IN THE SUPREME COURT OF THE STATE OF NEVADA

TOMMY STEWART,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 80084

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This appeal is appropriately retained by the Supreme Court because it relates to a conviction for a Category A and B Felonies. NRAP 17(b)(2).

STATEMENT OF THE ISSUE(S)

1. Whether the district court did not err by adopting the State's proposed Findings of Fact, Conclusions of Law and Order.
2. Whether the district court did not err in dismissing Appellant's pro per supplements to his Petition for Writ of Habeas Corpus on procedural grounds and whether postconviction counsel was not ineffective for declining to incorporate those claims into the supplement.
3. Whether trial and appellate counsel were not ineffective for allegedly failing to argue the necessity of the lesser-included charges of False Imprisonment and Second-Degree Kidnapping in the jury instructions.
4. Whether the evidence is sufficient to support Appellant's First-Degree Kidnapping conviction.

STATEMENT OF THE CASE

On April 26, 2016, Tommy Stewart ("Appellant") was charged by way of Information with 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. 1AA000108-12.

Appellant's jury trial began on March 14, 2016. 2AA000303. Prior to jury selection, Appellant again tried to raise the issue of the legal sufficiency of the LVMPD Miranda warning. Id. at 000311-17. The district court denied Appellant's renewed motion. On March 17, 2016, the jury found Appellant guilty on all counts, however, the jury did not find Appellant guilty as to the deadly weapon enhancements. 1AA000113-14.

On May 10, 2016, Appellant was sentenced as follows: Count 1 – thirteen (13) to sixty (60) months; count 2 – twenty-two (22) to ninety-six (96) months, concurrent with Count 1; Count 3 – eight (8) to twenty (20) 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. Id. at 000115-21. The Judgment of Conviction was filed on May 17, 2016. Id. at 000122-23.

Appellant filed a Notice of Appeal on May 19, 2016. Id. at 000124-25. On May 4, 2017, the Nevada Supreme Court issued its Order of Affirmance. Id. at 000128-37. Remittitur issued on June 12, 2017. Id. at 000138.

On April 13, 2018, Appellant filed a Petition for Writ of Habeas Corpus (post-conviction), and on April 25, 2018, Appellant filed a Motion for the Appointment of Counsel and Request for Evidentiary Hearing ("Motion"). Id. at 000139-50, 000152-56. The State filed its Response on June 1, 2018. Id. at 000158-73. Counsel was appointed. Counsel confirmed on July 31, 2018. Id. at 000230.

On June 6, 2018, Appellant filed his First pro per Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 000174-215. On June 14, 2018, Appellant filed his Second pro per Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 000221-22. On July 18, 2018, Appellant filed his Third pro per Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 000224-25. On July 27, 2018, Appellant filed his Fourth pro per Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 000227-28. On February 20, 2019, Appellant, through counsel, filed Fifth Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). Id. at 000231-42. The State filed its Response on April 3, 2019. 3 AA 000523-53. On April 29, 2019, the district court issued a Minute Order denying Appellant's Petition and Supplements for the reasons contained in the State's Response. Id. at 000554. The district court directed the State

to prepare a detailed order based on its Response. Id. The district court issued its Findings of Fact, Conclusions of Law and Order denying Appellant's Petition and Supplements on December 23, 2019. Id. at 000564-94.

On November 6, 2019, Appellant filed a Notice of Appeal. Id. at 000555-56.

STATEMENT OF THE FACTS

On January 20, 2015, Natasha Lumba was living at 805 Rock Springs Drive, Apartment 101 in Las Vegas, Nevada. 2AA000320-21. On that evening, Natasha was coming home from her boyfriend's house at approximately 11:00P.M. Id. at 000322. When she was walking into the gate of her apartment, she saw two men approaching her rather quickly out of the corner of her eye. Id. at 000323. Natasha went inside the gate and was fumbling for the keys to her apartment and the men were suddenly right next to her. Id. One of the individuals held a gun on her and the other one told her not to yell or they would hurt her. Id. Natasha testified that the two men were African American and that they were both wearing dark hoodies and dark pants and had their hoods up. Id. at 000323-24. One of the men was approximately 5'10" and the other was about two inches shorter. Id. at 000324. The taller individual had the firearm. Id. at 00325. Natasha testified that the firearm was black and a semiautomatic. Id.

Natasha testified that the men told her to open her front door and she complied even though she did not want the men to come inside her house. Id. at 000326. The

men followed her inside and they told her to lie face down on the ground in her bedroom. Id. Natasha dropped her purse and another bag on the floor. Id. The men took turns going through and ransacking the apartment while the other was watching her. Id. at 000328. Natasha testified that the men appeared to be working together the whole time. Id. at 000339. They were opening closets and looking in every corner of her apartment. Id. at 000328. Natasha testified that she did not try to run away because she was afraid for her safety and she did not have a clear path to the door. Id. at 000329. The shorter man asked her where the money was and what could be sold for money. Id. at 000329-30. At one point, he checked inside her bra and underwear to see if she was hiding cash. Id. at 000330. The man told her not to look at him while his hand was inside her bra and pants and she complied. Id. at 000331. Natasha only had $2.00 in her wallet at the time. Id. at 000330.

The individuals asked Natasha where her cellphone and wallet were and she told them in her purse that she had dropped near the front door. Id. at 000331. The men also asked her for the PIN number for her debit card. Id. Natasha told the men her PIN number because she was scared for her life. Id. at 000332. After the men left Natasha saw that cards had been removed from her wallet. Id. at 000331. The men also went through her jewelry chest but did not take any jewelry because she told them it was costume jewelry. Id. at 000333-35. The men also went through a piggy bank Natasha had which only had a few coins in it. Id. at 000335. The men

took her yellow Apple 5C cellphone, Toshiba laptop, Cannon camera and the $2.00 from her wallet. Id. at 000337. The men went through her apartment for approximately ten (10) to fifteen (15) minutes. Id. at 000340. Before they left the shorter man told Natasha not to call the police or they would come back and kill her. Id. The men left and Natasha laid on the floor until she was sure that they were gone. Id. at 000341. Natasha found her iPad, which the men had not found. Id. Natasha got in her car and went to her boyfriend's house. Id. at 000342. Natasha told her boyfriend what happened and the two drove to her parents' house and called 911. Id. at 000344-45. Natasha's parents lived at 34 Gulf Pines Avenue in Las Vegas, Nevada. Id. at 000350. Natasha called the police approximately twenty (20) minutes after the men left her house. Id. at 000345.

LVMPD Detective Jeffery Abell was assigned to Natasha's case. Id. at 000447. At some point, Detective Abell was notified that Appellant's fingerprints were found at the scene. Id. at 000449. On February 6, 2015, Natasha met with a Detective Abell at her workplace. Id. at 000352. Detective Abell showed her a photo lineup. Id. Natasha identified the individuals in photos two and three. Id. at 000353-54. Natasha testified that the individual in photo two had similarities to the shorter man and the person in photo three had similarities to the taller man. Id. at 000356. Natasha testified that she did not know Appellant. Id. Appellant was in photo three in the photo lineup. Id. at 000456.

On January 20, 2015, LVMPD senior crime scene analyst ("SCSA") Noreen Charlton responded to 805 Rock Springs Drive, Unit 101 under event number 150120-4490. Id. at 000376-77. SCSA Charlton processed the exterior side of the front door and several items in the residence was latent fingerprints. Id. at 000379. SCSA Charlton discovered latent prints on a coin bank and a jewelry box near the laundry room, Id. at 000382-86. LVMPD forensic scientist Heather Gouldthorpe was provided with fingerprints under event number 150120440 to run through AFIS. Id. at 000395. Gouldthorpe was provided three latent print lift cards, one of the prints came back to Natasha Lumba another came back as belonging to Appellant. Id. at 000396. Appellant's print was found on the jewelry box from the laundry room. Id. at 000398.

On February 14, 2015, at approximately 5:00P.M. Officer Brian Jackson was on patrol near H Street and Owens in Las Vegas, Nevada. Id. at 000416.[1] Officer Jackson was in plain clothes during his patrol, meaning he was not in his uniform, and he was driving an unmarked Metro pickup truck. Id. at 000416-17. Officer Jackson was performing surveillance in the area while assisting Detective Abell in locating Appellant. Id. at 000417-18. Officer Jackson had information that Appellant was in the area of 720 West Owens. Id. at 000418. As Officer Jackson was

[1] The State will note that, between the time of Appellant's arrest and his trial, Officer Jackson was promoted to Detective. The State will refer to him as Officer Jackson to reflect his position at the time of the events. See 3AA000416.

approaching the area, he saw an individual matching Appellant's description and conducted a person stop in a gas station parking lot. Id. at 000421-26. The individual was later identified as Appellant and he was wearing a black hoodie. Id. at 000422-23. Appellant was standing near a Toyota Corolla with approximately three (3) other males and a female. Id. at 000425. For his safety, Officer Jackson called Appellant away from the group under the guise that he was potentially involved in an altercation just north of the gas station. Id. Another officer conducting surveillance saw Appellant place a firearm inside the Toyota Corolla prior to approaching Officer Jackson. Id. at 000433. Another student was seen placing a second firearm into the vehicle. Id. at 000435. Sergeant Vorce conducted a probable cause search of the Corolla and found a bag with firearms inside. Id. at 000437. One of the firearms recovered was a Ruger firearm and the other was a Taurus firearm. Id. at 000440, 000442. Appellant was detained at the time. Id. at 000426.

Appellant was interviewed by Detective Abell at Metro Headquarters. Id. at 000462. Appellant was read his Miranda rights. Id. Appellant told Detective Abell that he had never been inside of Natasha's apartment. Id. at 000464. Eventually, Appellant told Detective Abell that he and his friend Raymond met up with a girl near the MGM and followed her home. Id. at 000465. Appellant said that Raymond went into the bedroom to have sex with the girl and he looked for items to steal. Id. at 000466. Appellant admitted that he stole a watch, a ring and some coins. Id.

Appellant only admitted this after he was confronted with the fingerprint evidence. Id. Appellant denied taking any electronics and stated he was never inside of Natasha's bedroom. Id. at 000468. Appellant was booked into custody at the Clark County Detention Center ("CCDC"). Id. at 000470. On February 15, 2015, at approximately 12:12A.M., Appellant made a phone call from CCDC and told the individual to "tell Baby to call Hannah" and that "shit happened in his area, his apartments." Id. at 000472-73. Detective Abell took this to mean that Appellant was trying to contact his co-conspirator. Id. at 000473. Appellant made a second call on February 16, 2015, at approximately 1:53 P.M., Appellant indicated he was not identified and the police did not have his fingerprint, even though he had already been interviewed by the detective and knew that was not true. Id. at 000474.

SUMMARY OF THE ARGUMENT

The district court did not err when it adopted the State's proposed Findings of Fact, Conclusions of Law and Order. Further, the district court did not err when it dismissed Appellant's pro per Supplements to his Petition for Writ of Habeas Corpus on procedural grounds and Appellant's postconviction counsel was not ineffective for failing to incorporate those claims in Appellant's Fifth Supplement. Appellant's trial and appellate counsel were similarly not ineffective for allegedly failing to meaningfully argue the necessity of the lesser-included charges of False Imprisonment and Second-Degree Kidnapping in the jury instructions. Finally, the

evidence was sufficient to sustain Appellant's conviction for First-Degree Kidnapping.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS AND ITS SUPPLEMENTS

Appellant claims that the district court erred when it denied Appellant's Petition for Writ of Habeas Corpus and his Supplements on both procedural grounds and on the merits. Appellant's Opening Brief ("AOB"), p. 8-33. However, a district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong. Riley v. State, 110 Nev. 638, 647 (1994). The district court properly denied Appellant's Petition because Appellant's claims are meritless.

A. The district court did not err when it adopted the State's Findings of Fact, Conclusions of Law and Order

Appellant argues that the district court's Findings of Fact, Conclusions of Law and Order ("Findings") should not be given deference because Appellant claims, by adopting the State's proposed Findings, the district court itself did not make findings supported by substantial evidence. AOB at 8-13. Specifically, he argues that the district court erred by signing off on the State's proposed order without first providing the State with any guidance. Id. Appellant's claim is meritless.

Indeed, he raises this claim without ever challenging the district court's Findings as a faulty adoption of the State's proposed order below. Although Appellant claims that he was unable to object to the district court's Findings, his claims are patently false. See AOB at 12-13. Appellant could have objected on any of the grounds he now raises by motion or written objection pursuant to Byford v. State, 123 Nev. 67, 69 (2007). His failure to raise these complaints amounts to waiver and, thus, they are only reviewable, if at all, for plain error. Dermody v. City of Reno, 113 Nev. 207, 210–11 (1997); Guy v. State, 108 Nev. 770, 780 (1992), cert. denied, 507 U.S. 1009 (1993); Davis v. State, 107 Nev. 600, 606 (1991). Plain error review asks:

> To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, [] 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543[]). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190[] (quoting Green v. State, 119 Nev. 542, 545[] (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights.

Martinorellan v. State, 131 Nev. 43, 49 (2015).

Regardless of the standard of review employed, the district court did not err when it issued its Findings. Indeed, Appellant's claims are not only meritless, but they are also belied by the record as well as by Nevada and United States Supreme

Court precedent. The Eighth Judicial District Court rules require the prevailing party to furnish the written order. EDCR 7.21. "The counsel obtaining any order, judgment or decree shall furnish the form of the same[.]" DCR 21. Such proposed findings must "accurately reflect[] the district court's findings." Byford, 123 Nev. at 69. However, a court may reject objections to proposed findings that are belied by the record. Hargrove v. State, 100 Nev. 498, 502 (1984).

The prevailing party is not limited to the transcript of oral pronouncement of a ruling when drafting proposed findings. To the contrary, the court need only orally pronounce its decision "with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Byford, 123 Nev. at 70; State v. Greene, 129 Nev. 559, 565 (2013). This Court recently reiterated that "[i]t is common practice for Clark County district courts to direct the prevailing party to draft the court's order." King v. St. Clair, 134 Nev. 137, 142 (2018) (quoting EDCR 1.90(a)(5) ("[A] judge or other judicial officer shall order the prevailing party to prepare a written judgment and findings of fact and conclusions of law")). Moreover, this Court has concluded that proposed orders that contain findings and conclusions beyond what is made in a court's oral pronouncement may still be valid, especially when a defendant has an opportunity to appeal any errors in the court's written order. See Smith v. State, 2019 WL 295686, Docket No. 74373 (unpublished) (Jan. 17,

2019); Zakouto v. State, 2018 WL 5734375, Docket No. 73489 (unpublished) (Oct. 11, 2018).

Here, on April 29, 2019, the district court rendered its decision as to Appellant's Petition via minute order. 3AA000554. The district court's decision was as follows:

> [Appellant]'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*.

Id.

Accordingly, the State drafted its proposed finding consistent with this minute order and its Response. No judge wants findings that are incomplete, weak, or inadequate. To this end, the State's proposed findings included all rulings necessary for final disposition of Appellant's Petition in accord with the district court's rulings, regardless of whether they were specifically mentioned in the oral pronouncement. The record reflects that the findings signed by the judge accurately reflect the district court's intention and were deliberately adopted after the exercise of independent judgment.

Appellant's claim that it was improper for the district court to adopt an order written by the State is not consistent with Nevada law. This Court in has held that although the district court's failure to announce its findings or provide guidance to the State in drafting the order was troubling, it did not warrant automatic reversal

because the district court's order was sufficiently detailed to allow the Court to review the bases of the court's decision, and the defendant had the opportunity to appeal any factual or legal errors in the order. Leonard v. State, 403 P.3d 1270, Docket No. 62800 (October 23, 2017) at 32-33. Here, like in Leonard, the district court's minute order stated that the Petition and Supplements were denied for the reasons set forth in the State's Response. Such an order is sufficiently detailed to demonstrate the bases for the district court's decision as Appellant's counsel was provided with a copy of the State's Response approximately three (3) weeks before the district court issued its decision. Thus, Appellant was informed of the bases of the Court's decision and his claim to the contrary fails.

Further, this Court has recently upheld a district court's adoption of the State's proposed findings even when language was added that did not comport with the district court's oral pronouncement. See Smith v. State, 2019 WL 295686 at *2 (Nev. Jan. 17, 2019). This Court held:

> A district court's oral pronouncement is not final and can be modified before a written order is filed. Miller v. Hayes, 95 Nev. 927, 929[] (1979). If there are differences between the findings and conclusions issued during the hearing and those recorded in the order, the written order controls. Rust v. Clark Cty. Sch. Dist., 103 Nev. 686, 689[] (1987) (explaining that oral pronouncements from the bench are ineffective and only a written judgment has legal effect). Therefore, differences between the oral findings and the written findings do not render the written order invalid, as only the written order has legal effect. Id. As the district court was required to address the procedural bars, see State

> v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231[] (2005) (explaining that application of procedural bars is mandatory), and its findings on the merits were consistent with procedural bar analysis, the proposed order was consistent with the findings made at the hearing. Moreover, the written order is sufficiently detailed so as to allow this court to review the bases of the district court's decision, and Smith has the opportunity in this appeal to challenge any perceived factual or legal errors in the written order.

Id.

The record reflects that the Findings signed by the district court accurately reflect the Court's intention and were deliberately adopted after the exercise of independent judgment. Although the district court did not orally pronounce whether the Petition was denied based on procedural grounds or on the merits, the district court clearly adopted both rulings when it signed and filed the Findings. The district court's ruling clearly states that Appellant's claims are barred on procedural grounds and, even if they were not, Appellant's claims fail on the merits. Appellant's claim that he is prejudiced by the district court fully disposing of his claims based both on procedural grounds and on the merits is meritless. Arguably, the district court went above and beyond in adopting its Findings by ensuring that the matter was fully adjudicated. Thus, Appellant's claim that the district court made no effort in Appellant's case fails.

This is not a case in which the district court did not give Appellant notice of what the ruling was. This is not a case where the State took control of the district

court's power. The district court did not conduct an ex parte hearing of any kind. The district court reviewed the pleadings of both parties and signed the State's proposed order because it was in compliance with the administration of justice in this case, not solely because the State proposed it. The district court acted alone when it signed the State's Order. The State did not hold the pen for the district court when he reviewed and signed the Findings. The State did not demand that it be filed. The State did not ask the district court if it could propose the findings. The district court directed that the State draft findings "consistent with" its minute order. 3AA000554. As such, the district court's adoption of the proposed findings was not clearly erroneous.

Unless this Court is prepared to say that the district court failed to exercise independent judgment in denying Appellant's Petition, there is no error in the verbatim adoption of proposed findings consistent with the arguments and pleadings. Even then, the remedy would only be heightened scrutiny of the Findings on appeal. Drafting proposed findings places a substantial burden on the State, and while the State would have no opposition to the District Court drafting its own findings, the appropriate venue for such a discussion would be an attempt to modify DCR 21 and EDCR 7.21. Therefore, the district court did not err when it adopted the State's proposed Findings and Appellant's claim fails.

B. The district court properly struck Appellant's four pro per Supplemental Petitions as they were filed without leave of court and

counsel was not ineffective for declining to incorporate these arguments into his Fifth Supplemental Petition

Appellant claims that the district court erred by dismissing Appellant's pro per Supplements to his Petition for Writ of Habeas Corpus. AOB at 13-18. However, after filing his first Petition for Writ of Habeas Corpus on April 13, 2018, Appellant filed four supplemental petitions without first requesting leave of this Court. 1AA000174-229. Therefore, the district court properly struck Appellant's four pro per Supplements.

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). This 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 (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. 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 (emphasis added).

The district court properly dismissed each of the supplemental petitions filed by Appellant in proper person. Appellant 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 Appellant's pro-per supplemental petitions make any attempt to show good cause for failing to raise the issue in the initial petition. Barnhart precludes Appellant 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. Further, Appellant admits that allowing such untimely filings is within the district court's discretion and, in Appellant's case, Appellant failed to demonstrate to the district court why such claim should be considered by the district court. See AOB at 16. Because Appellant was not entitled to supplement his initial petition and never sought the district court's leave, his four rogue supplemental filings were properly dismissed by the district court.

1. Even if the district court did err by dismissing Appellant's four pro per Supplements on procedural grounds, any error was harmless because the district court also disposed of Appellant's pro per claims on the merits.

Pursuant to NRS 178.598, "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." See also Knipes v. State, 124 Nev. 927, 935 (2008) (noting that nonconstitutional trial error is reviewed for harmlessness based on whether it had substantial and injurious effect or influence in determining the jury's verdict). The district court also found each of Appellant's

claims nevertheless fail to provide relief as the claims themselves are either waived or otherwise meritless. Furthermore, the claim raised in Appellant's fifth Supplemental Petition by his appointed counsel is also meritless. Therefore, even if the district court erred by denying Appellant's Supplements on procedural grounds, any error is harmless because, as demonstrated below, Appellant's claims in each of his pro per Supplements and his Fifth Supplement are meritless.

a. Appellant 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 (1984); see also State v. Love, 109 Nev. 1136, 1138 (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. See also Love, 109 Nev. at 1138. 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; Warden, Nevada

State Prison v. Lyons, 100 Nev. 430, 432 (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.

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 (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 (1975).

Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706 (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 (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 (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 (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. "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117 (1992); see also Ford v. State, 105 Nev. 850, 853 (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.

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 (1999) (*citing*

Strickland, 466 U.S. at 687). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (*citing* Strickland, 466 U.S. at 687-89, 694).

This 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 (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, 100 Nev. at 502. "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, "[Appellant] *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. 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 (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 (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. 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.

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

Appellant first argued that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence based on his acquittal of the deadly-weapon enhancement. 1AA000175-76. This claim fails to satisfy either Strickland prong.

As an initial matter, any claim that Appellant'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. This Court found each argument meritless. State v. Stewart, 393 P.3d 685, 687-88 (Nev. 2017). Furthermore, Count 1, 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 (1996). It is not unreasonable to "winnow out" weaker arguments. Jones, 463 U.S. at 751-52.

Appellant claims that because the jury declined to find him guilty of using a deadly weapon, the underlying crimes themselves were unsupported. 1AA000175. This argument fails on its own terms. Appellant was found guilty of Conspiracy to Commit Robbery, Burglary, Robbery, and First-degree Kidnapping. Id. at 000122-23. None of those crimes require the State to prove that Appellant 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 Appellant 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.

Furthermore, Appellant cannot show that he was prejudiced by this alleged error. Each of Appellant's counts run concurrent with one another. 1AA000123. The sufficiency of the evidence of the counts with the longest sentences has already been raised by Appellant on appeal and found meritless. Id. at 000132-34. Accordingly,

even if there was some merit to Appellant'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, Appellant 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 000131. From this, police located Appellant and "detained him for further questioning." Id. The police informed Appellant of his rights pursuant to Miranda v. Arizona, 384 U.S. 436, 479 (1966), and then informed Appellant that his fingerprints had been found at the scene of the crime. Id. Appellant then admitted to "being in Lumba's apartment on the night in question with another man and admitted to stealing her personal effects." Id.

Appellant 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, this Court has already found that there was sufficient evidence to convict Appellant. In addressing the sufficiency of the evidence presented at trial, it reasoned:

> 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[]. 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.

Id. at 000133-34.

Appellant'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. Id. at 000188-89. It is for the jury to weigh the evidence, not Appellant and not, as important here, this Court. Origel-Candido v. State, 114 Nev. 378, 381 (1998), (quoting Koza v. State, 100 Nev. 245, 250 (1984)); see also Jackson v. Virginia, 443 U.S. 307, 319 (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 (1996); Kazalyn v. State, 108 Nev. 67, 71 (1992); Bolden v. State, 97 Nev. 71, 73 (1981). Because this Court was unlikely to play the role of the factfinder on

appeal, Appellant cannot show that he was prejudiced by his counsel. Ennis, 122 Nev. at 706.

The evidence presented against Appellant at trial was overwhelming. Any claim that the evidence was insufficient would have failed—this 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. Thus, Appellant's claim fails and the district court properly denied Appellant's Supplement.

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

Appellant next claims that his Burglary, Robbery, and First-Degree Kidnapping convictions should have been challenged on appeal for violating the Double Jeopardy Clause. 1AA000190-95. 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 Appellant's claim of ineffective assistance accordingly fails.

As an initial matter, any claim that appellate counsel was ineffective for not raising a challenge to Appellant's robbery and kidnapping convictions under Mendoza v. State, 122 Nev. 267, 274-75 (2006), is belied by the record, as this claim

was raised on direct appeal. Hargrove, 100 Nev. at 502. Moreover, Appellant cannot show that he would have been prejudiced even if the claim was not raised because this issue was squarely rejected by this Court in a published opinion. See 1AA000132-33. "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 (1975) (quoting Walker v. State, 85 Nev. 337, 343 (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. 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 (2001) (*citing* McNelton, 115 Nev. at 414-15). Furthermore, the district court cannot overrule this Court. NEV. CONST. Art. VI § 6.

Appellant'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 (2000); *citing* State v. Lomas, 114 Nev. 313, 315 (1998); see also Gordon v. District Court, 112 Nev. 216, 220 (1996). Appellant 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," this Court applies the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932).[2] Jackson v. State, 128 Nev. 598, 604 (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 (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 "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

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

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

For this same reason, Appellant 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 Appellant's trial would have been the same. Furthermore, Appellant 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 (2004); see also Kirksey, 112 Nev. at 998.

Because a claim under the Double Jeopardy Clause would have been meritless, Appellant has failed to show that his counsel was ineffective for raise it. This claim is, thus, meritless and the district court properly denied Appellant's claim.

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

Appellant's next claim is that his trial counsel was ineffective for failing to investigate LVMPD's forensic policies, but Appellant 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." 1AA000196-202.

Appellant's self-serving claim is wholly unsupported and therefore insufficient to demonstrate either prong of Strickland. Appellant alleges that "touch DNA" could have been found to demonstrate his innocence. Id. at 000198. 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

2AA000412; 1AA000201. 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 Appellant has failed to make that showing. Molina, 120 Nev. at 192. For these reasons, this claim is suitable only for summary denial under Hargrove, 100 Nev. at 502. Therefore, the district court properly denied Appellant's claim.

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

Appellant 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." 1AA000204-05.

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 was properly denied. Hargrove, 100 Nev. at 502.

Appellant 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 (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 (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.

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, this 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 (1979).

Appellant 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. 2AA000381-87, 000398-99. The prints were placed on "latent print cards." Id. at 000384. Those prints were examined and ran through a database which returned several of Appellant's known prints. Id. at 000398-99. Appellant's known prints were then manually compared with the prints found on the coin bank. Id. at 000400-01. Appellant'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. 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. 2AA000394.

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. Appellant has not made this required showing here because his claim is unsupported by any record citation to show that (1) Appellant 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. This entire claim is based on speculation, and Appellant 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, Appellant 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 Appellant'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.

Appellant 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 the district court properly denied Appellant's claim.

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

Appellant 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. 1AA000206-07. He further claims that independent testing of the fingerprints would have proven that the fingerprints were not his. Id. As with Appellant's other claims, this is a bare and naked claim suitable only for summary denial. Hargrove, 100 Nev. at 502. Beyond this, however, Appellant 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. This determination is strategic and virtually unchallengeable. Doleman, 112 Nev. at 848.

Beyond this, however, it is unclear what an independent expert would have found that would have changed the outcome of Appellant's case. At the heart of Appellant'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. This Appellant fails to do. Appellant 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. 1AA000206. 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. Furthermore, this claim, like previous claims, fails to show prejudice because Appellant'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, the district court properly denied Appellant's claim.

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

Appellant 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. 1AA000208-10. These claims fail for several reasons. Appellant has failed to show either deficient performance or prejudice from his trial counsel's decision to not object. Appellant claims that his rights under the Confrontation Clause as interpreted in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309-10 (2009) were violated. 1AA000208-09. The record belies this claim. Hargrove, 100 Nev. at 502.

"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 (Jan. 31, 2019) (unpublished) (*citing* *Vega v. State*, 126 Nev. 332, 340 (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. 2AA000392. She explained the process by which she determined that a fingerprint left at the scene was Appellant's. Id. at 000392-98. She first ran prints

from the crime scene through the Automated Fingerprint Identification System (AFIS). Id. at 000392, 000396, 000399. In this case, she ran three fingerprints through AFIS. Id. at 000396. One of them returned Appellant's name as the only potential hit. Id. at 000396, 000399, 000412. Once the database returned Appellant's previously filed prints, Gouldthorpe performed a "manual comparison" to verify if there is a match. Id. at 000399. 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 000405.

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 Appellant's. Id. at 000399, 000402. She then sent for verification and "technical review by another forensic scientist in the unit." Id. at 000399. In this case, the technical review was performed by Kathryn Aoyama. Id. at 000403. 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. Appellant seemingly acknowledges this by arguing that the mere introduction of testimony to suggest that a review was performed "inferenc[ed] by reference" a statement. 1AA000208. 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.

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 (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, Appellant 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 Appellant with those found at the scene of the crime on the jewelry box—they were a match. 2AA000399, 000402. 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. 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.

For these reasons, Grounds VII and VIII of the First Supplemental Petition are meritless and the district court properly denied Appellant's claims.

vii. Trial counsel was not ineffective for failing to impeach Appellant's confessions

Appellant next claims that his trial counsel was ineffective for failing to either impeach his confession through an expert witness or seeking to suppress it. 1AA000211-12.

As an initial matter, trial counsel did seek to suppress Appellant'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**.** To the extent that Appellant 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.

To show ineffectiveness, Appellant makes the bare and naked assertion that he was "high on alcohol, extasy and marijuana" when he gave his statement. 1AA000211. 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.

Because the allegation that he was intoxicated is itself unsupported, Appellant'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 Appellant 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 (1977) (holding that counsel "has the immediate and ultimate responsibility of deciding … which witnesses, if any, to call, and what defenses to develop); Rhyne, 118 Nev. at 8; Doleman, 112 Nev. at 846.

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

viii. Neither Appellant'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 the district court were two interrelated claims of ineffective assistance raised by his appointed counsel in his Fifth Supplemental Petition. These claims allege that Appellant 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] 1AA000238-40. The district court properly denied each claim.

In Nevada, a defendant "may be found guilty … of an offense *necessarily included* in the offense charged." NRS 175.501. This Court has long recognized that this statute entitles a defendant to an instruction on lesser-included offenses. Alotaibi v. State, 404 P.3d 761, 764 (Nev. 2017) (en banc), (*citing* Rosas v. State, 122 Nev. 1258, 1267–69 (2006)).

To determine if an uncharged offense is a lesser-included offense of a charged offense, courts "apply the 'elements test' from Blockburger, 284 U.S. 299." 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" Id. (internal citations and punctuations omitted).

Appellant 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,

[3] These two claims—trial and appellate ineffective assistance claims for failing to seek a lesser-included jury instruction—are the subject of Appellant's rogue Second, Third and Fourth Supplemental Petitions, respectively. See1AA000222, 000225, 000228. In this section, the State is responding to the claims in those filings as well.

boldly claiming that "[a]ny argument to the contrary is simply ridiculous." 1AA000237. Yet despite Appellant'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 (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 Appellant 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 Appellant 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 Appellant 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 Appellant'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 (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. 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, Appellant 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 Appellant 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. Appellant'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, the district court properly found the claims in Appellant's Third through Fifth Supplemental Petitions for Writ of Habeas Corpus meritless and did not err by denying each.

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

Appellant claims that the State improperly withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) and that his right to a fair trial was violated because the jury did not receive proper instructions. 1AA000203. These claims should have been raised on appeal, and Appellant'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 (2001); Franklin v. State, 110 Nev. 750, 752 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148 (1999).

This 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 (emphasis added) (disapproved on other grounds by Thomas, 115 Nev. 148). "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.

"[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 (2005). In Riker, this 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. 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 23 (citation omitted); see also State v. Haberstroh, 119 Nev. 173, 180–81 (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, Appellant cannot overcome the procedural bar to his claim. See Hogan v. Warden, 109 Nev. 952, 959–60 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659 (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 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621. 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 (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 (1993) (quoting United States v. Frady, 456 U.S. 152, 170 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252 (2003) (quoting Colley v. State, 105 Nev. 235, 236 (1989)).

c. Appellant 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[] (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[] (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[]; *see also Hathaway v. State*, 119 Nev. 248, 254-55[] (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, 351 P.3d 725, 728 (Nev. 2015) (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 (1976). Further, "the burden of demonstrating the elements of a Brady claim as well as its timeliness" rests with Appellant. Lisle, 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 (1999); Leonard v. State, 117 Nev. 53, 68 (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 (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 (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, 890-91 (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 890-91. 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 (1972), and Napue v. Illinois, 360 U.S. 264 (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 Appellant by introducing evidence of a fingerprint taken from the crime scene which matched Appellant's known fingerprints in a database. 2AA000381-87, 000398-401. Appellant 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, Appellant 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. The record is bare of

any reference to touch DNA stemming from the investigation[4], and Appellant 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.

Appellant'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 Appellant's valid confession of the crimes. Therefore, the district court properly denied Appellant's claim.

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

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

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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.

3AA000497.

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 (2006), abrogated on other grounds by Alotaibi v. State, 404 P.3d 761 (Nev. 2017). Appellant'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, Appellant 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 this Court has already found that there was enough evidence presented at trial to affirm his conviction for First Degree Kidnapping. 1AA000133-34.

Appellant 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.

Appellant has failed to show good cause or prejudice to overcome the procedural bar, and for this reason, the district court properly denied Appellant's claims.

2. Based on the above, postconviction counsel was not ineffective for failing to raise these issues in Appellant's Fifth Supplement to his Petition

Appellant claims that postconviction counsel was ineffective for failing to raise Appellant's pro per claims in the Fifth Supplement. AOB at 19-23. However, as noted above, postconviction counsel did raise some of the same claims Appellant raised in his four (4) pro per Supplements. See Page 45, fn 4, supra. Therefore, to the extent postconviction counsel raised claims set forth in the Second, Third and Fourth Supplements, Appellant's claim is belied by the record. Hargrove, 100 Nev. at 502. Thus, Appellant's claim fails.

Further, because Appellant is not under a sentence of death, he is not entitled to effective assistance of postconviction counsel. Brown v. Warden, 331 P.3d 867, 870-75 (Nev. 2014) (holding that ineffective assistance of counsel in postconviction petitions is not good cause to overcome the procedural bars); McKague v. Warden, 112 Nev. 159, 164-65 (1996) (holding that in non-capital cases a defendant has not right to counsel for postconviction matters and that where no right to counsel exists, there can be no ineffective assistance of counsel). Appellant's failure to address these controlling precedents is particularly troublesome since he is essentially asking this Court to overrule them. Appellant does not even address the standard for

overruling precedent. The Court will not abandon precedent absent a compelling reason. City of Reno v. Howard, 318 P.3d 1063, 1065 (Nev. 2014) (quoting Armenta-Carpio v. State, 306 P.3d 395, 398 (Nev/ 2013). As Appellant fails to even address these controlling precedents, Appellant does not offer this Court compelling reason to overrule them and Appellant's claim must be denied.

Moreover, Appellant merely explains that postconviction counsel could have incorporated Appellant's pro per arguments into his Supplement. AOB at 21-22. However, Appellant cites to no authority which requires postconviction counsel to do so. In fact, failing to make futile objections is not deficient performance. Ennis, 122 Nev. at 706. Counsel did raise some of Appellant's pro per claims in his Supplement. Clearly, counsel reviewed Appellant's pro per documents and determined which claims were frivolous and set forth the strongest arguments for Appellant. As demonstrated above, Appellant's pro per claims were meritless and, thus, raising these claims in the Fifth Supplement would have been futile. Therefore, counsel was not ineffective for failing to raise these claims and Appellant's claim fails.

C. Trial and appellate counsel were not ineffective for allegedly failing to argue the lesser included charges of False Imprisonment and Second Degree Kidnapping in the jury instructions

Appellant claims that trial and appellate counsel were ineffective for allegedly failing to meaningfully argue the necessity of the lesser included charges of False

Imprisonment and Second Degree Kidnapping in the jury instructions. AOB at 23-30. However, as demonstrated above, Appellant's claim is meritless as Second Degree kidnapping is not a lesser included offense of First Degree Kidnapping. See Section I(B)(1)(a)(viii), supra. 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. Further, as Appellant failed to raise his ineffective claim as it relates to a False Imprisonment instruction, Appellant's claim is waived for appellate review. It is a well-founded, that issues cannot be brought in the first instance on appeal. See Davis v. State, 107 Nev. 600, 606 (1991), overruled on other grounds by Means v. State, 120 Nev. 1001 (2004) (citation omitted) (noting that issues not litigated in the district court and raised for the first time on appeal need not be considered by this court); Coast to Coast Demolition and Crushing, Inc. v. Real Equity Pursuit, 226 P.3d 605, 607 (Nev. 2010). Therefore, Appellant's claim fails and the district court properly denied Appellant's Petition and the Supplements.

D. The evidence is sufficient to sustain Appellant's conviction for First Degree Kidnapping

Appellant claims that the evidence presented at trial was insufficient to support his conviction for First Degree Kidnapping. AOB at 30-33. However, as demonstrated above, the evidence was sufficient to sustain Appellant's conviction at trial. See Section I(B)(1)(a)(i), supra. Further, this Court has already reviewed

Appellant's sufficiency claim and squarely denied it on direct appeal. 1AA000132-33. Thus, as demonstrated above, Appellant's claim is barred by the law of the case doctrine. Hall, 91 Nev. at 315. Therefore, the district court properly denied Appellant's Petition and Supplement and his claim fails.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court affirm the district court's denial of Appellant's Petition and Supplemental Petitions for Writ of Habeas Corpus.

Dated this 27th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 13,972 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of January, 2021.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 27, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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