IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT CASE NO. 80084

DISTRICT COURT CASE NO.
C-15-305984-1

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. TOMMY STEWART, aka TOMMY LAQUADE STEWART, Defendant.	CASE NO. C-15-305984-1 DEPT. NO. XXI

BEFORE THE HONORABLE VALERIE ADAIR, DISTRICT COURT JUDGE

WEDNESDAY, MARCH 16, 2016

RECORDER'S PARTIAL TRANSCRIPT
JURY TRIAL DAY 3 - CLOSING ARGUMENTS

APPEARANCES:

For the State: TIERRA D. JONES
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Deputies District Attorney

For the Defendant: JESS R. MARCHESE, ESQ.

RECORDED BY: SUSIE SCHOFIELD, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, MARCH 16, 2016, 10:42 A.M.

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THE COURT: Is the State ready to proceed with their closing arguments?

MS. JONES: We are, Your Honor.

(Closing Argument for the State)

MS. JONES: Good morning, Ladies and Gentlemen. I had a really fancy power point prepared for you guys but we're having technical difficulties and the file is corrupt so I can't show it to you. So you're going to have to listen to me. I'm sorry.

I explained to you guys a couple days ago that this trial was going to be very short, that I didn't want you take that away from the significance of this trial because it is significant and it's important, and it's important for what happened to Natasha. And even though it went rather quickly, that doesn't take away from the importance of this case.

In any criminal case, the State has two things that we have to prove. The first thing that we have to prove to you is that a crime was actually committed, and the second thing that we have to prove to you is that it is actually the defendant who committed those crimes.

So we're going to start at the beginning with which crimes were actually committed. And I submit to you that the State has proven to you that the defendant has committed a conspiracy to commit robbery, a burglary while in possession of a firearm, a robbery with use of a deadly weapon, and a first degree kidnapping with use of a deadly weapon.

Count 1 that's charged in the Information is the conspiracy to commit robbery. And you will have your own packet of jury instructions that explains to you

all of the definitions of the crimes and all those instructions the Judge just read to you.

The State will prove to you that the defendant did willfully, unlawfully and feloniously conspire with an unknown individual to commit a robbery. And when you talk about a conspiracy, that deals with more than one person who's involved in the crime. And there's a list of jury instructions that talk to you about what a conspiracy is.

You have a jury instruction that tells you that conspiracy is agreement or mutual understanding between two or more persons to commit a crime. That instruction also tells you that in order to be guilty of a conspiracy, a defendant has to intend to commit or aid in the commission of the specific crime that was agreed to. The crime is the agreement. The crime is the agreement that they had in order to commit this unlawful act.

So what did you learn about what happened in this case? Well, we know that the defendant was with another person when they approached Natasha Lumba as she was going into her apartment on January 20th of 2015, because she told you that there was two people who approached her.

She told you that the entire time when these two people forced her into her home, forced her at gunpoint to get down on the ground, and was rummaging through all of her belongings, that the entire time they were acting together. She even told you that there came a time where they would switch off. One of them would watch her while the other one would be rummaging through her things, and then they would basically switch off, and the other one starts watching her and then somebody else would be going through her things. So the entire time they're both ransacking her house. She said they both went through the items in her house and

they were acting together.

Ladies and gentlemen, that is an agreement between the defendant and the other person that he was with to rob Natasha Lumba of her belongings. So the appropriate verdict on Count 1 is guilty of conspiracy to commit robbery.

Count 2 is the burglary while in possession of a firearm. The State has proven to you that the defendant did then and there, willfully, unlawfully, and feloniously enter with the intent to commit larceny and/or robbery that certain building occupied by Natasha Lumba, located at 805 Rock Springs, Apartment 101, in Las Vegas, Clark County, Nevada, and that the defendant did possess and/or gain possession of a firearm during the commission of this crime.

Now you will have that whole definition of what a burglary while in possession of a firearm is, but it's important to note the specific elements that the State has proven to you that we must prove to you in order for you to convict.

A burglary is defined as any person who by day or night enters a building with the intent to commit larceny or robbery.

So we have to talk about the entrance. Did the defendant enter into Natasha's apartment? Well, an entry is deemed complete once any portion of the defendant's body enters into Natasha's apartment, however slight that is. But that's not an issue in this case because we know that he was in her apartment. He didn't just slightly enter, his leg didn't go enter; he's in her apartment rummaging around and going through all of her things.

What did Natasha tell you when she was here? She told you what they did to her. She told you that they basically went through every single room in her apartment. And you will have all of those photographs that we showed to Natasha, that we showed to the CSA to see. They went through all of her drawers, they went

through her jewelry box, they went through the sewing box, they carried her printer from her back room and brought it into the front room. They went through every single room in her house looking for things that they could take. So we know that the defendant was inside of her house.

And how else do you know that? Because the defendant's fingerprint is found on her sewing box that's in her laundry area, that she testified was up above the washing machine, but you will see in the photographs it's been moved by the time the CSA gets there, and the defendant's fingerprint is on there. The only way for him to have touched that is while he's inside of her home. So we know the defendant entered her house.

So we move on to the next element of a burglary which is what was his intent when he entered into her house? The intent with which entry is made is a question of fact which can be inferred from the defendant's conduct in all other circumstances. So that's a question of fact that you can infer from what happened.

Well, what happened once he got inside of her apartment? Him and this other individual that he was with went through all of her stuff, they started demanding, well, where is the cash, we know you have cash because you have all of this stuff. They started just going through all of her things. They went through her purse. She told you that when she got back to her wallet all of her credit cards had been removed from her wallet. She told you that they started asking her for her PIN number, and she actually gave it to him but she just told them, I don't have any money.

They asked her for the code to get into her iPhone; she gave them that. They went through all of her stuff. So their intention was clear what they intended to do when they went into her house. They intended to commit a larceny or a robbery

against her. That was the reason that the defendant and the other person that he was with went into her house. The defendant entered into Natasha's residence with the intent to commit that larceny or robbery, and that is a burglary. So he's guilty of a burglary.

You have a jury instruction that tells you that every person who commits the crime of burglary, who has in his possession or gains possession of firearm or a deadly weapon at any time during the commission of a crime is guilty of burglary while in possession of a deadly weapon.

What did Natasha tell you? She told you that when the defendant and the other person approached her outside of her residence, he told her he had a gun as well as she saw a black semi-automatic handgun is what she said. She said he held it up, they pointed it at her, and they told her that they had a gun, and she told you that during the entirety of this event she had no reason to believe that they no longer had that weapon. She believed that they still had a gun during the entire time that they were in her house.

And what else do we know about a gun? Well, we know that when the defendant is apprehended, even though it's several weeks later, that this gun which just happens to be a black semi-automatic handgun is found inside of the vehicle where Office Vorce watched the defendant pull a gun out of his waistband and place it into the back seat of that car. And a black semi-automatic handgun is recovered in the back seat of that car where Officer Vorce had seen the defendant place it.

Ladies and gentlemen, the proper verdict on Count 2 is the defendant is guilty of a burglary while in possession of a deadly weapon.

Count 3 is the robbery with use of a deadly weapon. The State has proven to you that the defendant did willfully, unlawfully, and feloniously take

personal property from Natasha, that being her laptop, her cell phone, lawful money of the United States, and her camera, and that that property was taken in her presence by means of force or violence, or fear or injury thereto, and without the consent and against the will of Natasha Lumba, and that was also done with a deadly weapon.

When we started to talk about the robbery and taking her property through force, it's important for you to know, you have a jury instruction that tells you, basically each member of a criminal conspiracy is liable for each act of the criminal conspiracy. So what that means is the act of one is the act of all in a criminal conspiracy.

The defendant was involved in the conspiracy with the other person who went into Natasha's house. The State has the robbery charge the defendant can be convicted of the robbery under three different theories of liability. You can find that he directly committed this crime, that he aided and abetted in the commission of this crime, or that he conspired in the commission of this crime. And I'll submit to you the defendant actually did all three of those.

The defendant directly committed this crime because he was in Natasha's house. He went into her house, he took her personal property from her, she told you that the entire time they were in her house she was in fear. She was scared. She was scared the entire time. She said, I never wanted to let them in my house. I let them in my house because they had a gun, and they were pointing a gun at me, and that's the reason that I opened the door. I did that at their direction. I laid down on the ground and was told not to look at them and I was scared the whole time.

She was forced down to the ground and they took her belongings. And

the defendant directly committed this act and he is one of the individuals who was taking her belongings, and he's the individual who had the gun inside of her residence.

He aided and abetted in the commission of this act. You have a jury instruction that tells you the State is not required to prove precisely which defendant committed the act and which defendant aided and abetted in this act. It's the counsel encouragement that goes from one person to the other that is the aiding and abetting for the actual robbery.

And what do we know that they did here together? We know that it was the two of them together when they approached Natasha as she's walking up to her front door. We know that the defendant was armed with a handgun, we know that they demanded that Natasha open her door, then proceeded to enter into her residence, forced her to go into her own bedroom and lie down on the ground. They stayed there and took turns watching her while the other person is going through her belongings. They ransacked her residence.

When the other defendant says -- figures out they don't have any money and they asked her, well, where's your money? That other individual then proceeds to put his hands down her underwear and down her bra and groped her in an effort to see if she had any money that she was hiding from him in her bra or in her underwear. We know that that happened and we know that at the end of this, the two of them fled the scene together. The defendant aided and abetted in the commission of the robbery against Natasha.

The defendant also conspired with the other individual. They had an agreement they were going to go there, they were going to rob Natasha. The State doesn't have to show you that they sat down at a table and had a meeting and

decided that this is what they were going to do. You have to ask yourself, were they acting together? And I submit to you that the entire time the two of them are acting together as they conspire to rob Natasha.

And what did she say they took from her? She said they took her laptop, she said they took her cell phone, she said that they also took her camera, and they took the last two dollars that she had in her wallet because she told them that she didn't have any money. But she had that two dollars and so they took that.

The defendant is guilty of a robbery against Natasha Lumba as he directly committed this act, he aided and abetted in the commission, and he conspired with the other individual.

You have a jury instruction that tells you that if you find that the defendant committed a robbery you then have to find whether or not a deadly weapon was used in the commission of that offense.

You have another jury instruction that tells you that a firearm is a deadly weapon. Natasha was robbed with a firearm, the defendant is apprehended in the presence of a firearm, and it was used to rob Natasha. The proper verdict on Count 3 is a robbery with use of a deadly weapon.

Count 4 is the first degree kidnapping with use of a deadly weapon. The State has submitted to you that we have proven that the defendant did willfully, unlawfully, and feloniously seize or confine Natasha Lumba, that being a human being, with the intent to hold her, detain her, against her will and without her consent for the purpose of committing a robbery against her, and that that was done with a deadly weapon.

And again, the State has alleged the defendant is guilty of this offense by the three different theories of liability. He directly committed this act, he aided

and abetted in the commission, or he conspired to commit this act. And I submit to you he did all three, just as he did with the robbery.

He directly committed the kidnapping because he's a part of forcing Natasha into her home. He forced her in there at gunpoint, forced her on the ground, and what did Natasha tell you? I couldn't make a run for it. There was not a clean path to get to my front door. I had no reason to believe that they were not still armed, I knew they were in my house, they're taking turns watching me, I can't make a run for it. She's confined in her own home because she cannot make a run for it because the people that have the gun is still in her house. They're detaining her in her own house.

The defendant aided and abetted in the commission of the offense in exactly the same way he aided and abetted in the commission of the robbery. The defendant is actively involved in this, he's actively involved in making sure Natasha's detained in her home so that they can take her property from her while she's being held in her home, and they have a gun, and she's afraid.

The defendant also conspired with the other individual to commit this crime in exactly the same way that he did the robbery. However, the difference in the kidnapping is you have a jury instruction that tells you that the defendant cannot be criminally responsible under a conspiracy theory for the kidnapping unless he also had the specific intent to commit the robbery or the larceny.

So you have to ask yourself what was his intent? Well, what's shown to you by the facts? He's the person who had the gun. He's the person who's mostly rummaging through Natasha's things because she told you, I had a majority of my conversation with the shorter of the two.

They both took her items and the defendant even told Detective Abell

that he stole some things from her apartment. So his actual intent was to commit the robbery or larceny against her, and he kidnapped her for that purpose.

Again, the kidnapping you have to ask yourself if you find the guilty of a kidnapping whether or not a deadly weapon was used. The same firearm was used for the kidnapping that was used for the burglary, that was used for the robbery, and the appropriate verdict on Count 4 is guilty of first degree kidnapping with use of a deadly weapon.

The State has proven to you that all four of the crimes which we have charged defendant with has been committed. The other thing the State has to prove to you is that it's actually the defendant who committed these crimes. And in proving to you that it's him that committed these crimes and that he should be held responsible for this, it's important for you to know that you have a jury instruction that tells you you're here to determine the guilt or innocence of the defendant from the evidence that's been presented in this case. You're not called upon to return a verdict as to the guilt or innocence of any other person.

If the evidence in this case convinces you beyond a reasonable doubt of the guilt of the defendant, then you should so find even though you believe one or more persons may also be guilty.

The State submits to you that there's somebody else who was involved in this. But you heard Detective Abell tell you yesterday that Metro has not been able to identify that person. Metro does not know who that person is, but that doesn't mean that the defendant is not guilty of these crimes just because we don't know who it is that he conspired with. That doesn't mean that he gets a verdict of not guilty because you don't know who he was with. You can still convict him for his involvement in these crimes.

And how do we know that he was involved in these crimes? Well, there's three separate ways that you know he was involved in these crimes. When Natasha Lumba was shown that photo lineup, what did she do? She selected the person in position No. 3.

And what did she say about the person in position No. 3? She said, No. 3 has a similar face shape, eyes, nose, complexion and face shape as the taller assailant, and she said No. 3 looks a lot like the taller robber that I remember. Who was in position No. 3 in the photo lineup? Tommy Stewart is in position No. 3 in the photo lineup.

Natasha also selected the person in position No. 2 and describes some similarities to the person in position No. 2. Did Natasha believe that both of the individuals that may have robbed her might have been in that lineup? I don't know. But she selected the person in position No. 3 as the similarities to the taller robber who had the gun, who happens to be Tommy Stewart.

The second way that you know that the defendant is the person who robbed and kidnapped and burglarized Natasha is because of her sewing box. Natasha had this sewing box on top of her laundry area, on the shelf, and she keeps her sewing items in this box. And you'll see this little tape right here that has the number 2 on it. That's where the defendant's fingerprint was found on her sewing box. That print was run and it comes back to the right middle finger of Tommy Stewart.

Natasha doesn't know Tommy Stewart. Natasha says she has no idea who that is prior to this case happening. She has never allowed Tommy Stewart to be in her house. There is no reason for Tommy Stewart to have been in her house. She has no idea who he is. There is no reason why his fingerprint is on her sewing

box except because he robbed her and took the sewing box down off of that shelf when he was kidnapping her and burglarizing her.

And what did he say to Detective Abell about the sewing box? He told Detective Abell, oh, I thought I threw that behind the washer. Detective Abell told you yesterday that that's what he said about the sewing box when he was shown the photo that is still laying on top of the laundry.

Natasha also told you that when both of these individuals were rummaging through her things that they had the arms of their hoodies pulled down over their hands most of the time. And the one time that they didn't, Tommy Stewart's print comes back on her sewing box.

And the third way that you know that Tommy Stewart is the person who robbed and kidnapped and burglarized Natasha Lumba is what is he saying on those calls that we played for you yesterday? Well, he's sending out a warning to the co-conspirators involved in this that Metro knows about the crime that happened in his neighborhood and that now he's facing all these charges. He wanted to just put him on notice of what was happening to him.

And what else did he say? He said, if they don't have my fingerprint or that lady's ID, then they don't have anything because my stain is not going to stay in. And he was certain on that call that we didn't have his fingerprint. But we know that's not true because we do. His fingerprint is on Natasha's jewelry box but when he didn't know that, he was certain that without that print she'd have to ID him, because otherwise we didn't have that statement that he made. That just wasn't going to be enough even though he told Detective Abell he was in her house.

And what else did he tell Detective Abell. Well, and originally he tells Detective Abell he doesn't know anything about this address and he doesn't know

anything about what Detective Abell's talking about, until Detective Abell then confronts him with his fingerprint that's actually found inside this lady's residence who doesn't know him. And then all of a sudden he has a recollection that he was there with his friend Raymond or his cousin. They were there; he remembers that now. But prior to knowing Detective Abell had his fingerprint, he didn't remember being there with Raymond, but now he remembers.

And what did Natasha tell you? She has a cousin named Raymond who lives in the Philippines but that's the only person that she knows by the name of Raymond.

And what else did the defendant tell Detective Abell? Oh, yeah, well, I was there with Raymond. I was going through her things looking for things that I could steal. That's what I was doing there.

That's not what he was doing there. He went there to rob and kidnap and burglarize Natasha along with his co-conspirator, and they held this lady down in her own house, forced her onto the ground, told her not to look at them, wearing their black hoodies, and I'd like to point out defendant was still wearing a black hoodie when Metro came into contact with him weeks later. They told her, don't look at us, forced her on the ground, and robbed her of her belongings.

The defendant is guilty of every crime that we charged him with. The State would ask you to return a guilty verdict on all four counts.

Thank you.

THE COURT: All right, thank you, Ms. Jones. Mr. Marchese?

MR. MARCHESE: Thank you, Your Honor.

(Closing Argument for the Defense)

MR. MARCHESE: Good morning Ladies and Gentlemen. I just have a few

points that I wanted to make in reference to the case. This is the last opportunity that you'll get to hear from me, but like I said, I just wanted to go over a few things.

The first is the testimony of Natasha Lumba. Now, first off, you know, I feel bad for her, I really do. But that is not our jobs here to inject our emotion into these proceedings. No one ever wants to see someone getting robbed allegedly at gunpoint, go into the house and having their possessions taken, and all those sorts of things.

We, or you, are here to determine the guilt or the innocence of Tommy Stewart. So I would ask that you leave out Ms. Lumba's emotions in this particular circumstance and look at the facts of the case.

Now what are the facts of the case? We know that Ms. Lumba testified a couple days ago and basically she was unable to positively identify my client, Mr. Tommy Stewart. Now previously she was given that six pack which is good, the photo lineup which was brought into evidence, and Ms. Jones also alluded to him, to it in her closing statement.

She was given that six pack but she really wasn't able to positively identify Tommy Stewart. What did she say? She said he had similar characteristics but there was also a portion in which she was identifying the individual that had similar characteristics to Tommy Stewart as the one, the individual who had the gun. She also testified the individual who allegedly had the gun was approximately 5'll" to 6 foot, somewhere in that range.

But what do we know from Detective Abell when he testified yesterday? We know that my client -- we've actually had the opportunity to see my client, seeing him in Court standing up. My client was booked into the Clark County Detention Center at 5:00. Now I realize as a defense attorney one of my jobs here is to nitpick

and to go after all the little inconsistencies in someone's statement, but I would submit to you that I'm not nitpicking whether or not someone had Count Chocula cereal for breakfast as opposed to, say, Cocoa Krispies. But 5'5" to 5'll", 6 foot, that's a significant difference of height. That's a full head if not even more.

So what I would submit to you is that she is unable to positively identify Mr. Stewart as she even admitted on the stand when she testified. So that's important.

And what else do we know? We know that on the night in question that these two individuals came up to her and now that the State is saying definitively that these individuals had a gun. Now it really doesn't matter what I say. It really doesn't matter what the State says. And with all due respect, it doesn't matter what the Judge says about the facts because, like I said, you folks -- you folks are the finder of fact.

And the fact that you'll need to find here in order to find that there was, in fact, a deadly weapon used, is that there was a deadly weapon, and you'd need to go to law school to figure that out.

Now what do we know? We know that the original statements that she made, Ms. Lumba was never definitive about saying, yes, there was a gun. She said things in the nature of it appeared there was a gun. She thought there was a gun but she never actually said, yes, there was a gun.

She also said that the only time that she saw a gun, or allegedly saw a gun, was outside of her apartment. She never actually saw one inside the apartment. And this is important because the State has charged the burglary while in possession of a firearm. So even if you find that there was, in fact, a firearm in their possession, you also need to find that it was used in the commission of a

burglary.

Now she clearly said at no particular time, the only time she saw what she thought might have been a gun was outside of her apartment. So I would ask that you take that into consideration during your deliberations.

Now we've also had some testimony about these, these two guns. And Ms. Jones showed you the other gun from approximately about three to four weeks after the alleged incident, and you have this detective over by the Bells Grocery Store, convenience store, 150 yards away, it's approximately 7:00 at night and there's approximately five or so people in the crowd with Mr. Stewart.

What does he say? He says that he sees Mr. Stewart with some sort of a handgun and he puts it on the floorboard, and then they see another individual with some sort of a handgun put it onto the floorboard of that same car. Well, they're trying to make this connection that these two guns, one of them is apparently the same gun that wasn't even identified necessarily by Ms. Lumba three to four weeks earlier, said same gun.

The best description that she ever gave was after her original statement and she said she believed it might have been a black semi-automatic handgun. 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.

So, clearly, we know, and even the State I would imagine would concede, that showing you the second gun is nothing more than a red herring. It's

nothing more than to inflame your prejudices here today. So I would ask that you give that piece of evidence whatever worth you feel that it is worth, and I would submit to you that the weight is minimal, if any.

Now we also had some jail recordings that were played. I mean, I don't know, I'll submit it to you guys and you guys can listen to it. It sounded like Charlie Brown's teacher if you ask me. But you'll have the opportunity to go back and listen to them. Feel free to play them. To me, I would submit to you that there is nothing damning on those. Never at any point in time does Tommy Stewart say, I was there, I robbed Natasha Lumba, I did all the things that the State is here accusing me of today.

Now we also heard from a CSA, or heard from the State's fingerprint expert, and one of the things she talked about was how she makes her prints, how she finds and makes a connection. So what she says is she gets the print, she takes it out of this sealed envelope that's in this secure room and she takes it and she does a search with this AFIS. And AFIS is nothing that she has really anything to do with. She doesn't work for AFIS, she's not the one that puts -- inputs the information into AFIS, none of that. That's the first step.

And then she may or may not get a match, and then once she gets that match, she then will double check it for lack of a better term. Now how did she double check it? And this is what's important because her believability and her credibility go to my next point.

So she told everyone, we were all here and we all heard her testify under oath, that this entire process was done in one day. So what she did was she went to AFIS, she got Tommy Stewart, she did a match.

Then she went to her local database and she pulled it off. And I showed

her this on cross-examination and I asked her about this, and you'll have the opportunity to look at State's Exhibit No. 89, and we went over all this and I talked about these little numbers here at the top, and they personally identified Tommy Stewart, and then I asked her about these numbers here at the bottom. And this is the important point. And you probably can't see this but, like I said, you'll have the opportunity to view it.

This is April 16th, 2015. Approximately three months after when she told you guys on the stand, under oath, that she pulled those prints. Not my testimony, not my words; her words, their witness, their case, their evidence, their testimony.

Ladies and Gentlemen, I would ask that you go back and you give that the appropriate weight that you think that it's worth. But I'm not pulling any punches on you, I'm not trying to throw you any curve balls, I'm just simply reiterating what she told you guys yesterday, that she did it all in the same day and that the date on there was the date that's given to her when she pulls it. We know that's not true from her own testimony.

Now lastly, I want to talk about kidnapping. And I try to stay away from too much of the law because it gets a little bit confusing at times, it's very dry, but it's very important here because this is one of those instances where it's not so much the facts, it's where the legal nuances of the facts and how the facts apply to the law.

Now what do we know here? Assuming everything that the State says is true, and we don't, but just for the purposes of my argument, right? Two individuals allegedly point a gun at this young lady, say go in your house, she's in her living room, brief moment, you know, kind of going through some things, throws

them down, she's ordered to go into her bedroom and stay on the ground.

These two individuals, sometimes they're looking at her, sometimes they're not, and she stays there the whole time in her bedroom until at some point they leave, she feels that it's safe, and gets in the car and goes to her boyfriend's and the authorities are contacted.

So the first thing, assuming all that's true, is that you need to look at and you need to see that Mr. Tommy Stewart had the specific intent to kidnap her. Now this is where the law and the facts kind of gel together. Did he have the specific intent to kidnap her? Was he in there committing those acts to kidnap her? Or was he committing those acts to rob her?

I would submit to you that his intent in doing the actions that he did, assuming that the State is -- has proven their case, I would submit to you that, no, he was there simply to rob her and take whatever possessions him and his unnamed co-conspirator could find.

And you're also going to hear an instruction on this and it's basically the five different ways in which you would find Mr. Stewart criminally liable for first degree kidnapping if they are, in fact, present.

Now the first is that movement of the victim was not incidental to the robbery. Now I am arguing that it was incidental to the robbery. All these individuals did was they put her in her house, they sent her to her room, and that was it. It was all in the grand scheme of committing the robbery.

The second way that the State can prevail on first degree kidnapping that the incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the robbery. Well I would submit to you that she was in her own home, she was in her own bedroom, and no

way, shape or form was she at any more increased substantial risk by being sent to her bedroom to lay on the ground.

The third way is that any incidental movement of the victim substantially exceeded that required to complete the robbery. Once again, same argument pretty much; very basic, just brought her into her home, into the bedroom, told her to lay down. There was nothing extra, there was nothing unnecessary, simple, short and sweet, to the point, no kidnapping ever.

Number four is very simple. I'm talking about physical restraint. There was no physical restraint here, there was -- most of us when we think kidnapping we think that someone is bound and gagged. As you're seeing right now that is not the law in this state, nor is it the facts and circumstances of this case.

And lastly, the movement or the restraint had an independent or significant purpose. Once again, I would argue to you, no, there was no independent purpose. It was not for the specific intent to kidnap Ms. Lumba. It was -- the purpose was to commit the robbery.

So based upon all that, Ladies and Gentlemen, I would submit to you that the case -- the State has not met their substantial burden of proving the case to you beyond a reasonable doubt. We've never had anyone come into Court that was actually present and positively identify Mr. Stewart as the perpetrator of these crimes.

I would ask that you go back to deliberate and look at the exhibits and think about the testimony that was given by the fingerprint expert here, and why there is some real serious concerns about what she had to say, and what she testified under oath here about, and I would also ask that you look at the jury instructions in reference to a deadly weapon, proving that there was, in fact, a

deadly weapon and a deadly weapon was, in fact, proven to be used during the commission of the crime, and also look at the jury instructions in reference to first degree kidnapping and see why this was not a first degree kidnapping, if the State proves their case. It was not a first degree kidnapping but rather just a simple robbery.

So at that, Ladies and Gentlemen, I will let you go back, the State will have an opportunity now to rebut my arguments, and I think you for your time.

THE COURT: All right, thank you, Mr. Marchese. Ms. Lexis?

MS. LEXIS: Yes, Your Honor.

(Rebuttal Argument for the State)

MS. LEXIS: Ladies and Gentlemen of the Jury, Mr. Marchese in his closing arguments, one of the very first points that he pointed out was who you should believe at this particular case. He pointed out credibility.

I submit to you that the evidence in this case, beyond a reasonable doubt, that what happened on January 20th, 2015, was pretty much every woman's worst nightmare. It was not a sexual encounter with this Raymond gone wrong where the defendant was left bored in the living room, but he decided since I'm here let's steal. This was a very violent offense committed against Natasha Lumba.

So let's talk about credibility. There is actually an instruction, it is No. 37, that tells you what you should consider when you are thinking about credibility. It says, The creditability or believability of a witness should be determined by his manner upon the stand, his relationship to the parties, his fears, motives, interests or feelings, his opportunity to have observed the matter to which he testified, the reasonableness of his statement and the strength or weakness of his recollection. If you believe that a witness has lied about any material fact in this case, you may

disregard the entire testimony of that witness or any portion of his testimony which is not proved by other evidence.

So you heard Natasha testify for about an hour or so. She was subject to cross-examination and what she told you was very clear. And most of what she testified to is undisputed.

Show you State's Exhibit No. 29. What Natasha told you is that when she came up to her apartment on January 20th, 2015, at about 11:00 P.M., she had been coming back from her boyfriend's house.

She'd gone on a drive and she was coming back from her boyfriend's house. She approached this gate, right here you can see it, she was fumbling for her keys when she noticed two men darkly -- dressed in dark clothing, black male adults approaching her from the corner of her eye. She said this immediately drew her suspicion, she became afraid, and her testimony was that she thought, oh my God, oh my God. She's, like, fumbling for her keys even more.

As -- by the time she had gotten into the front door as shown in State's Exhibit No. 32, these two men were already next to her, the taller one with the gun had already brandished the firearm which she described as a black semi-automatic weapon, and told her to open the door.

She told you she complied because she was afraid for her life. And Mr. Marchese during his closing arguments talked about the burglary charge, okay? He indicated to you that you needed -- that the defendant needed to have used the burglary, or the gun during the course of the burglary.

When the defendant and his co-conspirator drew a weapon on Natasha, forcing her to open her door and then they entered, they committed the crime of burglary while in possession of a firearm. Okay?

The defense wants you to believe that it is just a coincidence that Natasha was able to identify and describe to you the type of gun, the color of the gun that was used on her during this January 20, 2015, robbery and kidnapping, and that that same gun, or a gun matching that description, was found and seen by the officers when he was apprehended on February 14th of 2015.

Ladies and Gentlemen of the Jury, we are not talking about coincidence here, okay? We're talking about evidence. A coincidence is one thing that happens by happenstance, unplanned. What you have in this case is proof of this defendant's guilt beyond a reasonable doubt.

What do you -- what actually should point you to this particular defendant? Well, it's not a coincidence that his fingerprint is found on an item in Natasha's laundry room that he admits to touching. It is not a coincidence that Natasha, when shown a photo lineup of an individual that she told you she had only seen -- I'm going to show you State's Exhibit No. 29.

Natasha told you when she testified that she didn't have an opportunity to really observe these individuals except for when they first came up to her right here, right outside of her gate. Yes, when Mr. Marchese asked her on cross-examination, Is it dark out there. She said yes. They were wearing dark clothing and sometimes they drew their hoodies over their face, such that she didn't have such a good opportunity.

Coupled that with her testimony that she was in extreme fear, it is not a coincidence that -- I'm going to show you State's Exhibit No. 87 -- that she identified the person in the number 3 position, the defendant, Tommy Stewart, as the person resembling one of her assailants on January 20th, 2015.

She describes him as the taller assailant, and we'll talk about the height

in a moment. But she said, No. 3 has a similar face shape, eyes, nose, complexion, and face shape as the taller assailant. Okay?

She was able to get a good enough look of her assailant that she was able to, about a week, week and a half later when presented this photo lineup, was able to at least identify common characteristics. But it's not as if the State is just asking you to convict this man, or believe that he was in Natasha's home on January 20th, 2015, based on this identification. The State's not asking you to do that because, I mean, it's similar face, shape, eyes, nose, complexion, face shape of the taller assailant. That's not very clear. That is not a 100% identification. I agree with Mr. Marchese on that.

And, yes, Natasha was not able to identify the defendant when she was testifying. She was not; I agree. But what doesn't lie is forensic evidence. And what we know for certain is that the defendant's fingerprint, State's Exhibit 85, was found in an item in Natasha's home that he admits to touching. I think that's where there's confusion here because it's not as if Natasha's credibility is necessarily at issue, because Natasha -- a lot of Natasha's testimony is corroborated, it's not disputed.

First, Natasha tells you that two men were in her apartment on January 20th, 2015. Well, you heard Detective Abell tell you, testify, concerning the defendant's statement, the statement that the defendant gave him on February 14th, 2015. During that statement the defendant admits to being in Natasha's home January 20th, 2015, with another person. So that part of Natasha's testimony is undisputed and actually corroborated by the defendant's own statement.

What's another part of Natasha's statement that's corroborated? Well, that one or both looked through or rummaged through her apartment and through

her stuff. Detective Abell told you when he testified that the defendant admitted to looking through Natasha's stuff.

The defendant admitted to rummaging through her stuff looking for money, looking for things to take. The defendant said he got bored while his alleged friend or cousin, Raymond, was having sex with Natasha in the bedroom. And so he decided to rummage through her stuff.

That is not disputed. The defendant admitted to rummaging through her stuff. And there's evidence, if you look at all of the pictures, that her house was gone through, that it was rummaged.

What else is undisputed? Well, the items were stolen from her apartment. What may be disputed is that things were taken -- what things were taken. But the defendant during his statement to the detective said he took a watch and a ring. Natasha tells you that she's missing a laptop and a camera, and two dollars from her purse, the only two dollars she had in her wallet. Okay? The what was taken may be different, but the defendant admitted to taking things from Natasha's home.

What else do you know? Well, you know that one of the men who assailed her, who robbed her and kidnapped her that day, had a gun. You know that because the gun matches the description that Natasha gave, State's Exhibit No. 27, was found in the car that the defendant was by. That's undisputed.

What else? Natasha doesn't know the defendant. She told you that. That's not disputed. The defendant himself during his statement with Detective Abell indicated he didn't know her. They met her on the strip allegedly, him and his cousin or friend, Raymond, met her. And while they were out, this girl who, one, has a boyfriend; two, had been at her boyfriend's house and not on the strip, just

decided to exchange phone numbers with this Raymond individual, and allowed two men she did not know to follow her home so she could have sex with the one while the other waited in the living room, giving them an opportunity to steal.

When we're talking about credibility, you also get to weigh the credibility of the man who stands charged with the crimes in this particular case. He gave a statement in this case. It's not as if he wasn't -- he didn't have the opportunity to tell you, the Ladies and Gentlemen of the Jury, what happened.

What did he tell Detective Abell after he was read his rights, after he was advised of what Detective Abell was investigating. What did he say? Detective Abell asked him, were you ever at 805 Rock Springs Road or Street? And he denies, denies, denies, denies, until Detective Abell confronts him with the fact that his fingerprint, State's Exhibit No. 85, is found on this jewelry box. And then what does the defendant say? Well, then he makes up this very creative story about Raymond, about Natasha agreed to have sex with this person she doesn't know, allowing them to follow her to her house while she engages in sexual activity with one, leaving the defendant unattended in her apartment.

There's another jury instruction besides the credibility that I want to draw your attention to, and that is State's Exhibit -- excuse me, Jury Instruction No. 40. This is called a common sense instruction because while during jury selection we asked you a lot of technical things, as a juror you are allowed to use your common sense and experience in deliberating this case.

And what does this instruction tell you? It's actually an instruction. It tells you, Although you are to consider only the evidence in the case in reaching a verdict, you must bring for the consideration of the evidence, your everyday common sense and judgment as reasonable men and women. Thus, you are not

limited solely to what you see and hear as the witness testified. You may draw reasonable inferences from the evidence which you feel are justified in light of common experience, keeping in mind that such inferences should not be based on speculation or guess. A verdict may not be influenced by sympathy, prejudice or public opinion, and your decision should be the product of sincere judgment and sound discretion in accordance with these rules of law.

So that you have a jury instruction that tells you to use your common sense. If the defendant's creative story about how his prints would have ended up in Natasha's apartment, is that reasonable? And when put against your common sense test, does it pass muster. I submit to you it does not because what the defendant is doing in this case, is he is essentially, after he is confronted with evidence that he can't dispute, the fact that his fingerprint is in this girl's apartment, this girl who doesn't know him from Adam, okay? What is he left with? Well, he's left with the position where he has to admit what he can't deny and he denies what he can't admit.

You see, Ladies and Gentlemen of the Jury, if you believe Natasha as she testified before you a couple days ago, if you believe Natasha and the corroborating evidence, the fingerprints, the fact that we found him or the defendant was seen with a gun a few weeks later, okay, her photo lineup. If you believe the defendant -- excuse me, if you believe Natasha, fingerprints, other corroborating evidence, the defendant is guilty. The defendant is guilty of all of the crimes charged.

But he's admitting what he can't deny. He can't deny fingerprint evidence. He can't deny that he was in this apartment. So what does he do? Well, he has to deny what happened in this particular apartment, hence the story, this

very creative story of why he was there. Okay?

He can't admit that he and his friend used this gun that was found on the defendant's person February 14th, 2015. He can't admit that he used that and pointed it at this girl as he forced -- as they forced her to open the door, as they forced her to lie in her bedroom, as they forced her to stay there as they continued to commit this robbery upon her. He cannot admit that because that would make him guilty.

I submit to you this is a very creative explanation as to why his print would be in this woman's house. If he admitted that, he would be guilty. It would be a very, very easy decision for you.

So, again, much of the evidence in this case is not disputed. The defendant was at her house on January 20th, 2015. The defendant touched the jewelry or sewing box that you've seen photos of throughout the few days that you've been here. Okay?

It is not disputed that the defendant stole items from Natasha's house, or from her apartment. It is also not disputed, perhaps the motive for this particular crime, okay, when the defendant talked to Detective Abell, he told Detective Abell that he thought Natasha was a prostitute. He said, if you're hoin' you should have cash.

And what did Natasha tell you? Well, Natasha told you that the defendant or the person that he was with, one of her two assailants, kept asking her if she was a prostitute, and that if she was a prostitute, or why wouldn't she have more cash. They were just astounded that this girl who worked at Top Rank Promotions as an administrative assistant whom they thought was a prostitute, a very likely target to rob because what do we -- prostitutes typically have cash.

They were so surprised when they went into this girl's home, this girl who works as an administrative assistant, that she had two dollars to her name, and that she willingly gave them her PIN number and told them she didn't have money in there anyway so go ahead. And that she had trinkets and sewing supplies and costume jewelry. They were just so surprised at that because they thought she was a prostitute, because they thought she should have money. That's also undisputed, okay?

The motive. Why did they pick Natasha? It wasn't again some sexual encounter, okay? They picked her because she was alone, because she was going into an apartment, because they knew they could overcome her will. She's a -- you had an opportunity to observe her. She's this little woman, two men, one with a gun, she's not going to resist much. This is going to be an easy thing. Okay? That's undisputed.

So as Ms. Jones indicated, the State has the burden of proving that crimes were committed and that the defendant committed the crimes. Okay? We know it's undisputed he was in her apartment, but what crimes were actually committed? Mr. Marchese indicated if the State proves our case, you now have to think about whether or not the defendant and his co-conspirator also kidnapped Natasha.

There is an instruction -- let me find first kidnapping instruction. It's actually Instruction No. 28 -- thank you, Jess, I have it. It says, "The crime of kidnapping in the first degree as charged in this case is a specific intent crime. Basically, the defendant had to have intended to commit the crime of robbery when he entered her residence."

Again, that's why it's such a convenient story that he came -- he stole

from her only after she was in the bedroom with his friend. Okay? Because the defendant restrained -- the defendant and his co-conspirator restrained Natasha for the purpose of committing a robbery. Okay? That's why they kept her in that back bedroom so they could rummage through her stuff without any kind of obstruction, and they could easily steal these items and leave.

But what Mr. Marchese also brought up and I need to go through with you, is State's exhibit -- or excuse me, State's 3, Instruction No. 27. And this says, In order for you to find the defendant guilty of first degree kidnapping and an associated offense of robbery -- because here we have a kidnapping and a robbery charged, you must also find beyond a reasonable doubt either -- I circled or right here because you only need to find one of these five factors, okay -- you must also find beyond a reasonable doubt either: (1) that the movement of the victim was not incidental to the robbery.

What does that mean? The movement that we're talking about here is the moving of Natasha from that front porch, and I know that this is a very technical argument, but moving her from the gate from outside of her front door to the back bedroom.

Did they need to move her to commit a robbery upon her? Did they need to move her into that back bedroom? And I submit to you, no, because they could have just as easily robbed her while she was standing outside her front door or if she had her purse with her. The ATM cards that they asked about the PIN, her two dollars, they could have easily robbed her outside of her front door. They could have easily robbed her while she stood in her living room as opposed to being in the very far back bedroom.

I'm going to show you State's Exhibit No. 32. As opposed to taking her

to the furthest, back point of her apartment. Because Natasha described her apartment to you. She said from the front door you go straight, you pass the living room here, the kitchen here, bedroom with those little curtains, laundry room, bedroom, and another bedroom off to the side.

They actually put her in the place furthest away from where she could, one, escape; two, call for help, and let me also mention that they took her cell phone so she didn't even have the ability to do that.

Ms. Jones asked Natasha a lot on direct examination. Why didn't you run? Why didn't you do this? Why didn't you call for help? Because they put her in the furthest point of her apartment. And do you want to know why they did that? Because they wanted to continue to rob her, past the robbery that could have happened outside of her front door.

They did not need to put her in her back bedroom - in her bedroom to rob her. They absolutely did not. That's why the defendant is guilty of both a robbery and a kidnapping. But there's also another factor that can play into this as well because as I indicated, it's an or.

So, number one, that any movement of the victim was not incidental to the robbery. But it's number two that I really want you to focus on. That any incidental movement of the victim substantially increase the risk of harm to the victim over and above that necessarily present in the robbery.

Two men escorting, demanding that you, at gunpoint, open the door to your apartment, to your home where you should feel the safest, and having them while you continue to believe that they still have guns because we have a gun -- we have no reason to believe that the man holding the gun, the taller one whom Natasha identified by photo lineup as the defendant, that they ditched the gun when

they entered, right?

So if you believe that one of the assailants had a gun and they pointed it at her, presumably they brought it with them when they robbed her in her apartment. So having these two men she did not know in the apartment and then placing her in a place where she had the least likely chance of running out, calling for help, increased, substantially increased, the risk of harm to her. Okay?

A robbery is one thing if it was completed outside of her front door, but when they cross that threshold and placed her in her bedroom in a position where she is to lie face down, told not to look at these individuals, substantially increased her harm. And it's for that reason that the defendant is guilty of both the robbery and the kidnapping.

Mr. Marchese talked about the height, the height of this person. The defendant is 5'5", Natasha described her assailants as much taller. That's true. I mean, you heard the testimony, okay, but why is that even relevant? Let's just think about this from that common sense point of view.

Why is the defendant's height relevant? Because this is not an ID case, it's not as if we don't know that the defendant was in her house on January 20th, 2015. You have her identifying him in a photo lineup, you have his ID, and then you have his old statement telling you he was there and that he stole stuff. Okay?

This is not an ID case. The defendant was there; he stole from her. That's undisputed, okay? So height, whether he was 7 feet tall or 4 feet tall doesn't really matter because he already admits to being there. Because his fingerprints are already there.

Mr. Marchese indicated that we were simply trying to connect what was found, State's Exhibit No. 27, to the crime. We're not just trying to connect this gun

to the defendant. This is evidence that you can consider, one, whether or not Natasha was robbed at gunpoint, kidnapped at gunpoint, and, two, whether or not there was a gun used in the first place.

The fact that the defendant was seen with a gun, whether it was this one or the other one, okay, is evidence for you to consider in determining whether he possibly, or whether he had the gun when he robbed Natasha.

Mr. Marchese also touched on the jail calls, and I echo his remark in that you're able to go back when you're deliberating and listen to them. We played two calls for you. The first one because there's still an outstanding suspect, one who didn't accidentally leave a fingerprint, one that we have not been able to identify, and it is very telling that shortly after he is taken into custody and booked into the Clark County Detention Center, he is calling an individual on the phone, telling them to have someone call this other person because something happened in his neighborhood. Okay?

That is what you call consciousness of guilt. That is what you call trying to tip off the other guy that committed this crime with you. That's why that jail call's relevant. That's why you should listen to it.

The second jail call, the defendant discussing all of the things that could find him guilty. Her identifying him -- wrong, she did identify you in a photo lineup. Not having your fingerprint -- wrong, your fingerprint was on this actual, was on this jewelry box in her home. His statement wouldn't stand, his statement admitting to being there and taking her stuff? Well, it stood. And this is all evidence for you to consider.

The last thing I'll touch on is Instruction No. 35. During jury selection and during closing arguments that several of us has discussed, reasonable doubt.

This is the standard. This is the State's burden of proof. And I will tell you, Ladies and Gentlemen of the Jury, yes, this is our burden. Ms. Jones and I have the burden of proving this case to you beyond a reasonable doubt.

But I will also tell you this, that that is a burden that we welcome, it is a burden that we have met here today and the preceding days, and it's a burden that we've met such that you should find the defendant guilty.

But I'll leave you with this. The defendant is presumed innocent until the contrary is proven. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged, and that the defendant is the person who committed the offense.

A reasonable doubt is based on reason. It is not mere possible doubt but is such a doubt that would govern or control a person as a more weighty affairs of life. If the minds of the jurors after the comparison and consideration of all the evidence are in such a condition that they feel an abiding conviction as to the truth of this charge, there is not a reasonable doubt.

And I'll draw your attention to that, and I'll read that sentence for you again. If the minds of the jurors, that's all of you, after the comparison and consideration of all of the evidence are in such a condition that you feel an abiding conviction as to the truth of the charges, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

There is no doubt here. If you believe Natasha, if you believe the forensic evidence, if you believe the half-truths that the defendant told during his statement, and if you disregard the not-so-truthful statements made by the defendant during his taped interview with Detective Abell, there is no other true and just verdict except for guilty of all counts. And that's what Ms. Jones and I will be

asking you to return.

Thank you for your time.

THE COURT: All right, thank you, Ms. Lexis. The Clerk will now swear the officer to take charge of the jury.

(Closing Arguments concluded at 11:51 A.M.)

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Susan Schofield

SUSAN SCHOFIELD
Court Recorder/Transcriber

EXHIBIT 7

VER

ORIGINAL

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT
MAR 17 2016 12:10 pm
BY, Denise Husted
DENISE HUSTED, DEPUTY

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,
Plaintiff,
-vs-
TOMMY STEWART, aka
Tommy Laquade Stewart,
Defendant.

CASE NO: C-15-305984-1
DEPT NO: XXI

VERDICT

We, the jury in the above entitled case, find the Defendant TOMMY STEWART, as follows:

COUNT 1 – CONSPIRACY TO COMMIT ROBBERY

(please check the appropriate box, select only one)

☑ Guilty of Conspiracy to Commit Robbery

☐ Not Guilty

COUNT 2 – BURGLARY WHILE IN POSSESSION OF A DEADLY WEAPON

(please check the appropriate box, select only one)

☐ Guilty of Burglary while in Possession of a Deadly Weapon

☑ Guilty of Burglary

☐ Not Guilty

COUNT 3 – ROBBERY WITH USE OF A DEADLY WEAPON

☐ Guilty of Robbery with Use of a Deadly Weapon

☑ Guilty of Robbery

☐ Not Guilty

COUNT 4 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

(please check the appropriate box, select only one)

☐ Guilty of First Degree Kidnapping with Use of a Deadly Weapon

☑ Guilty of First Degree Kidnapping

☐ Not Guilty

DATED this 17 day of March, 2016

FOREPERSON

EXHIBIT 8

Electronically Filed
05/17/2016 10:43:56 AM

JOC

CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TOMMY STEWART aka
Tommy Laquade Stewart
#2731067

Defendant.

CASE NO. C305984-1

DEPT. NO. XXI

JUDGMENT OF CONVICTION

(JURY TRIAL)

The Defendant previously entered a plea of not guilty to the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in violation of NRS 200.380, 199.480, COUNT 2 – BURGLARY WHILE IN POSSESSION OF A FIREARM (Category B Felony) in violation of NRS 205.060, COUNT 3 – ROBBERY WITH USE OF A DEADLY WEAPON (Category B Felony) in violation of NRS 200.380, 193.165, and COUNT 4 – FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony) in violation of NRS 200.310, 200.320, 193.165; and the matter having been tried before a jury and the Defendant having been found guilty of the crimes of COUNT 1 – CONSPIRACY TO COMMIT ROBBERY (Category B Felony) in

violation of NRS 200.380, 199.480, COUNT 2 – BURGLARY (Category B Felony) in violation of NRS 205.060, COUNT 3 – ROBBERY (Category B Felony) in violation of NRS 200.380, and COUNT 4 – FIRST DEGREE KIDNAPPING (Category A Felony) in violation of NRS 200.310, 200.320; thereafter, on the 10th day of May, 2016, the Defendant was present in court for sentencing with counsel JESS R. MARCHESE, ESQ., and good cause appearing,

THE DEFENDANT IS HEREBY ADJUDGED guilty of said offenses and, in addition to the $25.00 Administrative Assessment Fee, $2,875.00 Restitution plus $3.00 DNA Collection Fee, the Defendant is SENTENCED to the Nevada Department of Corrections (NDC) as follows: **COUNT 1** - to a MAXIMUM of SIXTY (60) MONTHS with a MINIMUM parole eligibility of THIRTEEN (13) MONTHS; **COUNT 2** - to a MAXIMUM of NINETY-SIX (96) MONTHS with a MINIMUM parole eligibility of TWENTY-TWO (22) MONTHS, CONCURRENT with COUNT 1; **COUNT 3** - to a MAXIMUM of TWENTY (20) YEARS with a MINIMUM parole eligibility of EIGHT (8) YEARS, CONCURRENT with COUNT 2; and **COUNT 4** - LIFE with the eligibility for parole after serving a MINIMUM parole eligibility of FIVE (5) YEARS, CONCURRENT with COUNT 3; with FOUR HUNDRED FIFTY-TWO (452) DAYS credit for time served. As the $150.00 DNA Analysis Fee and Genetic Testing have been previously imposed, the Fee and Testing in the current case are WAIVED.

DATED this 16th day of May, 2016

Valerie Adair

VALERIE P. ADAIR
DISTRICT COURT JUDGE

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

TOMMY STEWART,
#2731067

Defendant.

CASE NO: C-15-305984-1

DEPT NO: XXI

STATE'S RESPONSE TO DEFENDANT'S FIRST THROUGH FIFTH SUPPLEMENTAL PETITIONS FOR WRIT OF HABEAS CORPUS

DATE OF HEARING: APRIL 23, 2019
TIME OF HEARING: 9:30 A.M.

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's First Through Fifth Supplemental Petitions For Writ Of Habeas Corpus.

This Response is made and based upon all the papers and pleadings on file herein, the attached points and authorities in support hereof, and oral argument at the time of hearing, if deemed necessary by this Honorable Court.

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POINTS AND AUTHORITIES

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

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

a minimum parole eligibility of 8 years, concurrent with Count 2; and Count 4 – life with the 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).

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." 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.

ARGUMENT

I. THIS COURT SHOULD STRIKE 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 should 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 should each be dismissed.

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

If this court decides to address Petitioner's rogue filings on the merits, it should find that each nevertheless fails 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 should be 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.

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 should be 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 should be 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 be 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 should be 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, ecstasy 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. This claim should be 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

[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.

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" 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).

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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.

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 should find the claims in Petitioner's Third through Fifth Supplemental Petitions for Writ of Habeas Corpus meritless and deny 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 "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. Ground 4 of the First Supplemental Petition should be 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),

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

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 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 should be 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 should find that an evidentiary hearing is not warranted and deny Petitioner's motion.

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CONCLUSION

For the foregoing reasons, each of Petitioner's Supplemental Petitions should be denied.

DATED this 2nd day of April, 2019.

Respectfully submitted,

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 hereby certify that on the 3rd day of April, 2019, I mailed a copy of the foregoing Response to:

TOMMY STUART 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** **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

FILED
NOV 06 2019
CLERK OF COURT

THE State OF NEVADA
Plaintiff
v.
TOMMY Stewart.
Defendant

SUPREME COURT
OF NEVADA

CASE NO. 70069
District court case No. C305984

To The supreme court of the State of Nevada

Notice of Appeal

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 29th day of April, 2019 whereby his petition for writ of Habeas Corpus and Supplements were denied.

Tommy Stewart # 1048467
10-27-19

RECEIVED
APPEALS
NOV 18 2019
CLERK OF THE COURT

RECEIVED
NOV 06 2019
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
DEPUTY CLERK

C-15-305984-1
NOASC
Notice of Appeal (criminal)
4876436

AA000555

Dear Clerk of the court,

My name is Tommy Stewart # 1048467 case no 70069. Im writting in concern about my appeal. I have an Attorney his name is Travis Akin. I haven't heard from him and the last six months. I would like to know if he had file a notice of appeal. If not I would like to file one on my behalf. May you please send me a docketed sheet giving me a full up date please and thank you.
may you please send me copys back of my letter and also my notice of Appeal. Tommy Stewart
10-27-19

AA000556

Tommy Stewart # 1048467
E.S.P
P.O. Box 1989
Ely, NV [redacted]
89301

LAS VEGAS
NV 890
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Supreme Court of Nevada
Office of The Clerk
201 S. Carson Street, Suite 2
Carson City, Nevada 89701

89701-478051

ELY STATE PRISON
NOV 0 3 2019
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ASTA

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: Valerie 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

12. Child Custody or Visitation: N/A

Dated This 19 day of November 2019.

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

FILED
DEC 02 2019
CLERK OF COURT

7

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

PP
DA
AOR
Travis
Alcin

January 2, 2020
9:30 AM

IN THE 8th DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Tommy Stewart
Petitioner,

vs.

Warden; State of Nevada,
Respondents.

CASE NUMBER:

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL [redacted]

COMES NOW, Tommy Stewart the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner ~~and for an evidentiary hearing~~. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings, or

(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at Ely State Prison, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 26 day of November, 2019.

Tommy Stewart

In Proper Person

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on November, 2019, he served a copy of the foregoing Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

District Attorney's Office
Address:

Warden
Address:

Tommy Stewart
Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Motion to appoint counsel
(Title of Document)

filed in District Court Case number C-15-305984-1

☑ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Tommy Stewart
Signature

11-26-19
Date

Tommy Stewart
Print Name

Appoint counsel
Title

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

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

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** **January 02, 2020**

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

January 02, 2020 **09:30 AM** **All Pending Motions**

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

COURT CLERK: Duncan, Kristin

RECORDER: Page, Robin

REPORTER:

PARTIES PRESENT:

Michael J. Scarborough	**Attorney for Plaintiff**
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)

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

89101-630000

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

ELY STATE PRISON
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1/7/2020 12:51 PM
Steven D. Grierson
CLERK OF THE COURT

ASTA

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

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **January 23, 2020**

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

January 23, 2020 **9:30 AM** **Appointment of Counsel**

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

COURT CLERK: Phyllis Irby

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT:

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

JOURNAL ENTRIES

- DEFT NOT PRESENT. The Court noted this was remanded by the Supreme Court for the Court to Appellate counsel.
Mr. Atkin informed the Court Deft had filed a Motion to Withdraw counsel; then a couple of days prior to the Motion being ruled on the Order dropped down and now Notice of Appeals has been filed with Mr. Atkin name on it; and he will be handling the case. COURT ORDERED, MR. ATKIN IS HEREBY CONFIRMED AS COUNSEL.

NDC

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80084

FILED

AUG 07 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER REMOVING COUNSEL, REFERRING COUNSEL TO STATE BAR FOR INVESTIGATION, REMANDING FOR APPOINTMENT OF COUNSEL, AND SUSPENDING BRIEFING

This court previously remanded this matter to the district court for the limited purpose of securing appellate counsel for appellant. The district court appointed attorney Travis D. Akin as counsel for appellant. On February 7, 2020, this court entered an order setting the briefing schedule in this appeal, and directing Mr. Akin to file a transcript request form and docketing statement within 21 days.[1] Mr. Akin failed to file the transcript request form and docketing statement. Thus, on March 19, 2020,

[1]A copy of this order is attached.

this court issued a notice directing Mr. Akin to file the transcript request form and docketing statement within 10 days.[2] Mr. Akin timely filed a motion for extension of time, and on April 15, 2020, this court entered an order granting Mr. Akin until May 6, 2020, to file the missing documents.[3] When Mr. Akin failed to comply with that order, on May 22, 2020, this court directed him to file the required documents within 7 days or face sanctions.[4] Mr. Akin again failed to comply. On June 25, 2020, this court entered an order conditionally imposing sanctions against Mr. Akin for his failure to file the transcript request form, docketing statement, and opening brief and appendix.[5] If Mr. Akin timely filed the required documents, the sanction would be automatically vacated. This court cautioned Mr. Akin that failure to comply with the order or any other filing deadlines would result in his removal as counsel in this appeal. This court also cautioned that any such failure would result in referral to the State Bar of Nevada for investigation. To date, Mr. Akin has not filed the required documents or otherwise communicated with this court.

This court has repeatedly stated that all appeals are expected to be "pursued in a manner meeting high standards of diligence, professionalism, and competence." *Cuzdey v. State,* 103 Nev. 575, 578, 747 P.2d 233, 235 (1987); *accord Polk v. State,* 126 Nev. 180, 184, 233 P.3d 357, 359 (2010); *Barry v. Lindner,* 119 Nev. 661, 671, 81 P.3d 537, 543 (2003); *State, Nev. Emp't Sec. Dep't v. Weber,* 100 Nev. 121, 123, 676 P.2d 1318,

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[2]A copy of this notice is attached.

[3]A copy of this order is attached.

[4]A copy of this order is attached.

[5]A copy of this order is attached.

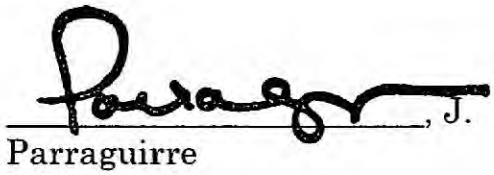
1319 (1984). It is incumbent upon Mr. Akin, as part of his professional obligations of competence and diligence to his clients, to know and comply with all applicable court rules. *See* RPC 1.1; RPC 1.3. These rules have been implemented to promote cost-effective, timely access to the courts; it is "imperative" that he follow these rules and timely comply with our directives. *Weddell v. Stewart,* 127 Nev. 645, 650, 261 P.3d 1080, 1084 (2011). Mr. Akin is "not at liberty to disobey notices, orders, or any other directives issued by this court." *Id.* at 652, 261 P.3d at 1085.

Mr. Akin's failure to comply with this court's rules and orders has forced this court to divert its limited resources to ensure his compliance and needlessly delayed the processing of this appeal. Therefore, Mr. Akin is removed as counsel in this appeal. Because it appears that Mr. Akin's conduct in this appeal may constitute violations of RPC 1.3 (diligence), 3.2(a) (expediting litigation), and 8.4 (misconduct), this court refers Mr. Akin to the State Bar of Nevada for investigation pursuant to SCR 104-105. Bar counsel shall, within 90 days of the date of this order, inform this court of the status or results of the investigation and any disciplinary proceedings in this matter.

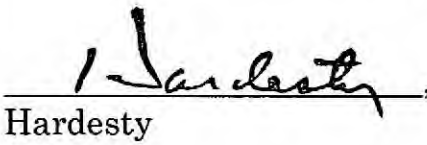
This appeal is remanded to the district court for the limited purpose of securing appellate counsel for appellant. If appellant is indigent, the district court shall have 30 days to appoint appellate counsel. Otherwise, the district court shall order that, within 30 days, appellant must retain appellate counsel and appellate counsel must enter an appearance in the district court. Upon the appointment of counsel, the district court clerk shall immediately transmit to the clerk of this court a copy of the district court's written or minute order or counsel's notice of appearance.

The briefing of this appeal is suspended pending further order of this court.

It is so ORDERED.



_____, J.
Parraguirre



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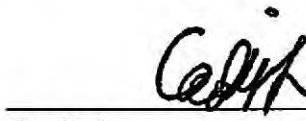


_____, J.
Cadish

cc: Hon. Valerie Adair, District Judge
The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk
Travis D. Akin
Tommy LaQuade Stewart
Bar Counsel, State Bar of Nevada

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80084

FILED
FEB 07 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER SETTING BRIEFING SCHEDULE

This is an appeal from an order denying a postconviction petition for a writ of habeas corpus. Pursuant to a limited remand, the district court has appointed attorney Travis D. Akin as counsel for appellant. Accordingly, this court sets the briefing schedule as follows.

Appellant shall have 21 days from the date of this order to file and serve a transcript request form or certificate that no transcripts will be requested, *see* NRAP 9, and a docketing statement, NRAP 14. Appellant shall have 120 days from the date of this order to file and serve the opening brief and appendix. Thereafter, briefing shall proceed as provided in NRAP 31(a)(1).

It is so ORDERED.

Pickering, C.J.

cc: The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney
Tommy LaQuade Stewart

IN THE SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

Supreme Court No. 80084
District Court Case No. C305984

NOTICE TO FILE DOCKETING STATEMENT AND REQUEST TRANSCRIPTS

TO: The Law Office of Travis Akin \ Travis D. Akin

To date, appellant has not filed the Docketing Statement and the Transcript Request Form in this appeal. NRAP 14(b); NRAP 9(a).

Please file and serve the Docketing Statement and either a Transcript Request Form or, alternatively, a certificate that preparation of transcripts is not requested within 10 days from the date of this notice. See NRAP 10(b); NRAP 30 (b)(1). Failure to file a Docketing Statement or the appropriate transcript document may result in the imposition of sanctions, including the dismissal of this appeal. See NRAP 9(a)(7); NRAP 14(c).

DATE: March 19, 2020

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

Notification List
Electronic
Clark County District Attorney \ Alexander G. Chen

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80084

FILED

APR 15 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER GRANTING MOTIONS

Appellant's first and second motions for extensions of time to file the docketing statement and transcript request form are granted. NRAP 14(d); NRAP 26(b)(1)(A). Appellant shall have until May 6, 2020, to file and serve the docketing statement and transcript request form. Failure to comply may result in the imposition of sanctions. NRAP 14(c); NRAP 9(a)(7).

It is so ORDERED.

Pickering, C.J.

cc: The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80084

FILED

MAY 22 2020

CLERK OF SUPREME COURT

BY DEPUTY CLERK

ORDER DIRECTING THE FILING OF DOCKETING STATEMENT AND TRANSCRIPT REQUEST FORM

On April 15, 2020, this court directed appellant to file and serve the docketing statement and transcript request by May 6, 2020. To date, the required documents have not been filed. Accordingly, appellant shall, within 7 days of the date of this order, file and serve the docketing statement and transcript request form. Failure to comply may result in the imposition of sanctions. *See* NRAP 14(c); NRAP 9(a)(7). Appellant's counsel is reminded that the opening brief and appendix are due to be filed on or before June 8, 2020.

It is so ORDERED.

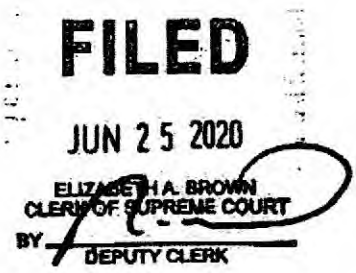
Pickering, C.J.

cc: The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney

IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY LAQUADE STEWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80084



ORDER CONDITIONALLY IMPOSING SANCTIONS

Appellant's counsel, Travis D. Akin, did not file the transcript request form and docketing statement. *See* NRAP 9(a)(3); NRAP 14(b). Accordingly, on May 22, 2020, this court entered an order directing Mr. Akin to file the missing documents within 7 days or face sanctions.[1] To date, Mr. Akin has not complied or otherwise communicated with this court. In addition, the opening brief and appendix are also overdue.

Mr. Akin's failure to file the transcript request form, docketing statement, and opening brief and appendix warrants the *conditional* imposition of sanctions. Mr. Akin shall pay the sum of $250 to the Supreme Court Law Library and provide this court with proof of such payment within 14 days from the date of this order. The conditional sanction will be automatically vacated if Mr. Akin files and serves the transcript request form, docketing statement, and opening brief and appendix, or a properly supported motion to extend time, *see* NRAP 26(b)(1)(A); NRAP 14(d); NRAP 31(b)(3), within the same time period.

[1]A copy of this order is attached.

If the required documents are not timely filed, the sanction will no longer be conditional and must be paid. Failure to comply with this order or any other filing deadlines will result in Mr. Akin's removal as counsel of record in this appeal. *See* NRAP 9(a)(7); NRAP 14(c). Further, because it appears that Mr. Akin's conduct in this appeal may constitute violations of RPC 1.3 (diligence), 3.2(a) (expediting litigation), and 8.4 (misconduct), failure to comply with this order or any other filing deadlines will also result in Mr. Akin's referral to the State Bar of Nevada for investigation pursuant to SCR 104-105.

It is so ORDERED.

_____, J.
Gibbons

_____, J.
Stiglich

_____, J.
Silver

cc: The Law Office of Travis Akin
Attorney General/Carson City
Clark County District Attorney
Supreme Court Law Librarian
Travis D. Akin

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT

REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Fl.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

August 24, 2020

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

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

Dear Ms. Brown:

Pursuant to your Order Removing Counsel, Referring Counsel to State Bar for Investigation, Remanding for Appointment of Counsel and Suspending Briefing, dated August 7, 2020, enclosed is a copy of the District Court minute order from the August 20, 2020 hearing in which Alexis M. Decker was confirmed as counsel in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

Heather Ungermann, Deputy Clerk

DISTRICT COURT
CLARK COUNTY, NEVADA

Felony/Gross Misdemeanor **COURT MINUTES** **August 20, 2020**

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

August 20, 2020 **1:45 PM** **Appointment of Counsel**

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

COURT CLERK: April Watkins
Carina Bracamontez-Munguia / cb

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT:

Clemons, Jennifer M.	Attorney for Pltf. appearing by Blue Jeans
Duecker, Alexis M.	Attorney for Deft. appearing by Blue Jeans
State of Nevada	Plaintiff

JOURNAL ENTRIES

- The Court noted this matter was remanded by the Supreme Court for the appointment of Appellate counsel. Upon Court's inquiry, Ms. Duecker CONFIRMED as counsel. Colloquy.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Tommy Stewart, BAC #1048467, Ely State Prison, P.O. Box 1989, Ely, NV 89301. cb