING

CLERK'S NOTE: Minutes amended to show briefing schedule. jmc 11/13/18

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **November 13, 2018**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

November 13, 2018 9:30 AM Motion

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Cannizzaro, Nicole J.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court ORDERED, motion GRANTED and set the following revised briefing schedule:

11/28/18 filing of the petition;
12/13/18 opposition due;
12/28/18 reply due.

Court FURTHER SET matter for hearing.

NDC

1/10/19 9:30 AM HEARING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 08, 2019**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

January 08, 2019 **9:30 AM** **Motion**

HEARD BY: Smith, Douglas E. **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Cannizzaro, Nicole J.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Atkin stated that the Deft. was not present and requested a new briefing schedule. Court gave the following briefing schedule:

2/19/19 motion to be filed;
4/9/19 State's response due;
4/16/19 reply due.

Court advised counsel there would be no further extensions and SET hearing date.

4/23/19 9:30 AM HEARING

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 23, 2019**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

April 23, 2019 **9:30 AM** **Hearing**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES PRESENT:

Akin, Travis D	Attorney
Pandukht, Taleen R	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court advised counsel that everything was reviewed. Ms. Pandukht submitted on the briefing submitted. Mr. Atkin argued. Court advised counsel that a decision would issue from chambers.

NDC

4/29/19 CHAMBERS CALENDAR - DECISION

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **April 29, 2019**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

April 29, 2019 **3:00 AM** **Hearing**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- Defendant's Petition for Writ of Habeas Corpus and Supplements are denied for the reasons set forth by the State in its Response. The State is directed to prepare a detailed order consistent with its Response.

CLERK'S NOTE: The above minute order has been distributed to counsel via email. jmc 4/29/19

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 02, 2020**

C-15-305984-1 State of Nevada
vs
Tommy Stewart

January 02, 2020 **9:30 AM** **All Pending Motions**

HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Kristin Duncan

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT:

Scarborough, Michael J.	Attorney
State of Nevada	Plaintiff

JOURNAL ENTRIES

- DEFENDANT'S PRO PER EX PARTE MOTION FOR APPOINTMENT OF COUNSEL...DEFENDANT'S PRO PER MOTION FOR WITHDRAWAL OF ATTORNEY OF RECORD, OR IN THE ALTERNATIVE, REQUEST FOR RECORDS/COURT CASE DOCUMENTS

COURT ORDERED Defendant's Pro Per Motion for Withdrawal of Attorney of Record, or in the Alternative, Request for Records/Court Case Documents, was hereby GRANTED. COURT FURTHER ORDERED Mr. Akin to provide the Defendant was a copy of the Defendant's file.

COURT ORDERED Defendant's Pro Per Ex Parte Motion for Appointment of Counsel, was hereby DENIED, FINDING that Defendant's post-conviction Petition was already denied, and there was no basis for the appointment of counsel.

NDC

CLERK'S NOTE: A copy of this minute order was mailed to: Tommy Stewart #1048967 [Ely State

Prison P.O. Box 1989]. A copy of this minute order was e-mailed to: Travis Akin, Esq. [travisakin8@gmail.com]. (KD 1/2/20)

	Date Offered	Objection	Date Admitted
1. ~~Photo~~ CD - 911 Call	3/14/16	Stip	3/14/16
2. Photo - Bells Market	3/15/16	Stip	3/15/16
3. Photo – White vehicle	3/15/16	Stip	3/15/16
4. Photo – Nevada license 667-LPK	3/15/16	Stip	3/15/16
5. Photo – White Corolla	3/15/16	Stip	3/15/16
6. Photo – White Corolla	3/15/16	Stip	3/15/16
7. Photo – VIN Number	3/15/16	Stip	3/15/16
8. Photo – Newport cig./marijuana/white purse	Withdrawn		
9. Photo – White purse and contents	Withdrawn		
10. Photo – Purse and contents/weapon	3/15/16	Obj	3/15/16
11. Photo – White purse	3/15/16	Obj	3/15/16
12. Photo – White purse	3/15/16	Obj	3/15/16
13. Photo – White purse	3/15/16	Obj	3/15/16
14. Photo – White purse/black garbage bag	3/15/16	Obj	3/15/16
15. Photo – Weapon	3/15/16	Obj	3/15/16
16. Photo – Weapon	3/15/16	Obj	3/15/16
17. Photo – Weapon/Ruger P95DC	3/15/16	Obj	3/15/16
18. Photo – Weapon/Ruger/316-20373	3/15/16	Obj	3/15/16
19. Photo – Weapon/Ruger	3/15/16	Obj	3/15/16
20. Photo – Weapon	3/15/16	Obj	3/15/16
21. Photo – Weapon	3/15/16	Obj	3/15/16
22. Photo – Weapon	3/15/16	Obj	3/15/16
23. Photo – Weapon/Ruger	3/15/16	Obj	3/15/16
24. Photo – Weapon and bullets	3/15/16	Obj	3/15/16
25. Photo – Weapon	3/15/16	Obj	3/15/16
26. Photo – Gun handle	3/15/16	Obj	3/15/16

27. Photo – Weapon/Bullet and Cartridge	3/15/16	Obj	3/15/16
28. Photo – Weapon/Bullet and Cartridge	3/15/16	Obj	3/15/16
29. Photo – Patio	3/15/16	Obj	3/15/16
30. Photo – Patio #101	3/14/16	Stip	3/14/16
31. Photo – Post/101	3/15/16	Stip	3/15/16
32. Photo – Patio gate	3/15/16	Stip	3/15/16
33. Photo – Entry	3/15/16	Stip	3/15/16
34. Photo – Door jamb	3/15/16	Stip	3/15/16
35. Photo – Door	3/15/16	Stip	3/15/16
36. Photo – Living Room	3/15/16	Stip	3/15/16
37. Photo – Living Room	3/14/16	Stip	3/14/16
38. Photo – Living Room	3/15/16	Stip	3/15/16
39. Photo – Living Room	3/14/16	Stip	3/14/16
40. Photo – Living Room	3/15/16	Stip	3/15/16
41. Photo – Living Room	3/15/16	Stip	3/15/16
42. Photo – Facing kitchen area	3/14/16	Stip	3/14/16
43. Photo – Facing kitchen area	3/15/16	Stip	3/15/16
44. Photo – Dresser	3/15/16	Stip	3/15/16
45. Photo – Items on floor	3/14/16	Stip	3/14/16
46. Photo – Items on floor	3/14/16	Stip	3/14/16
47. Photo – Dining area/kitchen	3/15/16	Stip	3/15/16
48. Photo – Dining area	3/15/16	Stip	3/15/16
49. Photo – Kitchen	3/15/16	Stip	3/15/16
50. Photo – Kitchen	3/15/16	Stip	3/15/16
51. Photo – Kitchen	3/15/16	Stip	3/15/16
52. Photo – Kitchen	3/15/16	Stip	3/15/16
53. Photo – Living room looking into another room	3/15/16	Stip	3/15/16

54. Photo – Beaded doorway	3/14/16	Stip	3/14/16
55. Photo – Washer and dryer	3/14/16	Stip	3/14/16
56. Photo – Washer and dryer	3/14/16	Stip	3/14/16
57. Photo – Step stool	3/15/16	Stip	3/15/16
58. Photo – Bedroom	3/15/16	Stip	3/15/16
59. Photo – Dresser	3/15/16	Stip	3/15/16
60. Photo – Bed	3/15/16	Stip	3/15/16
61. Photo – Floor of bedroom	3/14/16	Stip	3/14/16
62. Photo – Bedroom	3/14/16	Stip	3/14/16
63. Photo- Bedroom	3/14/16	Stip	3/14/16
64. Photo – Closet	3/14/16	Stip	3/14/16
65. Photo – Bedroom	3/15/16	Stip	3/15/16
66. Photo – Closet	3/14/16	Stip	3/14/16
67. Photo – Closet	3/14/16	Stip	3/14/16
68. Photo – Bed	3/15/16	Stip	3/15/16
69. Photo – Nightstand	3/15/16	Stip	3/15/16
70. Photo – Doorway	3/15/16	Stip	3/15/16
71. Photo – Looking into bathroom	3/14/16	Stip	3/14/16
72. Photo – Mirror	3/15/16	Stip	3/15/16
73. Photo – Jewelry stand	3/14/16	Stip	3/14/16
74. Photo – Clothes rack/desk	3/14/16	Stip	3/14/16
75. Photo – Shoes on floor	3/15/16	Stip	3/15/16
76. Photo – Clothes rack/desk	3/15/16	Stip	3/15/16
77. Photo – Trunk	3/15/16	Stip	3/15/16
78. Photo – Bathroom	3/15/16	Stip	3/15/16
79. Photo – Bathroom	3/15/16	Stip	3/15/16
80. Photo – Wood door	3/15/16	Stip	3/15/16

81. Photo – Wood door	3/15/16	Stip	3/15/16
82. Photo – Wood door	3/15/16	Stip	3/15/16
83. Photo – Wood door	3/15/16	Stip	3/15/16
84. Photo – Box	3/14/16	Stip	3/14/16
85. Photo – Box	3/14/16	Stip	3/14/16
86. Photo – Ceramic Coin Bank	3/14/16	Stip	3/14/16
87. Photo - Line Up Witness Instructions	3/14/16	Stip	3/14/16
88. LVMPD Report of Examination	3/14/16	Obj	
89. Finger prints	3/15/16	Obj	3/15/16
90. CD Tommy Stewart calls	3/15/16	Stip	3/15/16
91. Photo – Parking Lot	3/15/16	Stip	3/15/16
92. Photo – Market and gas station	3/15/16	Stip	3/15/16
93. Photo –View of parking lot	3/15/16	Stip	3/15/16
94. Photo – View of parking lot	3/15/16	Stip	3/15/16
95. Photo – Latent prints	3/15/16	Obj.	3/15/16
96. Photo – Latent prints	3/15/16	Obj.	3/15/16
97. Photo – Latent prints	3/15/16	Obj.	3/15/16
98. Photo – Chart of prints	3/15/16	Stip	3/15/16

EXHIBIT(S) LIST

Case No.: C305984

Dept. No.: 21

Plaintiff: STATE OF NEVADA

vs.

Defendant: TOMMY STEWART

Hearing / Trial Date: 5/10/16

Judge: VALARIE ADAIR

Court Clerk: SHELLEY BOYLE

Recorder / Reporter: SUSIE SCHOFIELD

Counsel for Plaintiff: AGNES LEXIS

Counsel for Defendant: JESS MARCHESE

SENTENCING

STATE'S EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	CERTIFIED COPY OF JOC IN SUPPORT OF SMALL HABITUAL TREATEMENT – C257625	05/10/16	N	05/10/16
2	CERTIFIED COPY OF JOC IN SUPPORT OF SMALL HABITUAL TREATEMENT –C275532	05/10/16	N	05/10/16

Court's EXHIBITS

CASE NO. CJ305984

	Date Offered	Objection	Date Admitted
1. Notes from jurors			3/15-3/16/16
2. Request from jurors			3/16/16

Certification of Copy

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

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

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT DOCKET ENTRIES; FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER; DISTRICT COURT MINUTES; EXHIBITS LIST

STATE OF NEVADA,

Plaintiff(s),

vs.

TOMMY STEWART
aka TOMMY LAQUADE STEWART,

Defendant(s).

Case No: C-15-305984-1

Dept No: XXI

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 7 day of January 2020.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk