IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Supreme Court Case No.: 82060

APPELLANT'S APPENDIX
Volume VII

JEAN J. SCHWARTZER. ESQ
Nevada Bar No. 11223
Law Office of Jean J. Schwartzer
170 S. Green Valley Parkway
Suite 300
Henderson, Nevada 89012
(702) 979-9941
Attorney for Appellant

STEVEN B. WOLFSON, ESQ.
Nevada Bar No. 1565
Clark County District Attorney
Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155
(702) 671-2500
Attorney for Respondent

Cash v. State Case No. 82060
INDEX TO APPELLANT'S APPENDIX

State Appellate Procedure

Mr. Cash did not receive assistant on Direct Appeal.

On Aug. 20, 2018 Appellate Attorney was appointed to Mr. Cash. On Oct. 1, 2018 41 days later appellate attorney receive Mr. Cash case file in district court.

Mr. Rutledge came to see me (Mr. Cash) on March 13th 2019 at High Desert State Prison only (1) once for 10 minutes, and stated he would come and see me again which he never did. On March 14, 2019 Mr Rutledge filed a opening brief that was worthless, so deficient it was inexcusable.

Due process is offended if attorney does not provide effective assistant for the appeal.

U.S. Constitution Amendment 14th affords a criminal defendant the right to counsel on first appeal as a right from judgement of conviction.

As for professional responsibility of counsel, the appellate lawyer must master the trial record, thouroughly research the and exercise judgement in identifying the arguments that may be advanced on appeal.

Appellate counsel was neglectful for not perfecting the direct appeal, the result was that appellant was deprived of his right to a direct appeal. The negligent failure to perfect an appeal amounts to a complete denial of assistance of counsel during a critical stage of the criminal proceedings.

In Mr. Cash brief on the issues of argument, relating to insufficient evidence produced by the State to meet their burden of proving the defendant did not act in self-defense. Mr. Rutledge did not seriously present this issue for the courts consideration because he does not cite any authority for prosecutorial misconduct. It was counsel responsibility to present relevant authority and cogent argument, issues not so present need not be addressed by the court.

Maresca v. State, 103 Nev 669, 673, 748 P.2d 3, 6 (1987) (refusing to consider prosecutorial misconduct argument where no authority is present.) A criminal defendant is entitled to constitutionally effective assistance of counsel on direct appeal. Petitioners former Appellate

COUNSEL WAS INEFFECTIVE BECAUSE the ATTORNEY FAILED to ADEQUATELY PRESENT ARGUMENTS, AND RAISE ISSUES ON DIRECT APPEAL. MR. CASH REPLY BRIEF WAS FILED ON 22ND of APRIL 2019, MR. RUTLEDGE FAILED AGAIN to CONSULT. WITH MR. CASH. COUNSEL OBLIGATION to ASSIST the DEFENDANT ON IMPORTANT DECISION INCLUDES A DUTY to CONSULT WITH the DEFENDANT "STRICKLAND 466 U.S. AT 688."

*GROUND 2: INEFFECTIVE ASSISTANCE of Appellate Counsel IN VIOLATION of the petIONER'S SIXth AND FOURTEENth AMENDMENT RIGHT to the U.S. CONSTITUTION.

The CONSTITUTION to effective ASSISTANCE of COUNSEL EXTENDS to A DIRECT Appeal, BURKE V. STATE, 110 NEV. 1366, 1368, P.2d 267, 268 (1994). A CRIMINAL DEFENDANT IS ENTITLED to CONSTITUTIONALLY effective ASSISTANCE of COUNSEL ON DIRECT APPEAL EVITTS V. LUCEY, 469 U.S. 387, 394 (1985) IN ORDER to PROVE INEFFECTIVE ASSISTANCE of COUNSEL, A petITIONER MUST FIRST show that his ATTORNEY'S PERFORMANCE WAS DEFICIENT AND, SECOND, DEMONSTRATE that SUCH DEFICIENCY CAUSED HIM PREJUDICE. IN STRICKLAND, 466 U.S. AT 687. SEE ALSO ROE V. FLORES-ORTEGA, 528 U.S. 470, 145 L.Ed.2d 985 (2000) (holding the STRICKLAND test APPLIES to CLAIMS that COUNSEL WAS INEFFECTIVE for FAILING to CONSULT.) THE SUPREME COURT EXPLAINED that A COUNSEL'S FAILURE to CONSULT WITH DEFENDANT ABOUT AN APPEAL CONSTITUTES DEFICIENT PERFORMANCE if the ATTORNEY HAD A DUTY to CONSULT. AN ATTORNEY MAY NOT SPEAK CURSORILY WITH A DEFENDANT ABOUT HIS RIGHT to APPEAL AND CALL IT

"CONSULTATION". FROM STRICKLAND, WHICH MAY IT CLEAR, THAT THE ADVICE AN ATTORNEY DISPENSES DURING CONSULTATION "MUST" MEET AN "OBJECTIVE STANDARD OF REASONABLENESS."

MR. BRIAN RUTLEDGE, APPELLATE COUNSEL KNEW THAT PETITIONER WANTED HIM TO FILE A DIRECT APPEAL. A DEFENDANT HAS THE ULTIMATE AUTHORITY TO MAKE THE FUNDAMENTAL DECISION AS to WHETHER TO TAKE AN APPEAL. ANY COUNSEL'S OBLIGATION TO ASSIST A DEFENDANT INCLUDES A DUTY TO CONSULT WITH THE DEFENDANT ON IMPORTANT DECISIONS. MR. RUTLEDGE CAME TO SEE PETITIONER ON MARCH 13th, 2019 AT High DESERT STATE PRISON ONE TIME. MR. RUTLEDGE MADE THE REPRESENTATION to the PETITIONER THAT HE WAS GOING to FILE A DIRECT APPEAL. MR. RUTLEDGE CONSULTATION ON MARCH 13, 2019 ONLY LASTED 10 MINUTES, WHICH HE PROMISSED to RETURN to High DESERT STATE PRISON to SPEAK WITH PETITIONER AGAIN, WHICH HE NEVER DID. MR. RUTLEDGE FILED APPELLATE OPENING BRIEF ON MARCH 14th, 2019. COUNSEL'S OBLIGATION IS to ASSIST the DEFENDANT INCLUDES A DUTY to CONSULT WITH DEFENDANT ON

IMPORTANT DECISIONS STRICKLAND, 466 U.S. AT 688. NOT ONLY DID MR. RUTLEDGE MAKE REPRESENTATION to the PETITIONER but he also MADE them to the COURT.... well SIT there AND FRETTER out what those ISSUES ARE AND put those all IN A APPEAL BECAUSE ~~he~~ he HAS that RIGHT. The PETITIONER ALSO MAILED letters to APPELLATE COUNSEL MR. Rutledge. (SEE EXHIBITS 2)

THERE IS NO QUESTION that the PETITIONER WAS UNHAPPY with the COURTS PREVIOUS RULINGS (DENIAL of MOTION to DISMISS MURDER CHARGE, MOTION to DISMISS BATTERY CHARGE AS A LESSER INCLUDED OFFENSE, AND DENIAL of MOTION to STRIK HABITUAL CRIMINAL ENHANCEMENT) AND the NUMEROUS MOTIONS, MEMORANDUMS, AND NOTES to the COURT that the PETITIONER FILED.

COUNSEL HAS A CONSTITUTIONAL DUTY to CONSULT with A DEFENDANT ABOUT AN APPEAL when; 1) ANY RATIONAL DEFENDANT ~~would~~ would WANT AN APPEAL; OR 2) The DEFENDANT REASONABLE DEMONSTRATED AND INTEREST IN APPEALING- FLORES-ORTEGA, 528 US AT 480.

IN ORDER to ESTABLISH that he WAS PREJUDICED by COUNSEL'S UNPROFESSIONAL ACTS which WERE UNREASONABLE. The DEFENDANT

MUST SHOW THAT "THERE IS A REASONABLE PROBABILITY THAT BUT FOR COUNSEL'S DEFICIENT FAILURE TO CONSULT WITH HIM ABOUT AN APPEAL" FLORES-ORTEGA 528 US AT 484, HE WOULD HAVE FILE AN APPEAL.

A DEFENDANT HAS A RIGHT TO PURSUE A DIRECT APPEAL EVEN IF FRIVOLOUS, WHICH COUNSEL MUST ASSIST AS "AN ACTIVE ADVOCATE ON BEHALF OF HIS CLIENT." ANDERS V. CALIFORNIA, 386 US. 738, 744, 87 S.CT. 1369 (1967).

THE UNITED STATES SUPREME COURT HELD THAT THE "FUNDAMENTAL DECISION OF WHETHER TO APPEAL RESTS WITH THE DEFENDANT". JONES V. BARNES, 463 US. 745, 751, 103 S.CT. 3208 (1983).

THERE IS NO QUESTION THAT THE PETITIONER WANTED A DIRECT APPEAL, AND THAT HE WAS PREJUDICED BY MR. RUTLEDGE INEFFECTIVENESS, BECAUSE HE WAS NOT AFFORDED A DIRECT APPEAL WITH CONSULTATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTION 8 TO THE NEVADA CONSTITUTION. THEREFORE PETITIONER IS ENTITLED TO RELIEF, THE CONVICTION MUST BE REVERED AND REMANDED FOR A NEW TRIAL.

*GROUND 3

REQUEST FOR EVIDENTIARY HEARING

IN BERRY V. STATE, 363 P.3D 1148 (NEV. 2015), RELYING ON MANN V. STATE, 46 P.3D 1228, 1230 (NEV. 2002). THE COURT HAS LONG RECOGNIZED A PETITIONERS ASSERTS A CLAIM SUPPORTED BY SPECIFIC FACTUAL ALLEGATION NOT BELIED BY THE RECORD THAT, IF TRUE, WOULD ENTITLE YOU TO RELIEF. IJ AT 368, AT 1155, SEE ALSO HATHAWAY V. STATE, 71 P.3D 503, 508 (NEV. 2003) (REVERSING AND REMANDING DISTRICT COURTS DENIAL OF A WRIT OF HABEAS CORPUS FOR DISTRICT COURT TO CONDUCT AN EVIDENTIARY HEARING ON PETITIONERS SPECIFIC FACTUAL ALLEGATIONS CONTAINED IN THE SWORN AFFIDAVIT NOT BELIED BY THE RECORD.)

MR. CASH WRIT OF HABEAS CORPUS/POST-CONVICTION PETITION CHALLENGES THE VALIDITY OF THE JURY'S VERDICT AND RESULTING IN A CONVICTION BASED ON A CLAIMS OF INEFFECTIVE ASSISTIVE OF COUNSEL. AS THE INEFFECTIVE ASSISTIVE OF COUNSEL CLAIMS ARE SUPPORTED BY SPECIFIC FACTUAL ALLEGATIONS, EVIDENCE AND THE SWORN AFFIDAVIT. SEE [redacted] VAILLANCOURT V. WARDEN, 529 P.2D 204 (NEV. 1974) (... IT'S ERROR

to RESOLVE APPARENT FACTUAL DISPUTE WITHOUT GRANTING THE ACCUSED A EVIDENTIARY HEARING.")

MR. CASH ASSERTS that his TRIAL AND APPELLATE COUNSEL'S WAS INEFFECTIVE AND IN ASSERTING his CLAIMS he MAKES SPECIFIC FACTUAL ALLEGATION OF EVENTS OUTSIDE the RECORD THAT WARRANT AN EVIDENTIARY HEARING. SEE DOWN-MORGAN V. UNITED STATES, 765 F.2d 1534 (11th Cir. 1985) (CONCLUDING that the DEFENDANT WAS ENTITLED TO AN ~~EX~~ EVIDENTIARY HEARING to DETERMINED whether COUNSEL WAS INEFFECTIVE BASED UPON the UNDERLYING ARGUMENTS AND FACTUAL ASSERTIONS PRESENTED IN the DEFENDANTS AFFIDAVIT.) When CONSIDERING the totality OF THE CIRCUMSTANCES OF the FACTUAL ALLEGATIONS, EVIDENCE AND CONSTITUTIONAL VIOLATIONS ALLEGED WITHIN the PETITION AND SUPPORTED BY MR. CASH SWORN AFFIDAVIT, he IS ENTITLED TO AN EVIDENTIARY HEARING TO RESOLVE APPARENT FACTUAL DISPUTES WITHIN the RECORD AND CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. GOOD CAUSE APPEARING, the COURT MUST APPOINT COUNSEL AND CONDUCT AN EVIDENTIARY HEARING. RELIEF IS WARRANTED.

CONCLUSION

Wherefore, Mr. Cash respectfully request of this court to grant the petition in it's entirety and award the relief so requested of a new trial. In the alternative appoint counsel and conduct an evidentiary hearing on the claims of ineffective assistance of counsel, and grant the appropriate relief. Grant and other relief deemed appropriate.

Date this 16 day of July 2020.

Print name: Thomas Cash
Signature: Thomas Cash
Number #1203562
Address: P.O. Box 1989
Ely, Nevada,
89301

EXHIBIT 1

Date: 11/24/2019

To whom it may concern:

I Sandi M Cash the undersigned do hereby swear that all the following statement description of events are true and of my own knowledge, I believe to be true and correct. This is what my testimony would have been if I had been called to testify at trial. Thomas Cash attorney Mr. Kenneth W. Long never did interview me.

On or around October or November, I was awakened out of my sleep by my niece Brittney Turner, at 3999 Pistachio Nut Ave Las Vegas, Nv 89115; to come assist her to get her child Londyn Davis. She woke me up saying "Auntie can you come downstairs with me to get my baby so Kyirell (Davis) won't do anything to me". I got up and went outside with her, as soon as we got outside Brittney said "why did you bring him to my house" "you know I don't like him" (she was speaking on Zeek)(Ezekiel Devine) Kyirell started screaming at Brittney grabbing Brittney by the hood of her sweater. I stepped in and said, "you guys need to stop, Brittney get the baby and let's go". They started arguing more, kyriell then told "Brittney get whoever you want to fight me. I don't care call your cousins, uncle, daddy anybody". I then grabbed Londyn and said Brittney "let's go". Kyriell looked at me and said "you can go get yo uncle (Thomas Cash) right now. Go get him go get him!!! I'll shoot up this whole house up. I'll take my daughter". I said, "I'm not doing that just give us the baby and leave". In the mist of kyriell trying to grab Brittney I got between the two and he reached over me trying to grab her and ended up scratching me. I told them "it's too late for all of this, the neighbors are starting to come out. Come on Bri" I got the baby diaper bag and we went inside the house. Kyreill and Zeek (Ezekiel Devine) were sitting in front of the house in a white car for about another 5-8 minutes while Kyriell was calling Brittney's phone for her to come back outside. I did not tell my uncle (Thomas Cash) about the incident or express my concerns to my uncle (Thomas Cash) or my sister (Antoinette White) therefore he was unaware that kyriel had any issue with him. I solemnly swear my words are true. Pursuant to NRS 208.165. I Declare under penalty of perjury that the forgoing is true and correct.

Date this: 3rd day of Jan 2020.

x

State of Nevada
County of Clark

This instrument was acknowledged before me on the day of 01/03/2020 **by** Sandi Cash **and** N/A.

Notary Signature

RIKKI PAYTON
Notary Public - State of Nevada
County of Clark
APPT. NO. 12-7113-1
My App. Expires Feb. 12, 2024

11/05/2019

To whom it may
concern,

I Angel Turner undersigned to hereby swear that all the following statement description of events are true and of my knowledge, information, and to those I believe to be true and correct. My stepfather Thomas Cash attorney Mr. Kenneth W. Long never did interview me before I testified at pre-trial or before I testified at trial. The only reason I came to court to testify for my stepfather is because my mother Antoinette White, took me out of school to bring me to court, both times I testified at pre-trial because the attorney Mr. Long never called and asked me to come to court or subpoena me to come to court .

I declare under penalty of perjury that the foregoing its true and correct as I have written to be pursuant to N.R.S. 208.16, I declare under penalty of perjury that the foregoing is true and correct.

Date this Jan 13 2020 day of 20 . Angel Turner

x

State of Nevada
County of Clark

This instrument was acknowledged before me on the day of 01/03/2020 **by** Angel Turner **and** N/A.

Notary Signature _____

RIKKI PAYTON
Notary Public - State of Nevada
County of Clark
APPT. NO. 12-7113-1
My App. Expires Feb. 12, 2024

EXHIBIT 2

Thomas Cash
1203562*
H.D.S.P.
P.O.Box 650
Indian Springs
NV.89070

Octobe 22,2018
Dear Mr.Rutledge

Mr.Rutledge my name is Thomas Cash you wa appointed to be my Attorney on [redacted] Aug.20,2018. But when we went to court on Oct.1,2018 was the first time we talked to each other, you told me that you was going to come and talk to me about my appeal. So we could talk about what issues I would like to raise on appeal. It have now been (3) three weeks and you have not came to see me, I would like to know when your coming because I got some issues I would like to talk to you About. So when are you coming to see me.

Thomas Cash
Thomas Cash

Thomas Cash
1203562*
H.D.S.P.
P.O.Box 650
Indian Springs
NV. 89070

December 10, 2018
Dear Mr. Rutledge

Mr. Rutledge this is Thomas Cash writin to you again, because it have now been over (2) two months since I last wrote to you about coming to see me. I would like to know when your coming because I have a few issues I would like for you to raise on my appeal. I also would like to know what issues you was looking at raising on my appeal. I also would like to know when do you have to file my appeal with the courts. But I would like for you to come see me before it get to late, and you have to rush and file it I hope you come see me before the New Years

Thomas Cash
Thomas Cash

FILED

AUG 0 3 2020

CLERK OF COURT

(Court Clerk: Courtey
Copy Please)

THOMAS CASH
1203562
P.O. Box 1989
Ely, NV. 89301

A-20-818971-W
Dept. 9

IN THE Eighth DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

THOMAS CASH
Petitioner,

vs.

GITTERE WILLIAM
Warden; State of Nevada,

Respondents.

CASE NUMBER: C-18-329699-1

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, THOMAS CASH 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 16 day of JULY, 2020.

Thomas Cash

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 7-16-20, 2020, 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:
200 Lewis Ave. 8th Floor
Las Vegas, NV. 89155-1160

Warden William Gittere
Address:
P.O. Box 1989
Ely, NV. 89301

Thomas Cash
Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Appointment of Counsel
(Title of Document)

filed in District Court Case number C-18-329699-1

☒ 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.

Thomas Cash
Signature

7-16-20
Date

THOMAS CASH
Print Name

PETITIONER
Title

RSPN
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 Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH,
#7053124

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-18-329699-1
A-20-818971-W

DEPT NO: IX

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR AN EVIDENTIARY HEARING

DATE OF HEARING: OCTOBER 7, 2020
TIME OF HEARING: 1:45 PM

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 Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, and Request for an Evidentiary Hearing.

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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.

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On April 19, 2018, the State filed an Amended Information charging Thomas Cash (hereinafter "Petitioner") with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3). The State attached an Amended Notice of Intent to Seek Punishment as Habitual Criminal to the Amended Information.

On June 18, 2018, Petitioner's jury trial commenced. After eight days of trial, the jury found Petitioner guilty of SECOND-DEGREE MURDER WITH USE OF A DEADLY WEAPON and not guilty of BATTERY WITH INTENT TO KILL. On August 20, 2018, the Court adjudicated Petitioner guilty. At Petitioner's sentencing hearing the State argued for habitual treatment and provided certified copies of Petitioner's prior Judgments of Conviction. After argument by both parties, the Court sentenced Petitioner, for Count 1, life without the possibility of parole under the large habitual criminal statute. The Judgment of Conviction was filed on August 24, 2018.

On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS 207.010(1)(b).

On August 3, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State's Response follows.

STATEMENT OF FACTS[1]

On December 11, 2017, a verbal argument led to Petitioner, a fifty-two-year old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street.

The events of this day started when Kyriell Davis, twenty-eight years Petitioner's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their child. Eventually, Kyriell pushed Brittney away from him with his hands. Upon hearing this verbal argument, Petitioner came down to intervene. Appellant asked whether Kyriell hit Brittney—Brittney answered no and told Petitioner to mind his own business.

Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell: multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back turned to Petitioner, without provocation by Kyriell. Petitioner later admitted that he threw the first punch. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. At about that time, two cars drove up the road and separated Ezekiel and Petitioner from Kyriell. Kyriell saw a flash in Petitioner's hand as the cars came by and tried to warn Ezekiel. While Petitioner and Kyriell were separated, Petitioner stabbed Ezekiel straight through the heart. Ezekiel collapsed in the middle of the street and quickly died.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. He then observed Brittany yelling at Petitioner. Petitioner took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Petitioner. After Petitioner tried to punch Kyriell, Kyriell and Petitioner interlocked and Petitioner tried to slam him to the ground. Kyriell never swung his fist at Appellant. Petitioner and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. Kyriell saw a flash from Petitioner's hand as a car came drove in between the group, leaving Petitioner

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[1] The State adopts the Statement of the Facts from its Answering Brief in response to Petitioner's direct appeal. For the sake of clarity, citations to the appellate record have been omitted and "Appellant" has been replaced with "Petitioner."

and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. Soon after, Ezekiel fell to the ground after being stabbed by Petitioner.

Petitioner's actions after the victim died demonstrated his consciousness of guilt. Petitioner did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. Despite these alleged threats and after he killed Ezekiel, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. Petitioner escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police.

Petitioner initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Petitioner throw the first punch. Brittney told police that Petitioner, Brittney's stepdad, threw the first punch. Brittney also stated that she never felt in danger and that Kyriell did not hit her. Moreover, multiple witnesses stated, including Petitioner, that no one but Petitioner had a weapon. Petitioner told police that he stabbed Ezekiel because he did not want to get hit again.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Petitioner came out of the house and tried to punch Kyriell. After Petitioner started this fight with Kyriell, both Petitioner and Kyriell locked together in a bear hug and after Petitioner's first punch, no one threw punches. Both men were "equally locked up." Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. She also said that during the argument, Kyriell did not hit her or slam her into a car.

Through their actions, Petitioner's family telegraphed that Petitioner did not act in self-defense. Petitioner's family did not call the police; instead, they went back into the house and shut the door. Furthermore, Petitioner's family did not bring out towels or water or ask if the

victim needed any help. Ultimately, Petitioner's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. After Petitioner left the scene, Petitioner spoke with family members while police were outside his home. Petitioner told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF

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).

The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "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).

Additionally, 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.

Appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that 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). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable

probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. 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. The Court also held that, "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. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

A. Petitioner's Claims in his Post-Conviction Writ of Habeas Corpus Should be Denied

1. Ground One: The State used Petitioner's post-arrest silence against him

Petitioner argues that the State impermissibly elicited testimony about Petitioner's post-arrest silence. Petition at 7. Additionally, Petitioner complains that the State called Detective Matthew Gillis as a rebuttal witness without "being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations." Id.

As a preliminary matter, these substantive claims are waived due to Petitioner's failure to raise them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); 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). Additionally, Petitioner cannot and does not demonstrate good cause because all of the facts and law related to these claims were available at the time Petitioner filed his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because the underlying claims are meritless.

Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612 (emphasis added).

Additionally, "[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona ..." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995), and concluded that the "use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct." However, this Court has also stated that comments made about the defendant's silence during cross-examination are not prohibited if the questions "merely inquire[] into prior inconsistent statements." Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if the references to "the defendant's post-arrest silence are harmless beyond a reasonable doubt." Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290 (1989)). Indeed, this Court has concluded that

> [c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (internal citations omitted).

In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's questions during its cross-examination of the defendant amounted to prosecutorial misconduct. Specifically, the Court evaluated whether the State's comments about the defendant's silence for impeachment purposes resulted in a due process violation. Id. The Court determined that the State's comment on the defendant's silence was harmless error due to the overwhelming evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the case was not based solely on the defendant's testimony and the victim's, but that there was both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664, 895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that the State's comment during closing argument that, "[the defendant] had nine months to think about what his theory would be," was not an attempt to draw attention to the defendant's silence and was merely a passing reference followed by the strong evidence that corroborated the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court affirmed the defendant's conviction. Id.

In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments made by the State on the defendant's post-arrest silence during its case in chief resulted in prosecutorial misconduct. The Court concluded that by making such comments in its case in chief, the defendant is prejudiced because he would feel pressure to testify in order to explain his silence resulting in an infringement on his or right to prevent self-incrimination. Id. Ultimately, the Court determined that the State's comments were not made in passing reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that the defendant's denial of the crime and the other witness's presenting conflicting stories as well as admitting to not getting a good look at the shooter cast enough doubt that the evidence of the defendant's guilt was not overwhelming. Id.

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Although Petitioner offers a span of pages of where he believes the State commented on his post-arrest silence, he does not indicate the exact comments for which he takes issue. Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the State to respond. Regardless, there are two instances in which Petitioner might be taking issue. First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Additionally, during the State's closing argument, the State commented on Petitioner's actions after the altercation. The State utilized the testimony elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even tell the detectives where he was that whole time or why he didn't come home or an opportunity to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner may have had.

As threshold matter, it does not appear that Petitioner invoked his right to remain silent on this issue. It appears that Petitioner just omitted that information to the officers. Moreover, just as in Coleman, the State's comments were merely a passing reference and did not occur with high frequency. Moreover, the case was not based solely on the statements Petitioner made, but there was both physical and testimonial evidence that corroborated the State's theory of the case, including Davis' and Brittney Turner's trial testimony about what they witnessed. Additionally, there was overwhelming evidence of guilt in this case, including Petitioner's very own confession that he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 10. Even absent the jury being apprised that he did not tell police where he was after the altercation, the jury was presented with his other behaviors that established he did not act in self-defense. For example, after Petitioner stabbed Devine, he fled from the scene by jumping two walls, eventually disposed of the murder weapon, called the

house when the police arrived and found out that Devine was deceased and stayed away from the home until he reported himself, after Petitioner's murder the police had to force all of the individuals in Petitioner's residence out of the home because no one would volunteer information. Recorder's Transcript of Proceedings: Jury Trial Day 2, filed December 14, 2018, at 171; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 217; Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 21-23; Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Notwithstanding the overwhelming evidence of guilt in this case, the jury was also provided Jury Instruction No. 32 which stated in relevant part that "the statements, arguments and opinions of counsel are not evidence in the case." Instructions to the Jury, filed June 28, 2018. Accordingly, any error would have been harmless as the jury was instructed to not consider statements made in the State's closing argument as evidence.

Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice of Witnesses and/or Expert Witness filed on April 12, 2018, prior to trial.

Therefore, Petitioner's claims should be denied.

2. Ground Two: Petitioner's sentence is illegal

Petitioner argues that the Court improperly sentenced him under the habitual criminal statute when rendering his sentence. Specifically, he claims that the Court erred by considering his felony conviction in this case as his third felony under the habitual criminal statute. However, Petitioner's claim fails for several reasons.

First, Petitioner's claim is waived because it is a substantive claim that should have been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

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Second, Petitioner does not and cannot demonstrate good cause because all of the facts and law underlying his claim were available for his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because his claim is meritless and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. NRS 207.010 states:

> [A] person convicted in this state of:
>
> (b) *Any felony, who has previously been three times convicted, whether in this state or elsewhere*, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, *is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:*
>
> *(1) For life without the possibility of parole;*
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
>
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Complying with this statute, Petitioner had three (3) felony convictions as an adult that qualified him for habitual treatment pursuant to this statute: (1) a 1989 possession/purchase of cocaine base for sale; (2) a 1991 second-degree robbery with use of a firearm; and (3) two counts of second-degree robbery with use of a firearm from 1997. The State introduced, and the Court admitted, certified copies of the prior Judgments of Convictions for these crimes along with a sentencing memorandum containing such documents. Accordingly, Petitioner's claim that the Court improperly relied on the instant conviction as the conviction qualifying him for habitual criminal treatment is belied by the record.

Notwithstanding this claim's lack of merit, this issue was already litigated on direct appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's claim is barred under the law of case doctrine which states that 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)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim should be denied.

3. Ground Three: Prosecutorial misconduct

Petitioner argues that the State engaged in several instances of prosecutorial misconduct during trial. Petition at 9-10. However, his claim should be denied.

As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot demonstrate good cause because all of the facts underlying this claim were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless.

When resolving claims of prosecutorial misconduct, the Nevada Supreme Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 165, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). When the misconduct is of constitutional dimension, this Court will reverse unless the State

demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Petitioner complains that the State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. Petition at 9. However, there is no indication from the record that the State argued Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

Second, Petitioner claims that the State improperly stated that witness, Flores, could see the altercation, even though Flores testified that she could see the incident when her front door was open and the altercation was nearly over. Petition at 9. Petitioner is mistaken. The State was not summarizing Flores' testimony during the portion of the State's closing argument Petitioner cites (Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 43). Instead, the State was summarizing Tamisha Kinchron's testimony. Id. at 42-43. Kinchron testified that while it was hard to see because it was dark outside, she could see the majority of what was going on outside during the altercation. Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 186-87. Accordingly, the State made a logical inference from her testimony that she could see what happened that night.

Third, Petitioner argues that the State's argument, that Flores heard the victims impact and ran outside, was a fabrication of Flores' testimony. Id. In its full context, the State argued as follows:

> when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's attempting to get Brittney to go somewhere, that's at the point when Kyriell is going to Zek and to the Defendant and Brittney is trying to pull him back

> and hold him back. And how do we know that that's true? Because the very next thing she hears is an impact. And she runs outside and Zek has just fallen.

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 46. The State did not fabricate Flores' testimony as Flores testified that after she heard "a strong impact or noise" that is when she decided to go outside of her home. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 113.

Fourth, Petitioner argues that the State improperly claimed that Flores provided testimony that she saw Petitioner throw the first punch in the altercation. Petition at 9. Once again, Petitioner has mistaken the witnesses to which he is complaining. Petitioner cites to the State's closing argument wherein the State summarized Brittney Turner's and Kyriell Davis' testimony. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 88-94. Indeed, the State argued that Turner was the individual that testified that Petitioner was the first person to throw a punch. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 205-09. Accordingly, the State did not fabricate testimony.

Fifth, Petitioner asserts that the State argued Petitioner stabbed Devine twice when there was no evidence presented to that effect. Petition at 9. Although Petitioner does not provide any reference as to when the State argued Devine was stabbed twice, the State did summarize Dr. Roquero's, the medical examiner, testimony and argued:

> And what the State would ask you to look at is not only the pictures but also the testimony of Dr. Roquero, who was the medical examiner. And what did he say? He said that there were two sharp force injuries to Ezekiel. One of them was a stab wound, that would be from like a jabbing or a plunging type action. And then the second one was an incised wound, meaning that it's longer than it is deep into the body.

Reporter's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 58. Examining the State's argument in its full context reveals that the State did not argue Devine was stabbed twice, but instead was arguing that he faced "two sharp force injuries," which was Dr. Roquero's testimony. Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 201-03. Accordingly, Petitioner cannot demonstrate that the State was misleading in its argument and he faced prejudice as a result.

Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As discussed *supra*, Petitioner's rights were not violated as he did not unambiguously invoke his right to remain silent when he omitted telling law enforcement where he was in the hours after he stabbed and murdered Devine. Moreover, the State's comments were merely a passing reference and the case was not based solely on such comments.

Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

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Here, the State made reference to Petitioner's juvenile history at sentencing. However, Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to support the actions of counsel and the court below). Indeed, the Court merely explained that it would use its discretion and find Petitioner as a habitual criminal, a status he qualified for based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual Criminal was attached to the Information filed on February 7, 2018. Additionally, the State attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument that appellate counsel should have raised a notice issue fails as doing so would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its statutory obligation as discussed *infra*.

Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently prejudicial to warrant ignoring the procedural default since this trial was essentially a credibility contest between Petitioner and the other witnesses and a court will not overturn a criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Petitioner has failed to establish good cause and prejudice to overcome the procedural default and his claim should be denied.

4. Ground Four: Certain jury instructions violated Petitioner's rights

Petitioner complains that several of the jury instructions provided at trial violated his rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive

claims that he failed to raise on direct appeal, they are also naked assertions and meritless as discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

First, Petitioner argues that Jury Instruction Nos. 1, 17, 20, and 31 were not neutral and unbiased as they informed the jury that they could find Petitioner guilty if certain terms were met and not guilty if they were not met. Petition at 11.

Jury Instruction No. 1 stated,

> It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Jury Instruction No. 17 stated,

> You are instructed that if you find a defendant guilty of murder in the first degree, murder in the second degree, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.
>
> If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."
>
> If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

Jury Instruction No. 20 stated,

> Battery means any willful and unlawful use of force or violence upon the person of another.
>
> Any person who commits a battery upon another with the specific intent to kill is guilty of the offense of Battery With Intent to Kill.

Jury Instruction No. 31 stated,

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you

should so find, even though you may believe one or more persons are also guilty.

As a preliminary matter, Petitioner's claims should be summarily dismissed as he has provided only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner has not attempted to and cannot demonstrate good cause to overcome the procedural default. Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are accurate statements of law, which the Court properly permitted. See Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the jury is properly instructed and is permitted to complete instructions sua sponte).

Second, Petitioner claims that Jury Instruction Nos. 21, 25, and 27 did not instruct the jury that they may find Petitioner not guilty. Petition at 11. Additionally, he claims that Jury Instruction Nos. 22 and 23 conflict with Jury Instruction Nos. 21, 25, and 27. Id. Further, he asserts that Jury Instruction No. 23 failed to provide the definition of "negate" and "disputes fear as insufficient to justify a killing," which attacked the Petitioner's post-arrest silence. Id.

Jury Instruction No. 21 stated,

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury to himself or to another person; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person; for the purpose of avoiding death or great bodily injury to himself or to another person.

Jury Instruction No. 22 stated,

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

Jury instruction No. 23 stated,

> An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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Jury Instruction No. 25 stated,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another person is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself or another person to be in like danger.
>
> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

Jury Instruction No. 27 stated,

> If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or the life of another person, or to prevent his receiving great bodily harm or to prevent another person from receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

As a preliminary matter, each of these instructions are accurate statements of law. Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200. Moreover, Petitioner's argument that these instructions failed to instruct the jury that they could find Petitioner not guilty is meritless. The jury was provided with multiple instructions that explained the jury could find Petitioner not guilty. Regardless, the jury was given Jury Instruction No. 30, the Reasonable Doubt Instruction, that explicitly provided Petitioner would be presumed innocent until the State proved each element beyond a reasonable doubt. Additionally, Petitioner provides no reason as to why he believes the above jury instructions conflict, which warrants summary dismissal of such claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner argues that the word "negate" was not explained to the jury, his claim should also fail. Negate is not a legal definition that must be defined for the

jury. Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Accordingly, Petitioner has not and cannot demonstrate good cause and prejudice to overcome the procedural default.

Third, Petitioner also challenges the language of Jury Instruction No. 30, which he claims the Nevada Supreme Court has stated cannot be used. Petition at 11.

Jury Instruction No. 30 stated,

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense. A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

In addition to his claim being suitable for summary denial, this instruction was an accurate statement of the law complying with NRS 175.211, which mandates the language of this instruction. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fourth, Petitioner asserts that Jury Instruction No. 37 improperly instructed the jury that the penalty phase need not be considered in deliberation, but then "biasly express[ed] first degree murder penalty." Petition at 11. He claims that the first-degree murder penalty instruction should be separate. Id.

Jury Instruction No. 37 stated,

> In arriving at a verdict in this case as to whether the Defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.
>
> If the Juris verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

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In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his claim should also be denied because this instruction was an accurate statement of law. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury not to involve the question of guilt with a consideration of the penalty is proper.").

5. Ground Five: Settling of jury instructions

Petitioner complains that the process used to settle jury instructions at trial precluded his ability to understand the instructions and present objections. Petition at 12. Specifically, he argues that it was improper for the Court to provide the number and the title rather than repeating the instruction word for word. Id.

As a preliminary matter, this is a substantive claim that is waived due to the failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to demonstrate good cause because all of the facts and law necessary for such claim were available when he filed his direct appeal.

Petitioner also cannot demonstrate prejudice to ignore his omission because his claim is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make objections to the jury instructions, and, thus, did not have the right to represent himself to object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an accused is not entitled to participate with counsel in the presentation of the defense"); see also, Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871 (10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010);

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People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986). If Petitioner wanted to represent himself, he should have made a request of the Court to canvass pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly, Petitioner's claim should be denied.

Notwithstanding these claims being waived, dismissed, and meritless, any error in these instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default since the jury was properly instructed on the burden of proof and the weighing of witness credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury was also presented with evidence that Petitioner was not justified in doing so. The State introduced credible and sufficient evidence of Petitioner's actions after the crime, which demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call 911—even though he later told police that Davis said that he would shoot up the house after Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by jumping two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00 PM and 2:00 AM the night of the crime, when he turned himself in to police. Therefore, Petitioner's claims should be denied.

6. Ground Six: Trial counsel was ineffective

Under Ground Six, Petitioner argues that trial counsel was ineffective for failing to: (1) investigate Petitioner's case and prepare for trial; (2) establish Petitioner's theory of defense through the jury instructions; (3) object to Kyriell Davis' testimony; (4) protect Petitioner's

post arrest silence; and (5) impeach Kyriell Davis. Petition at 13-17. As will be discussed below, each of these claims should be denied.

a. *Failure to investigate and prepare for trial*

Petitioner argues that counsel was ineffective regarding the investigation of his case for several reasons. Petition at 13-14.

First, Petitioner argues that counsel did nothing, but review the State's open file to prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify for the defense was because he told them to come to court. Id. This claim fails under Molina, 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better investigation would have shown.

Second, he argues that counsel failed to call a pathologist as an expert to discuss the positioning of the victim at the time of his death and other details regarding the stabbing, which he argues would have prevented his conviction. Petition at 13-14. However, this claim also fails under Molina as Petitioner does not and cannot demonstrate that such testimony would have changed the outcome of his trial. Moreover, which witnesses to call is a strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

Third, he argues that counsel failed to canvass his neighbors to determine what they knew. Petition at 14. This claim also fails under Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, Petitioner does not even attempt to indicate what the neighbors' testimony would have been, let alone whether it would have aided in his defense.

Fourth, he claims counsel did not interview Sandi Cash, Defendant's sister. Id. he claims that because counsel failed to obtain Sandi's information, there was no testimony elicited regarding Devine not visiting Petitioner's place of residence, the threats Devine made toward the home and Petitioner, and prior acts related to the case. Id. Even if such testimony had been elicited, Petitioner has also failed to demonstrate, as with his other claims, how the testimony would have changed the outcome of his trial. Indeed, assuming Sandi did testify to such information, that testimony would not have changed the fact that the jury was presented with evidence demonstrating Petitioner did not act in self-defense, including "that [Petitioner]

initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2.

In sum, Petitioner cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claims should be denied.

b. *Failure to establish Petitioner's theory of defense through jury instructions*

Petitioner complains that counsel failed to present Petitioner's theory of defense and offer jury instructions consistent with his self-defense theory. Petition at 15. Additionally, he argues that counsel was ineffective for failing to establish foundational evidence regarding why Petitioner was carrying a work knife on his person. Id.

Petitioner's complaint that counsel was ineffective because there was no self-defense jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of self-defense. Those jury instructions properly provided the jury with the law to determine whether Petitioner was justified under a theory of self-defense for protecting his daughter, Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to demonstrate what additional instruction he believes should have been given to demonstrate prejudice.

Petitioner's claim that counsel failed to establish foundational evidence regarding why Petitioner carried a work knife is also belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During counsel's opening statement, counsel provided context as to why Petitioner carried a knife:

> Now, this man sitting here, Thomas Cash, he's 52 years old. He works at Sears. *He's an HVAC technician.* He carries a tool belt around his waist. In addition to the tool belt, *he keeps a knife flipped on the inside of his pocket.* That knife really isn't for working. It's for when boxes come in that he has to open. He slices them open.

Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 167-68 (emphasis added). Counsel reiterated this foundation again during his closing argument:

> He went out as quickly as he could because he believed Brittney was in imminent danger. He just so happened, as I said in opening argument, *the man is an HVAC technician.* His daughter testified he fixes machines, fixes the vending machine at McDonald's. He works at Sears. *He always has this little knife clipped right here.*

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 75 (emphasis added). Accordingly, counsel could not have been ineffective as the jury was provided foundation regarding Petitioner carrying a knife. For the same reason, Petitioner cannot and does not demonstrate prejudice. Therefore, Petitioner's claim should be denied.

c. *Failure to object to Kyriell Davis' testimony*

Petitioner argues that counsel was ineffective for failing to object to a portion of Davis' testimony during trial wherein he discussed the altercation he had with Petitioner that ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature of Davis' testimony and when the same information was repeated. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

Petitioner's claim should be denied. As a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the subject matter of Davis' testimony, counsel could have concluded that it would have damaged his credibility with the jury if he made a series of pointless objections that could be perceived as disrespectful to the witness or as achieving nothing more than delaying the process. Also, if the information was going to be presented to the jury regardless, counsel did not need to offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if the State had asked more questions to break up Davis' testimony, the State would have elicited the information as it was pertinent eyewitness evidence of someone who watched Petitioner commit the crimes charged in this case. Accordingly, Petitioner cannot demonstrate he was prejudiced.

Additionally, Petitioner mistakenly claims that counsel should have objected when Davis' testimony was repeated. Any information that was repeated was for the purposes of clarification and asking further questions about what Davis' previous testimony. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of reasonableness, let alone prejudice so his claim should be denied. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64.

d. *Failure to protect post-arrest silence*

Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16. Petitioner claims that counsel should have requested that the rebuttal witness first testify outside the presence of the jury to determine the prejudicial nature of his testimony. Petition at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

e. *Failure to impeach Kyriell Davis' testimony*

Petitioner complains that counsel was ineffective for failing to impeach Davis, who he claims was the sole witness for the state that saw Petitioner with a knife and stab the victim. Petition at 16-17. Specifically, he argues that Davis committed perjury when he testified that Brittney Turner left the scene once the altercation occurred and Petitioner had to call her to come and get the baby. Id. He claims that he could have impeached Davis' testimony through witnesses: Brittney Turner, Tamisha Kinchron, Antoinette White, and Isidra Flores. Id. Petitioner's claim should fail.

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As a preliminary matter, Petitioner has not provided any evidence that Davis did in fact commit perjury when he testified regarding Turner leaving the scene. Even if he had provided the Court with such information, his claim would still fail as Turner's whereabouts once the altercation began would not have changed the outcome of his trial. The defense's theory was that Petitioner was acting in self-defense when he stabbed Devine as he felt like he was facing a two-on-one fight with Devine and Davis. In other words, whether Turner was inside of the home or outside of the home was not an essential factor in the jury determining if Petitioner, at the moment he stabbed Devine, was acting in self-defense. Accordingly, impeaching Davis was not necessary to proving Petitioner was acting in self-defense. Notably, Petitioner even appears to concede this point when he states, "[t]hough the impeach did not strick at the stab incident, such perjury would have gone to insight to the jury that Davis committed perjury." Petition at 17. Indeed, Petitioner cannot demonstrate prejudice because that sole fact would not have changed the outcome of the trial. Therefore, his claim should be denied.

7. Ground Seven: Cumulative error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, as argued in Section I.A.4 *supra*, the issue of guilt in this case was not close.

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Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there is no error to cumulate. Regardless, any errors that occurred at trial, which the State does not concede, would have been minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Third, and finally, Petitioner was convicted of a grave crime. However, because the evidence was more than sufficient and there was no error, it should not weigh heavily in this Court's analysis. Therefore, Petitioner's claim should be denied.

8. Ground Eight: Appellate counsel was ineffective for failing to consult prior to filing Petitioner's direct appeal

Petitioner argues that counsel was ineffective for failing to consult with him before drafting Petitioner's direct appeal and filed it despite Petitioner's request to hold off so he could research counsel's claims as well as add claims to his appeal, including the claims in the instant Petition. Petition at 17-18. However, his claim should fail for several reasons.

First, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the reasons discussed throughout this Petition, Petitioner's claims would not have been effective on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims should be denied.

9. Ground Nine: Petitioner's right to a speedy trial was violated

Petitioner argues that the Court violated his right to a speedy trial. Petition at 18. Specifically, he claims that the Court erroneously continued his trial against the parties' consent. Id. Not only is this claim a bare and naked assertion suitable only for summary dismissal, but also it is waived as a substantive claim that should have been raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved

on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot attempt to demonstrate good cause as these claims were available for direct appeal and he cannot demonstrate prejudice because his claim is meritless.

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992). Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14, 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett,

505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230, 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

Moreover, the reason for the delay was that defense counsel had to attend a federal sentencing outside of the jurisdiction which could not be reset and the State had another trial on that date. Accordingly, Petitioner's argument that his trial was continued over his objection is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Therefore, Petitioner's claim should be denied.

B. Petitioner's Claims in his Memorandum Should be Denied

1. Ground One: Counsel was ineffective for failing to investigate

a. Failure to consult and communicate

Petitioner argues that counsel was ineffective for only consulting with Petitioner only four times prior to trial, failing to have the defense's investigator meet with Petitioner, failing to interview and call witnesses that could have helped the defense, and failing to make appropriate objections. Memorandum at 9-13.

Petitioner's claims should be denied as they amount to nothing more substantive than naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. Moreover, Petitioner's failure to investigate allegations fail since Petitioner does not demonstrate what a better investigation would have uncovered. Molina, 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers nothing more than a naked assertion that further proves summary dismissal is warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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b. *Failure to investigate and call witnesses*

Petitioner complains that counsel did not speak to witnesses he wanted to testify at trial and failed to call them as witnesses. Memorandum at 14-19. In particular, Petitioner claims that Sandi Cash Earl and Angel Turner should have been called so they could have provided favorable testimony. Memorandum at 14. Not only are Petitioner's claims naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225, but also these claims should fail under Molina, 120 Nev. at 192, 87 P.3d at 538, for Petitioner failing to demonstrate what a better investigation would have discovered.

Petitioner's argument that counsel failed to call Angel Turner as a witness is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Angel testified for the defense on the sixth day of Petitioner's trial. Additionally, Petitioner attached a statement from Angel which merely stated that counsel did not interview her prior to testifying. However, Petitioner's claim still fails because he did not indicate how her testimony would have differed had counsel interviewed her, let alone whether that unknown testimony would have led to a better outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, in addition to her trial testimony, Angel Turner provided a recorded statement to the police and testified at the preliminary hearing, so it is not clear what additional interviewing would have accomplished.

Petitioner also attached a statement from Sandi Cash who provided what her testimony would have been had she been called to testify at Petitioner's trial. Memorandum, Exhibit 1, at 1. The crux of such statement was that when Brittney Turner was arguing with Davis outside, Sandi heard him tell Turner to get whoever she wanted to fight him, including Petitioner. Id. Sandi explained that she did not tell Petitioner about what was said or express her concerns. Id. However, Sandi's statement is referring to a completely separate incident wherein Davis was dropping off his child, rather than picking his child up. Regardless, Sandi's testimony about this event would not have been admissible at trial because she claims she never told Petitioner about what was said. Accordingly, Petitioner would not have known about the specific incident for it to have had affected his state of mind regarding self-defense. Moreover, such testimony would not have made a difference at Petitioner's trial. There was other

evidence presented that Petitioner did not act in self-defense, including as the Nevada Supreme Court pointed out when it affirmed Petitioner's sentence: "[t]here was evidence and testimony that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2. Accordingly, Petitioner cannot demonstrate he was prejudiced by not having Sandi's alleged testimony.

In sum, Petitioner's allegations of prejudice are long quotations to legal authority but short on actual harm to his case and thus he cannot establish prejudice under Strickland because his claims are governed by Hargrove and Molina. Therefore, Petitioner's claim should be denied.

c. *Failure to meet with Petitioner*

Petitioner complains that appellate counsel was ineffective for only having met with Petitioner once. Memorandum at 20-22. Additionally, he claims that appellate counsel did a poor job in filing his direct appeal. Id. However, Petitioner's claims should be denied for several reasons.

First, as with trial counsel, Petitioner is not entitled to a particular relationship with counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate counsel failed to do a "good job" is a naked assertion that should be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim raising insufficiency of the evidence, he has not explained how such complaint is relevant or how it would have made a difference on appeal. Notably, appellate counsel is more effective when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

///

2. Ground Two: Appellate counsel was ineffective

Petitioner appears to complain that appellate counsel failed to file a direct appeal on his behalf. Memorandum at 23-26. However, no matter how this claim is interpreted, it should fail.

Should Petitioner mean to argue that appellate counsel was ineffective for failing to file a direct appeal because counsel failed to consult with Petitioner, the State incorporates its argument from Section I.B.1.c. In the event Petitioner intended to argue that counsel failed to file a direct appeal on his behalf, his claim is belied by the record and suitable only for summary denial because appellate counsel did in fact file a direct appeal for Petitioner. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

To the extent Petitioner is complaining that counsel did not consult and include his issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claim should be denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States

Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

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

Accordingly, under NRS 34.750, it is clear that the Court has discretion in determining whether to appoint counsel.

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se post-conviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that

because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are severe as he is serving a sentence of life without the possibility of parole, that fact alone does not require the appointment of counsel. Indeed, none of the issues Petitioner raises are particularly difficult as his claims are either waived as substantive claims, fail to provide good cause because they are based on information Petitioner had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Moreover, unlike the petitioner in Renteria-Novoa who faced difficulties with understanding the English language, Petitioner does not claim he cannot understand English or cannot comprehend the instant proceedings. It is clear that Petitioner is able to comprehend the instant proceedings based upon his filing of the instant Petition.

Finally, despite Petitioner's argument, counsel is not necessary to proceed with discovery in this case as no additional discovery is necessary. Therefore, Defendant's Motion should be denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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.

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, 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 instant Petition does not require an evidentiary hearing. An expansion of the record is unnecessary because Petitioner has failed to assert any meritorious claims and the Petition can be disposed of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Mann, 118 Nev. at 356, 46 P.3d at 1231. Therefore, Petitioner's request should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, and Request for an Evidentiary Hearing be DENIED.

DATED this 18th day of September, 2020.

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 service of the State's Response to Petitioner's Petition for Writ of habeas corpus (post-conviction), memorandum of points and authorities in support of petition for writ of habeas corpus (post-conviction), motion for appointment of counsel, and request for an evidentiary hearing, was made this 18th day of September, 2020, by mail to:

THOMAS CASH, #1203562
P. O. BOX 1989
ELY, NV 89301

By: _____
Secretary for the District Attorney's Office

17FN2591X/JEV/bg/Appeals

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2/5/2021 11:55 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS CASH, Plaintiff, vs. WILLIAM GITTERE, Defendant.	CASE#: A-20-818971-W DEPT. IX

BEFORE THE HONORABLE CRISTINA D. SILVA, DISTRICT COURT JUDGE

WEDNESDAY, OCTOBER 7, 2020

RECORDER'S TRANSCRIPT OF HEARING:
PETITION FOR WRIT OF HABEAS CORPUS
PLAINTIFF'S EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING
PLAINTIFF'S EX PARTE MOTION FOR ORDER TO TRANSPORT PETITIONER

APPEARANCES:

For the Plaintiff: Not present

For the Defendant: JOHN TORRE, ESQ.
Deputy District Attorney

RECORDED BY: GINA VILLANI, COURT RECORDER

Las Vegas, Nevada, Wednesday, October 7, 2020

[Hearing began at 4:16 p.m.]

THE COURT: And I believe this is our last case, this is page 7, A-20-818971-W, Thomas Cash versus William Gitterre, I'm sure I'm mispronouncing that and I apologize. This is on for a petition of writ of habeas corpus, there's also an ex parte request for appointment of counsel, and a request for an evidentiary hearing, and last but not least there is a request for a motion to order transport of prisoner.

I'm going to go in reverse order and I'm going to deny the motion for order to transport the prisoner. I didn't have a basis to transport him and I can make the decision on the pleadings and therefore I'm waiving his presence.

I'm also denying his request for an evidentiary hearing and for the appointment of counsel. Having reviewed the petition for writ of habeas corpus, I am going to deny that petition. I did not find anything of particular complexity or otherwise that would have necessitated appointment of counsel. And certainly nothing in the petition meets the threshold for setting an evidentiary hearing.

As to the substance of the petition itself, I am denying it for the reasons set forth in the State's opposition. I do not find as alleged in the petition that the State improperly used his, quote, post arrest silence against him. And at most there was potentially harmless error if he did, in fact, even invoke his right to remain silent and there is no evidence in the petition that he did that.

I'll also note that the Court properly deemed him to be a habitual offender and that there is nothing that precludes a judge from reviewing a juvenile record or considering a juvenile record when considering sentencing. In fact, a district court has broad discretion in entering sentencing decisions.

I also find that his allegations that the jury instructions used in his case were unfair. They appear -- and there's nothing explaining beyond what is set forth in the petition that they are standard jury instructions. He broadly, and without support of his argument, claims that the jury instructions were unfair. And so that -- I'm going to deny the petition on that basis.

I'm also going to find that he fails to meet the required burden under *Strickland v Washington* to demonstrate ineffective assistance of counsel, that applies to both trial counsel and appellate counsel. He offers, and in regards to trial counsel, bare allegations and claims that there should have been a proper investigation conducted but it does not in any way set forth what a, quote, proper investigation would look like or what a, quote, proper investigation would have resulted in or uncovered that would have then granted him some relief via this petition.

He also fails to establish that he was prejudiced by his attorney not interviewing two witnesses. It seems that he wants them -- he wanted the attorney to interview these witnesses, quote, properly, but I don't know what that means and it's not set forth in the petition. It's also not set forth how, if they had been interviewed, quote, properly, how that would have changed their testimony or how that would have impacted the

outcome of the decision. And so certainly that's not a basis to grant the relief he is seeking via the petition for writ of habeas corpus.

I'll also note that he claims that he was prejudiced because he did not have a right to a meeting with appellate counsel and that is not a basis to grant a petition for writ of habeas corpus with the relief he's seeking via this avenue. Appellate counsel is -- has broad discretion to raise issues that it feels necessary.

Last, but certainly not least, I'm also going to note that he did also -- many of the allegations set forth in this petition should have been raised on direct appeal. To the extent that they were not raised on direct appeal, he is waiving his right -- he has waived his right to now raise them via a post-conviction writ of habeas corpus.

State, any questions?

MR. TORRE: No, Your Honor.

THE COURT: All right. So just if you can get that draft order to me in 30 days I'd appreciate it.

MR. TORRE: Thank you, Your Honor.

[Hearing concluded at 4:21 p.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.

Gina Villani
Court Recorder/Transcriber
District Court Dept. IX

NEO

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-18-329699-1

Dept No: IX

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

PLEASE TAKE NOTICE that on November 4, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 17, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 17 day of November 2020, I served a copy of this Notice of Entry on the following:

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

☑ The United States mail addressed as follows:
Thomas Cash # 1203562
P.O. Box 1989
Ely, NV 89301

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH, #7053124

Petitioner,

-vs-

~~THE STATE OF NEVADA~~,
WILLIAM GITTERE,

Respondent.

CASE NO: C-18-329699-1
A-20-818971-W

DEPT NO: IX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 7, 2020
TIME OF HEARING: 1:45 PM

THIS CAUSE having come on for hearing before the Honorable ~~JUDGE NAME~~ Cristina D. Silva, District Judge, on the 7th day of October, 2020, the Petitioner in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN TORRE, 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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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

On April 19, 2018, the State filed an Amended Information charging Thomas Cash (hereinafter "Petitioner") with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3). The State attached an Amended Notice of Intent to Seek Punishment as Habitual Criminal to the Amended Information.

On June 18, 2018, Petitioner's jury trial commenced. After eight days of trial, the jury found Petitioner guilty of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON and not guilty of BATTERY WITH INTENT TO KILL. On August 20, 2018, the Court adjudicated Petitioner guilty. At Petitioner's sentencing hearing the State argued for habitual treatment and provided certified copies of Petitioner's prior Judgments of Conviction. After argument by both parties, the Court sentenced Petitioner, for Count 1, life without the possibility of parole under the large habitual criminal statute. The Judgment of Conviction was filed on August 24, 2018.

On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS 207.010(1)(b).

On August 3, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State filed its Response on September 18, 2020. On October 7, 2020, the Court denied these pleadings finding as follows.

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FACTUAL BACKGROUND

On December 11, 2017, a verbal argument led to Petitioner, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. Recorder's Transcript of Proceedings, Jury Trial Day 5, at 229.

The events of this day started when Kyriell Davis, twenty-eight years Petitioner's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their children. Jury Trial Day 5 at 124-25, 132-33, 229. Eventually, Kyriell pushed Brittney away from him with his hands. Jury Trial Day 5 at 133-34. Upon hearing this verbal argument, Petitioner came down to intervene. Jury Trial Day 5 at 135-36. Petitioner asked whether Kyriell hit Brittney—Brittney answered no and told Petitioner to mind his own business. Jury Trial Day 5 at 135.

Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell: multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back turned to Petitioner, without provocation by Kyriell. Jury Trial Day 5 at 135-38, 156-57, 213. Petitioner later admitted that he threw the first punch. Jury Trial Day 7 at 9. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. Jury Trial Day 5 at 124-25, 131, 141, 183. At about that time, two cars drove up the road and separated Ezekiel and Petitioner from Kyriell. Jury Trial Day 5 at 142. Kyriell saw a flash in Petitioner's hand as the cars came by and tried to warn Ezekiel. Jury Trial Day 5 at 142. While Petitioner and Kyriell were separated, Petitioner stabbed Ezekiel straight through the heart. Jury Trial Day 3 at 192; Jury Trial Day 5 at 142. Ezekiel collapsed in the middle of the street and quickly died. Jury Trial Day 3 at 196-97, 224.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. Jury Trial Day 5 at 135. He then observed Brittany yelling at Petitioner. Jury Trial Day 5 at 136. Petitioner took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Petitioner. Jury Trial Day 5 at 136, 138.

After Petitioner tried to punch Kyriell, Kyriell and Petitioner interlocked and Petitioner tried to slam him to the ground. Jury Trial Day 5 at 137. Kyriell never swung his fist at Petitioner. Jury Trial Day 5 at 138-39. Petitioner and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. Jury Trial Day 5 at 139-141. Kyriell saw a flash from Petitioner's hand as a car came drove in between the group, leaving Petitioner and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. Jury Trial Day 5 at 141-43. Soon after, Ezekiel fell to the ground after being stabbed by Petitioner. See Jury Trial Day 5 at 142.

Petitioner's actions after the victim died demonstrated his consciousness of guilt. Petitioner did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. Jury Trial Day 5 at 247; Jury Trial Day 7 at 15. Despite these alleged threats and after he killed Ezekiel, Petitioner locked the door, left his home, and ran from the scene. Jury Trial Day 5 at 146. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. Jury Trial Day 5 at 68-69, 75, 200. Petitioner escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. Jury Trial Day 6 at 21-24. Petitioner also destroyed and hid the murder weapon, a knife. Jury Trial Day 7 at 11. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police. Jury Trial Day 6 at 30; Jury Trial Day 7 at 12.

Petitioner initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Petitioner throw the first punch. Jury Trial Day 5 135-38, 156-57, 213; Jury Trial Day 6 at 83-84, 155. Brittney told police that Petitioner, Brittney's stepdad, threw the first punch. Jury Trial Day 5 at 213. Brittney also stated that she never felt in danger and that Kyriell did not hit her. Jury Trial Day 5 at 222, 225. Moreover, multiple witnesses stated, including Petitioner, that no one but Petitioner had a weapon. Jury Trial Day 5 at 167-68; Jury Trial Day 6 at 137-38; see Jury Trial Day 7 at 9.

Petitioner told police that he stabbed Ezekiel because he did not want to get hit again. Jury Trial Day 7 at 10.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Petitioner came out of the house and tried to punch Kyriell. Jury Trial Day 5 at 208. After Petitioner started this fight with Kyriell, both Petitioner and Kyriell locked together in a bear hug and after Petitioner's first punch, no one threw punches. Jury Trial Day 5 at 208-09. Both men were "equally locked up." Jury Trial Day 5 at 209. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. Jury Trial Day 5 at 212-13. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. Jury Trial Day 5 at 222. She also said that during the argument, Kyriell did not hit her or slam her into a car. Jury Trial Day 5 at 225.

Through their actions, Petitioner's family telegraphed that Petitioner did not act in self-defense. Petitioner's family did not call the police; instead, they went back into the house and shut the door. Jury Trial Day 6 at 137, 140. Furthermore, Petitioner's family did not bring out towels or water or ask if the victim needed any help. Jury Trial Day 5 at 171; Jury Trial Day 6 at 137. Ultimately, Petitioner's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. Jury Trial Day 5 at 66-67, 171; Jury Trial Day 6 at 137. After Petitioner left the scene, Petitioner spoke with family members while police were outside his home. Jury Trial Day 6 at 217. Petitioner told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. Jury Trial Day 6 at 217.

ANALYSIS

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF

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).

The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "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).

Additionally, 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.

Appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that 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). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. 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. The Court also held that, "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. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

A. Petitioner's Claims in his Post-Conviction Writ of Habeas Corpus Are Denied

1. Ground One: The State did not use Petitioner's post-arrest silence against him

Petitioner argues that the State impermissibly elicited testimony about Petitioner's post-arrest silence. Petition at 7. Additionally, Petitioner complains that the State called Detective Matthew Gillis as a rebuttal witness without "being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations." Id.

As a preliminary matter, these substantive claims are waived due to Petitioner's failure to raise them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); 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). Additionally, Petitioner cannot and does not demonstrate good cause because all of the facts and law related to these claims were available at the time Petitioner filed his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because the underlying claims are meritless.

Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to

the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612 (emphasis added).

Additionally, "[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona ..." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995), and concluded that the "use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct." However, this Court has also stated that comments made about the defendant's silence during cross-examination are not prohibited if the questions "merely inquire[] into prior inconsistent statements." Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if the references to "the defendant's post-arrest silence are harmless beyond a reasonable doubt." Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290 (1989)). Indeed, this Court has concluded that

> [c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (internal citations omitted).

In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's questions during its cross-examination of the defendant amounted to prosecutorial misconduct. Specifically, the Court evaluated whether the State's comments about the defendant's silence for impeachment purposes resulted in a due process violation. Id. The Court determined that the State's comment on the defendant's silence was harmless error due to the overwhelming evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the case was not based solely on the defendant's testimony and the victim's, but that there was both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664,

895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that the State's comment during closing argument that, "[the defendant] had nine months to think about what his theory would be," was not an attempt to draw attention to the defendant's silence and was merely a passing reference followed by the strong evidence that corroborated the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court affirmed the defendant's conviction. Id.

In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments made by the State on the defendant's post-arrest silence during its case in chief resulted in prosecutorial misconduct. The Court concluded that by making such comments in its case in chief, the defendant is prejudiced because he would feel pressure to testify in order to explain his silence resulting in an infringement on his or right to prevent self-incrimination. Id. Ultimately, the Court determined that the State's comments were not made in passing reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that the defendant's denial of the crime and the other witness's presenting conflicting stories as well as admitting to not getting a good look at the shooter cast enough doubt that the evidence of the defendant's guilt was not overwhelming. Id.

Although Petitioner offers a span of pages of where he believes the State commented on his post-arrest silence, he does not indicate the exact comments for which he takes issue. Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the State to respond. Regardless, there are two instances in which Petitioner might be taking issue. First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Additionally, during the State's closing argument, the State commented on Petitioner's actions after the altercation. The State utilized the testimony

elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even tell the detectives where he was that whole time or why he didn't come home or an opportunity to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner may have had.

As a threshold matter, it does not appear that Petitioner invoked his right to remain silent on this issue. It appears that Petitioner just omitted that information to the officers. Moreover, just as in Coleman, the State's comments were merely a passing reference and did not occur with high frequency. Additionally, the case was not based solely on the statements Petitioner made, but there was both physical and testimonial evidence that corroborated the State's theory of the case, including Davis' and Brittney Turner's trial testimony about what they witnessed. Additionally, there was overwhelming evidence of guilt in this case, including Petitioner's very own confession that he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 10. Even absent the jury being apprised that he did not tell police where he was after the altercation, the jury was presented with his other behaviors that established he did not act in self-defense. For example, after Petitioner stabbed Devine, he fled from the scene by jumping two walls, eventually disposed of the murder weapon, called the house when the police arrived and found out that Devine was deceased and stayed away from the home until he reported himself, after Petitioner's murder the police had to force all of the individuals in Petitioner's residence out of the home because no one would volunteer information. Recorder's Transcript of Proceedings: Jury Trial Day 2, filed December 14, 2018, at 171; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 217; Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 21-23; Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Notwithstanding the overwhelming evidence of guilt in this case, the jury was also provided Jury Instruction No. 32 which stated in relevant part that "the statements, arguments and opinions of counsel are not evidence in the case." Instructions to

the Jury, filed June 28, 2018. Accordingly, any error would have been harmless as the jury was instructed to not consider statements made in the State's closing argument as evidence.

Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice of Witnesses And/Or Expert Witness filed on April 12, 2018, prior to trial.

Therefore, Petitioner's claims are denied.

2. Ground Two: Petitioner's sentence is not illegal

Petitioner argues that the Court improperly sentenced him under the habitual criminal statute when rendering his sentence. Specifically, he claims that the Court erred by considering his felony conviction in this case as his third felony under the habitual criminal statute. However, Petitioner's claim fails for several reasons.

First, Petitioner's claim is waived because it is a substantive claim that should have been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Second, Petitioner does not and cannot demonstrate good cause because all of the facts and law underlying his claim were available for his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because his claim is meritless and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. NRS 207.010 states:

> [A] person convicted in this state of:
>
> (b) *Any felony, who has previously been three times convicted, whether in this state or elsewhere*, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, *is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:*

> *(1) For life without the possibility of parole;*
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Complying with this statute, Petitioner had three (3) felony convictions as an adult that qualified him for habitual treatment pursuant to this statute: (1) a 1989 possession/purchase of cocaine base for sale; (2) a 1991 second-degree robbery with use of a firearm; and (3) two counts of second-degree robbery with use of a firearm from 1997. The State introduced, and the Court admitted, certified copies of the prior Judgments of Convictions for these crimes along with a sentencing memorandum containing such documents. Accordingly, Petitioner's claim that the Court improperly relied on the instant conviction as the conviction qualifying him for habitual criminal treatment is belied by the record.

Notwithstanding this claim's lack of merit, this issue was already litigated on direct appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's claim is barred under the law of case doctrine which states that 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)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim is denied.

3. Ground Three: Prosecutorial misconduct

Petitioner argues that the State engaged in several instances of prosecutorial misconduct during trial. Petition at 9-10. However, his claim is denied.

As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot

demonstrate good cause because all of the facts underlying this claim were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless.

When resolving claims of prosecutorial misconduct, the Nevada Supreme Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 165, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Petitioner complains that the State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. Petition at 9. However, there is no indication from the record that the State argued Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched

Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

Second, Petitioner claims that the State improperly stated that witness, Flores, could see the altercation, even though Flores testified that she could see the incident when her front door was open and the altercation was nearly over. Petition at 9. Petitioner is mistaken. The State was not summarizing Flores' testimony during the portion of the State's closing argument Petitioner cites (Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 43). Instead, the State was summarizing Tamisha Kinchron's testimony. Id. at 42-43. Kinchron testified that while it was hard to see because it was dark outside, she could see the majority of what was going on outside during the altercation. Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 186-87. Accordingly, the State made a logical inference from her testimony that she could see what happened that night.

Third, Petitioner argues that the State's argument, that Flores heard the victims impact and ran outside, was a fabrication of Flores' testimony. Id. In its full context, the State argued as follows:

> when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's attempting to get Brittney to go somewhere, that's at the point when Kyriell is going to Zek and to the Defendant and Brittney is trying to pull him back and hold him back. And how do we know that that's true? Because the very next thing she hears is an impact. And she runs outside and Zek has just fallen.

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 46. The State did not fabricate Flores' testimony as Flores testified that after she heard "a strong impact or noise" that is when she decided to go outside of her home. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 113.

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Fourth, Petitioner argues that the State improperly claimed that Flores provided testimony that she saw Petitioner throw the first punch in the altercation. Petition at 9. Once again, Petitioner has mistaken the witnesses to which he is complaining. Petitioner cites to the State's closing argument wherein the State summarized Brittney Turner's and Kyriell Davis' testimony. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 88-94. Indeed, the State argued that Turner was the individual that testified that Petitioner was the first person to throw a punch. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 205-09. Accordingly, the State did not fabricate testimony.

Fifth, Petitioner asserts that the State argued Petitioner stabbed Devine twice when there was no evidence presented to that effect. Petition at 9. Although Petitioner does not provide any reference as to when the State argued Devine was stabbed twice, the State did summarize Dr. Roquero's, the medical examiner, testimony and argued:

> And what the State would ask you to look at is not only the pictures but also the testimony of Dr. Roquero, who was the medical examiner. And what did he say? He said that there were two sharp force injuries to Ezekiel. One of them was a stab wound, that would be from like a jabbing or a plunging type action. And then the second one was an incised wound, meaning that it's longer than it is deep into the body.

Reporter's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 58. Examining the State's argument in its full context reveals that the State did not argue Devine was stabbed twice, but instead was arguing that he faced "two sharp force injuries," which was Dr. Roquero's testimony. Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 201-03. Accordingly, Petitioner cannot demonstrate that the State was misleading in its argument and he faced prejudice as a result.

Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As discussed *supra*, Petitioner's rights were not violated as he did not unambiguously invoke his right to remain silent when he omitted telling law enforcement where he was in the hours after

he stabbed and murdered Devine. Moreover, the State's comments were merely a passing reference and the case was not based solely on such comments.

Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

Here, the State made reference to Petitioner's juvenile history at sentencing. However, Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to

support the actions of counsel and the court below). Indeed, the Court merely explained that it would use its discretion and find Petitioner as a habitual criminal, a status he qualified for based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual Criminal was attached to the Information filed on February 7, 2018. Additionally, the State attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument that appellate counsel should have raised a notice issue fails as doing so would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its statutory obligation as discussed *infra*.

Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently prejudicial to warrant ignoring the procedural default since this trial was essentially a credibility contest between Petitioner and the other witnesses and a court will not overturn a criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). Petitioner has failed to establish good cause and prejudice to overcome the procedural default and his claim is denied.

4. Ground Four: Certain jury instructions did not violate Petitioner's rights

Petitioner complains that several of the jury instructions provided at trial violated his rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive claims that he failed to raise on direct appeal, they are also naked assertions and meritless as discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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First, Petitioner argues that Jury Instruction Nos. 1, 17, 20, and 31 were not neutral and unbiased as they informed the jury that they could find Petitioner guilty if certain terms were met and not guilty if they were not met. Petition at 11.

Jury Instruction No. 1 stated,

> It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Jury Instruction No. 17 stated,

> You are instructed that if you find a defendant guilty of murder in the first degree, murder in the second degree, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.
>
> If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."
>
> If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

Jury Instruction No. 20 stated,

> Battery means any willful and unlawful use of force or violence upon the person of another.
>
> Any person who commits a battery upon another with the specific intent to kill is guilty of the offense of Battery With Intent to Kill.

Jury Instruction No. 31 stated,

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

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As a preliminary matter, Petitioner's claims are summarily dismissed as he has provided only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner has not attempted to and cannot demonstrate good cause to overcome the procedural default. Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are accurate statements of law, which the Court properly permitted. See Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the jury is properly instructed and is permitted to complete instructions sua sponte).

Second, Petitioner claims that Jury Instruction Nos. 21, 25, and 27 did not instruct the jury that they may find Petitioner not guilty. Petition at 11. Additionally, he claims that Jury Instruction Nos. 22 and 23 conflict with Jury Instruction Nos. 21, 25, and 27. Id. Further, he asserts that Jury Instruction No. 23 failed to provide the definition of "negate" and "disputes fear as insufficient to justify a killing," which attacked the Petitioner's post-arrest silence. Id.

Jury Instruction No. 21 stated,

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury to himself or to another person; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person; for the purpose of avoiding death or great bodily injury to himself or to another person.

Jury Instruction No. 22 stated,

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

Jury instruction No. 23 stated,

> An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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Jury Instruction No. 25 stated,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another person is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself or another person to be in like danger.
>
> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

Jury Instruction No. 27 stated,

> If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or the life of another person, or to prevent his receiving great bodily harm or to prevent another person from receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

As a preliminary matter, each of these instructions are accurate statements of law. Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200. Moreover, Petitioner's argument that these instructions failed to instruct the jury that they could find Petitioner not guilty is meritless. The jury was provided with multiple instructions that explained the jury could find Petitioner not guilty. Regardless, the jury was given Jury Instruction No. 30, the Reasonable Doubt Instruction, that explicitly provided Petitioner would be presumed innocent until the State proved each element beyond a reasonable doubt. Additionally, Petitioner provides no reason as to why he believes the above jury instructions conflict, which warrants summary dismissal of such claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner argues that the word "negate" was not explained to the jury, his claim also fails. Negate is not a legal definition that must be defined for the jury.

Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Accordingly, Petitioner has not and cannot demonstrate good cause and prejudice to overcome the procedural default.

Third, Petitioner also challenges the language of Jury Instruction No. 30, which he claims the Nevada Supreme Court has stated cannot be used. Petition at 11.

Jury Instruction No. 30 stated,

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense. A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

In addition to his claim being suitable for summary denial, this instruction was an accurate statement of the law complying with NRS 175.211, which mandates the language of this instruction. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fourth, Petitioner asserts that Jury Instruction No. 37 improperly instructed the jury that the penalty phase need not be considered in deliberation, but then "biasly express[ed] first degree murder penalty." Petition at 11. He claims that the first degree murder penalty instruction should be separate. Id.

Jury Instruction No. 37 stated,

> In arriving at a verdict in this case as to whether the Defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

> If the Juris verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his claim is also denied because this instruction was an accurate statement of law. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury not to involve the question of guilt with a consideration of the penalty is proper.").

5. Ground Five: Settling of jury instructions

Petitioner complains that the process used to settle jury instructions at trial precluded his ability to understand the instructions and present objections. Petition at 12. Specifically, he argues that it was improper for the Court to provide the number and the title rather than repeating the instruction word for word. Id.

As a preliminary matter, this is a substantive claim that is waived due to the failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to demonstrate good cause because all of the facts and law necessary for such claim were available when he filed his direct appeal.

Petitioner also cannot demonstrate prejudice to ignore his omission because his claim is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make objections to the jury instructions, and, thus, did not have the right to represent himself to object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an accused is not entitled to participate with counsel in the presentation of the defense"); see also, Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871

(10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010); People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986). If Petitioner wanted to represent himself, he should have made a request of the Court to canvass pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly, Petitioner's claim is denied.

Notwithstanding these claims being waived, dismissed, and meritless, any error in these instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default since the jury was properly instructed on the burden of proof and the weighing of witness credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury was also presented with evidence that Petitioner was not justified in doing so. The State introduced credible and sufficient evidence of Petitioner's actions after the crime, which demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call 911—even though he later told police that Davis said that he would shoot up the house after Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by jumping two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00 PM and 2:00 AM the night of the crime, when he turned himself in to police. Therefore, Petitioner's claims are denied.

6. Ground Six: Trial counsel was not ineffective

Under Ground Six, Petitioner argues that trial counsel was ineffective for failing to: (1) investigate Petitioner's case and prepare for trial; (2) establish Petitioner's theory of defense

through the jury instructions; (3) object to Kyriell Davis' testimony; (4) protect Petitioner's post arrest silence; and (5) impeach Kyriell Davis. Petition at 13-17. As will be discussed below, each of these claims are denied.

a. *Failure to investigate and prepare for trial*

Petitioner argues that counsel was ineffective regarding the investigation of his case for several reasons. Petition at 13-14.

First, Petitioner argues that counsel did nothing, but review the State's open file to prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify for the defense was because he told them to come to court. Id. This claim fails under Molina, 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better investigation would have shown.

Second, he argues that counsel failed to call a pathologist as an expert to discuss the positioning of the victim at the time of his death and other details regarding the stabbing, which he argues would have prevented his conviction. Petition at 13-14. However, this claim also fails under Molina as Petitioner does not and cannot demonstrate that such testimony would have changed the outcome of his trial. Moreover, which witnesses to call is a strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

Third, he argues that counsel failed to canvass his neighbors to determine what they knew. Petition at 14. This claim also fails under Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, Petitioner does not even attempt to indicate what the neighbors' testimony would have been, let alone whether it would have aided in his defense.

Fourth, he claims counsel did not interview Sandi Cash, Defendant's sister. Id. he claims that because counsel failed to obtain Sandi's information, there was no testimony elicited regarding Devine not visiting Petitioner's place of residence, the threats Devine made toward the home and Petitioner, and prior acts related to the case. Id. Even if such testimony had been elicited, Petitioner has also failed to demonstrate, as with his other claims, how the testimony would have changed the outcome of his trial. Indeed, assuming Sandi did testify to such information, that testimony would not have changed the fact that the jury was presented

with evidence demonstrating Petitioner did not act in self-defense, including "that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2.

In sum, Petitioner cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claims are denied.

b. *Failure to establish Petitioner's theory of defense through jury instructions*

Petitioner complains that counsel failed to present Petitioner's theory of defense and offer jury instructions consistent with his self-defense theory. Petition at 15. Additionally, he argues that counsel was ineffective for failing to establish foundational evidence regarding why Petitioner was carrying a work knife on his person. Id.

Petitioner's complaint that counsel was ineffective because there was no self-defense jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of self-defense. Those jury instructions properly provided the jury with the law to determine whether Petitioner was justified under a theory of self-defense for protecting his daughter, Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to demonstrate what additional instruction he believes should have been given to demonstrate prejudice.

Petitioner's claim that counsel failed to establish foundational evidence regarding why Petitioner carried a work knife is also belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During counsel's opening statement, counsel provided context as to why Petitioner carried a knife:

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> Now, this man sitting here, Thomas Cash, he's 52 years old. He works at Sears. *He's an HVAC technician.* He carries a tool belt around his waist. In addition to the tool belt, *he keeps a knife flipped on the inside of his pocket.* That knife really isn't for working. It's for when boxes come in that he has to open. He slices them open.

Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 167-68 (emphasis added). Counsel reiterated this foundation again during his closing argument:

> He went out as quickly as he could because he believed Brittney was in imminent danger. He just so happened, as I said in opening argument, *the man is an HVAC technician.* His daughter testified he fixes machines, fixes the vending machine at McDonald's. He works at Sears. *He always has this little knife clipped right here.*

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 75 (emphasis added). Accordingly, counsel could not have been ineffective as the jury was provided foundation regarding Petitioner carrying a knife. For the same reason, Petitioner cannot and does not demonstrate prejudice. Therefore, Petitioner's claim is denied.

c. *Failure to object to Kyriell Davis' testimony*

Petitioner argues that counsel was ineffective for failing to object to a portion of Davis' testimony during trial wherein he discussed the altercation he had with Petitioner that ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature of Davis' testimony and when the same information was repeated. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

Petitioner's claim is denied. As a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the subject matter of Davis' testimony, counsel could have concluded that it would have damaged his credibility with the jury if he made a series of pointless objections that could be perceived as

disrespectful to the witness or as achieving nothing more than delaying the process. Also, if the information was going to be presented to the jury regardless, counsel did not need to offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if the State had asked more questions to break up Davis' testimony, the State would have elicited the information as it was pertinent eyewitness evidence of someone who watched Petitioner commit the crimes charged in this case. Accordingly, Petitioner cannot demonstrate he was prejudiced.

Additionally, Petitioner mistakenly claims that counsel should have objected when Davis' testimony was repeated. Any information that was repeated was for the purposes of clarification and asking further questions about what Davis' previous testimony. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of reasonableness, let alone prejudice so his claim is denied. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64.

d. *Failure to protect post-arrest silence*

Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16. Petitioner claims that counsel should have requested that the rebuttal witness first testify outside the presence of the jury to determine the prejudicial nature of his testimony. Petition at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

e. *Failure to impeach Kyriell Davis' testimony*

Petitioner complains that counsel was ineffective for failing to impeach Davis, who he claims was the sole witness for the state that saw Petitioner with a knife and stab the victim. Petition at 16-17. Specifically, he argues that Davis committed perjury when he testified that Brittney Turner left the scene once the altercation occurred and Petitioner had to call her to come and get the baby. Id. He claims that he could have impeached Davis' testimony through witnesses: Brittney Turner, Tamisha Kinchron, Antoinette White, and Isidra Flores. Id. Petitioner's claim fails.

As a preliminary matter, Petitioner has not provided any evidence that Davis did in fact commit perjury when he testified regarding Turner leaving the scene. Even if he had provided the Court with such information, his claim would still fail as Turner's whereabouts once the altercation began would not have changed the outcome of his trial. The defense's theory was that Petitioner was acting in self-defense when he stabbed Devine as he felt like he was facing a two-on-one fight with Devine and Davis. In other words, whether Turner was inside of the home or outside of the home was not an essential factor in the jury determining if Petitioner, at the moment he stabbed Devine, was acting in self-defense. Accordingly, impeaching Davis was not necessary to proving Petitioner was acting in self-defense. Notably, Petitioner even appears to concede this point when he states, "[t]hough the impeach did not strick at the stab incident, such perjury would have gone to insight to the jury that Davis committed perjury." Petition at 17. Indeed, Petitioner cannot demonstrate prejudice because that sole fact would not have changed the outcome of the trial. Therefore, his claim is denied.

7. Ground Seven: Cumulative error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, as argued in Section I.A.4 *supra*, the issue of guilt in this case was not close.

Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there is no error to cumulate. Regardless, any errors that occurred at trial would have been minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Third, and finally, Petitioner was convicted of a grave crime. However, because the evidence was more than sufficient and there was no error, it does not weigh heavily in this Court's analysis. Therefore, Petitioner's claim is denied.

8. Ground Eight: Appellate counsel was not ineffective for failing to consult prior to filing Petitioner's direct appeal

Petitioner argues that counsel was ineffective for failing to consult with him before drafting Petitioner's direct appeal and filed it despite Petitioner's request to hold off so he could research counsel's claims as well as add claims to his appeal, including the claims in the instant Petition. Petition at 17-18. However, his claim fails for several reasons.

First, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the reasons discussed throughout this Petition, Petitioner's claims would not have been effective on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims are denied.

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9. Ground Nine: Petitioner's right to a speedy trial was not violated

Petitioner argues that the Court violated his right to a speedy trial. Petition at 18. Specifically, he claims that the Court erroneously continued his trial against the parties' consent. Id. Not only is this claim a bare and naked assertion suitable only for summary dismissal, but also it is waived as a substantive claim that should have been raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot attempt to demonstrate good cause as these claims were available for direct appeal and he cannot demonstrate prejudice because his claim is meritless.

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992). Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414

U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14, 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230, 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

Moreover, the reason for the delay was that defense counsel had to attend a federal sentencing outside of the jurisdiction which could not be reset and the State had another trial on that date. Accordingly, Petitioner's argument that his trial was continued over his objection is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Therefore, Petitioner's claim is denied.

B. Petitioner's Claims in his Memorandum Should be Denied

1. Ground One: Counsel was not ineffective for failing to investigate

a. Failure to consult and communicate

Petitioner argues that counsel was ineffective for only consulting with Petitioner only four times prior to trial, failing to have the defense's investigator meet with Petitioner, failing to interview and call witnesses that could have helped the defense, and failing to make appropriate objections. Memorandum at 9-13.

Petitioner's claims are denied as they amount to nothing more substantive than naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his

representation. See id. Moreover, Petitioner's failure to investigate allegations fail since Petitioner does not demonstrate what a better investigation would have uncovered. Molina, 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers nothing more than a naked assertion that further proves summary dismissal is warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

b. *Failure to investigate and call witnesses*

Petitioner complains that counsel did not speak to witnesses he wanted to testify at trial and failed to call them as witnesses. Memorandum at 14-19. In particular, Petitioner claims that Sandi Cash Earl and Angel Turner should have been called so they could have provided favorable testimony. Memorandum at 14. Not only are Petitioner's claims naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225, but also these claims fail under Molina, 120 Nev. at 192, 87 P.3d at 538, for Petitioner failing to demonstrate what a better investigation would have discovered.

Petitioner's argument that counsel failed to call Angel Turner as a witness is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Angel testified for the defense on the sixth day of Petitioner's trial. Additionally, Petitioner attached a statement from Angel which merely stated that counsel did not interview her prior to testifying. However, Petitioner's claim still fails because he did not indicate how her testimony would have differed had counsel interviewed her, let alone whether that unknown testimony would have led to a better outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, in addition to her trial testimony, Angel Turner provided a recorded statement to the police and testified at the preliminary hearing, so it is not clear what additional interviewing would have accomplished.

Petitioner also attached a statement from Sandi Cash who provided what her testimony would have been had she been called to testify at Petitioner's trial. Memorandum, Exhibit 1, at 1. The crux of such statement was that when Brittney Turner was arguing with Davis outside, Sandi heard him tell Turner to get whoever she wanted to fight him, including Petitioner. Id. Sandi explained that she did not tell Petitioner about what was said or express her concerns. Id. However, Sandi's statement is referring to a completely separate incident wherein Davis

was dropping off his child, rather than picking his child up. Regardless, Sandi's testimony about this event would not have been admissible at trial because she claims she never told Petitioner about what was said. Accordingly, Petitioner would not have known about the specific incident for it to have had affected his state of mind regarding self-defense. Moreover, such testimony would not have made a difference at Petitioner's trial. There was other evidence presented that Petitioner did not act in self-defense, including as the Nevada Supreme Court pointed out when it affirmed Petitioner's sentence: "[t]here was evidence and testimony that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2. Accordingly, Petitioner cannot demonstrate he was prejudiced by not having Sandi's alleged testimony.

In sum, Petitioner's allegations of prejudice are long quotations to legal authority but short on actual harm to his case and thus he cannot establish prejudice under Strickland because his claims are governed by Hargrove and Molina. Therefore, Petitioner's claim is denied.

c. *Failure to meet with Petitioner*

Petitioner complains that appellate counsel was ineffective for only having met with Petitioner once. Memorandum at 20-22. Additionally, he claims that appellate counsel did a poor job in filing his direct appeal. Id. However, Petitioner's claims are denied for several reasons.

First, as with trial counsel, Petitioner is not entitled to a particular relationship with counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate counsel failed to do a "good job" is a naked assertion that is denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim raising insufficiency of the evidence, he has not explained how such complaint is relevant or how it would have made a difference on appeal. Notably, appellate counsel is more effective when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.

3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

2. Ground Two: Appellate counsel was not ineffective

Petitioner appears to complain that appellate counsel failed to file a direct appeal on his behalf. Memorandum at 23-26. However, no matter how this claim is interpreted, it fails.

Should Petitioner mean to argue that appellate counsel was ineffective for failing to file a direct appeal because counsel failed to consult with Petitioner, the State incorporates its argument from Section I.B.1.c. In the event Petitioner intended to argue that counsel failed to file a direct appeal on his behalf, his claim is belied by the record and suitable only for summary denial because appellate counsel did in fact file a direct appeal for Petitioner. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

To the extent Petitioner is complaining that counsel did not consult and include his issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claim is denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right

to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

However, the Nevada Legislature has given courts the discretion to appoint post-conviction counsel so long as "the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily." NRS 34.750. NRS 34.750 reads:

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

Accordingly, under NRS 34.750, it is clear that the Court has discretion in determining whether to appoint counsel.

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se post-conviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's

decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are severe as he is serving a sentence of life without the possibility of parole, that fact alone does not require the appointment of counsel. Indeed, none of the issues Petitioner raises are particularly difficult as his claims are either waived as substantive claims, fail to provide good cause because they are based on information Petitioner had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Moreover, unlike the petitioner in Renteria-Novoa who faced difficulties with understanding the English language, Petitioner does not claim he cannot understand English or cannot comprehend the instant proceedings. It is clear that Petitioner is able to comprehend the instant proceedings based upon his filing of the instant Petition.

Finally, despite Petitioner's argument, counsel is not necessary to proceed with discovery in this case as no additional discovery is necessary. Therefore, Petitioner's Motion is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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.

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, 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 instant Petition does not require an evidentiary hearing. An expansion of the record is unnecessary because Petitioner has failed to assert any meritorious claims and the Petition can be disposed of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Mann, 118 Nev. at 356, 46 P.3d at 1231. Therefore, Petitioner's request is denied.

ORDER

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

Dated this 4th day of November, 2020

DATED this _____ day of October, 2020.

DISTRICT JUDGE

EC

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

21A 498 D2C0 0B90
Cristina D. Silva
District Court Judge

BY /s/JONATHAN VANBOSKERCK
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 27th day of October, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

THOMAS CASH, BAC #1203562
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

BY _____
CELINA LOPEZ
Secretary for the District Attorney's Office

JVB/bg/Appeals

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Cash, Plaintiff(s)	CASE NO: A-20-818971-W
vs.	DEPT. NO. Department 9
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case. The filer has been notified to serve all parties by traditional means.

Court Clerk's Copy Please

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

Thomas Cash
*1203562
Plaintiff,

Case No: A-20-818971-W
Dept. No: IX

V.

William Gittere,
Warden,
STATE OF NEVADA
Defendant,

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Thomas Cash defendant above named, hereby appeals to the Supreme Court of Nevada from the denial of his Petition for Writ of Habeas Corpus (Post-Conviction) and his Motion for Appointment of Counsel entered in this action on the 7 day of Oct, 2020.

Dated this 28 day of Oct. 2020

Thomas Cash
Thomas Cash
Appellant

CERTIFICATE OF SERVICE

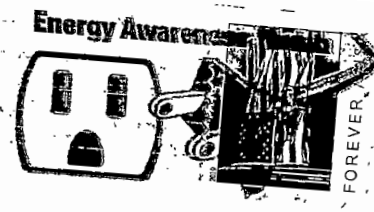
IT IS HEREBY CERTIFIED by the undersigned that on 28 day of Oct., 2020, I served a true and correct copy of the foregoing NOTICE OF APPEAL on the parties listed on the attached service list via one or more of the methods of service described below as indicated next to the name of the served individual or entity by a checked box:

VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Ely State Prison, Nevada

By: Thomas Cash
Thomas Cash
Appellant

THOMAS CASH 1203562#
P.O. Box 1989
Ely, NV. 89301

LAS VEGAS NV 890
29 OCT 2020 PM 4 L



LEGAL MAIL

AA1599

STEVEN D. GRIERSON
CLERK of the COURT
200 LEWIS AVE. 3RD FLOOR
LAS VEGAS, NV. 89155-1160

89101-630000

MS. DIGIACOMO: We could address it then?

THE COURT: Yeah. As far as her competency to testify knowing the difference between the truth and a lie and things like that, we'll go ahead and based on stipulation waive that portion of voir dire.

Good afternoon. If you can, just raise your right hand for our bailiff there, please.

ANGEL TURNER,

having been first duly sworn

was examined and testified as follows:

THE BAILIFF: Have a seat for me, please.

Our proceedings are being recorded so I need you to speak -- speak up just a little bit more than normal. Before you begin, if you could say your name and then spell your name for the record, please. Go ahead.

THE WITNESS: Angel Turner

THE BAILIFF: (Indiscernible).

THE WITNESS: Want me to say my name again?

MR. LONG: You've gotta back up just a little --

THE COURT: And then spell your --

MR. LONG: -- from the microphone so it doesn't get all jumbled.

THE COURT: And then go ahead and spell your name for us, please.

THE WITNESS: A-n-g-e-l, T-u-r-n-e-r.

THE COURT: Okay, thank you.

Mr. Long.

DIRECT EXAMINATION

BY MR. LONG:

Q. Okay. Angel, how old are you?

A. Seventeen.

Q. All right. Do you go to school? Work? What do you do?

A. I go to school at Mohave.

Q. And what year are you?

A. 2018.

Q. Okay. So you're gonna graduate this year?

A. Yes, sir.

Q. What are your plans after you graduate?

MS. DIGIACOMO: Objection. Relevance.

MR. LONG: I'm just getting to know her, your Honor.

MS. DIGIACOMO: And we don't need to do that. We can cut to the chase.

MR. LONG: I want to show that she's a good student and that she's gonna go to Texas and go to nursing school.

THE COURT: All right, sustained.

BY MR. LONG:

Q. Okay. Angel, do you remember December 11th, 2017?

A. Yes, sir.

Q. Okay. And did there come a time when you asked Thomas to go out and help your sister Brittney?

MS. DIGIACOMO: Objection. Leading.

MR. LONG: I'll rephrase it.

THE COURT: Okay, thank you.

BY MR. LONG:

Q. Angel, who is your stepfather?

A. Thomas Cash.

Q. Do you see Thomas here in the courtroom?

A. Yes, sir.

Q. Can you point to him, say something he's wearing?

A. Blue.

MR. LONG: The record (indiscernible) identify the defendant.

THE COURT: The record will so reflect.

BY MR. LONG:

Q. What happened on December 11th, 2017?

A. What -- do you want me to tell the story or?

Q. Yeah. I want you to start in the evening hours.

A. I was in my room. Thomas was in his room.

Q. Okay. Now where is your room? Is it upstairs or downstairs?

A. Upstairs.

Q. Okay. And which way does it face? Does it face the driveway or does it face the back yard?

A. Like my window faces the driveway.

Q. Okay. And let's go to the evening hours. What happened?

A. I heard commotion outside like so I looked out the window and I seen my sister getting banged up against the car.

Q. Okay. Let's stop right there. You saw your sister. Who's your sister?

A. Brittney.

Q. Okay. And did you see Brittney in court today?

A. Yes, sir.

Q. Okay. And you saw Brittney getting banged up was your testimony. What do you mean by that?

A. Like she was getting shooken against the car, shaken against the car like banged against the car.

Q. Who was shaking her, and you said banging against the car?

A. Yes.

Q. Who was doing that?

A. Kyriell.

Q. All right. And do you know Kyriell?

A. Yes, sir.

Q. Okay. And so you looked out your window. What do you do next?

A. I called Thomas and say -- I say, "He's banging her against the car. He's banging her against the car."

Q. Okay. Where was Thomas?

A. He was in the room.

Q. Okay. Also upstairs?

A. Yes.

Q. What was he doing?

A. He was wrapping the Christmas gifts.

Q. Okay. And what did Thomas do after you said he's banging her?

A. We ran outside.
Q. Now "we." Who was first, you or Thomas?
A. Thomas.
Q. Okay. But you were right behind him?
A. Yes, sir.
Q. Okay. What did Thomas do when he got outside?
A. He grabbed Kyriell off of Brittney.
Q. Okay. What was Kyriell doing when Thomas got outside?
A. He still had Brittney by her arms.
Q. Now you're moving your -- it looks like your hands are kind of around your biceps?
A. Yeah.
Q. Where did Kyriell have Brittney?
A. Right there.
Q. Okay. And by "right there," you mean biceps?
A. Yes, sir.
MR. LONG: And if the record could reflect she's got both her hands on her biceps.
THE COURT: Sure. That's accurate.
BY MR. LONG:
Q. Okay. And so what was it that Thomas did?
A. He got Kyriell off of Brittney.
Q. Okay. Were any punches thrown?
A. No.
Q. Okay. So after Thomas got Kyriell off Brittney, what happened

next?

A. Punches -- then that's when punches were thrown.

Q. All right. Do you know who threw the first one?

A. No.

Q. Okay. Did you see if Kyriell landed a punch --

A. Yes.

Q. -- on Thomas?

Okay. Did you see where?

A. It was, I mean, more than once but one was in the face and I seen the neck. It was just up ---

Q. Okay. Was Thomas punching back?

A. Yes.

Q. Okay. What happened next?

A. They started to move -- okay. You know, there was a car right there, so they started to move like behind the car that was parked in front of the driveway. And Ezekiel got out the car and they started to fight Thomas together.

Q. Okay. So it was Ezekiel and Kyriell against Thomas?

A. Yes.

Q. Okay. Now what are you doing at that time?

A. I'm watching the fight and I'm watching Londyn.

Q. All right. And who's Londyn?

A. Brittney and Kyriell's daughter.

Q. Okay. How old is she?

A. One.

Q. Okay. And so a baby.
A. Yes.
Q. Are you holding the baby?
A. No.
Q. Okay. Where is the baby?
A. She was kind of hanging out the car.
Q. Okay. Now did you hear either Kyriell or Thomas say any threats -- I mean, Kyriell or Ezekiel say any threats?
MS. DIGIACOMO: Objection. Leading.
MR. LONG: I can rephrase it, your Honor.
THE COURT: All right, thank you.
BY MR. LONG:
Q. Did you hear anybody say anything during this fight?
A. Kyriell did.
Q. And do you remember what Kyriell said?
A. He said, "I have something for you. Go get my thing out the car."
Q. "Go get my thing out of the car"?
A. Yes.
Q. All right. He didn't say what that thing was?
A. No.
Q. Did they say they were gonna do anything to Thomas?
A. Yes.
Q. What?
A. Shoot him.
Q. All right. Shoot him and --

MS. DIGIACOMO: Objection. Leading.

MR. LONG: It's not leading.

MS. DIGIACOMO: She answered the question.

BY MR. LONG:

Q. All right. Were they gonna do anything else besides shoot him?

A. I didn't hear it.

Q. You didn't hear me or you didn't hear anything else?

A. I didn't hear anything else.

Q. Okay. And did you watch this fight to its end?

A. The end, meaning?

Q. When Thomas went back inside.

A. No.

Q. Okay. What did you do?

A. So they were fighting --

Q. Uh-huh.

A. -- and Kyriell was threatening Brittney saying you're never gonna see Londyn again. And so I grabbed her out the car while they were still fighting and then -- but I know the fight, it was like going like somewhere. So I ran in the house and Thomas ran in the house behind me.

Q. Okay. So you never saw Ezekiel fall?

A. No.

Q. Okay. Did anybody tell you to grab the baby or is that just something you did?

A. Brittney told me to grab her and take her in the house.

Q. Okay. Did Brittney say why?

A. No. She just said, "Get my baby."

Q. Okay. Did you think --

MS. DIGIACOMO: Objection.

THE COURT: I'll let you finish --

MS. DIGIACOMO: It's leading.

THE COURT: -- that question.

MS. DIGIACOMO: It's leading.

MR. LONG: (Indiscernible) finish that question.

THE COURT: I'm gonna allow it.

MS. DIGIACOMO: Well, your Honor, he's gonna be putting --

THE COURT: Yeah, I understand.

MS. DIGIACOMO: -- what she's supposed to say in that question, so I'm objecting to leading.

THE COURT: I'll take that into account.

Go ahead, Mr. Long.

BY MR. LONG:

Q. When you grabbed the baby, why did you do it?

A. Because he was threatening Brittney saying that she would never see her again.

Q. Who was threatening Brittney?

A. Kyriell.

MR. LONG: Okay. And those are all the questions that I have.

THE COURT: All right, thank you.

Ms. DiGiacomo, cross.

MS. DIGIACOMO: Thank you.

CROSS-EXAMINATION

BY MS. DIGIACOMO:

Q. Okay. So when you were upstairs in your room, what led you to look out the window?

A. I heard her getting banged up against the car.

Q. You heard who?

A. Brittney.

Q. So you knew when you're upstairs in your bedroom, you knew Brittney was getting thrown up against the car?

A. No. I heard banging and then I looked out the window and saw her getting banged up against the car.

Q. Okay. And it was only Kyriell and Brittney outside?

A. Yes.

Q. All right. Could you see where Londyn was at that point?

A. Londyn was in the back seat with the door open --

Q. Okay.

A. -- standing up in her car seat.

Q. You mentioned a person by the name of Ezekiel that was there as well.

A. Yes.

Q. Do you know who he was?

A. No.

Q. So you didn't know his name at that time?

A. No.

Q. So you've since learned his name?

A. Yes.
Q. Okay. All right. So you go and tell Tommy --
A. Mm-hmm.
Q. -- what's going on, correct?
A. Yes, ma'am.
Q. All right. And then the two of you run outside, correct?
A. Yes, ma'am.
Q. And he went -- Tommy went first?
A. Yes, ma'am.
Q. And he ran out and went straight to Kyriell outside?
A. Yes, ma'am.
Q. And you never saw Thomas try and punch Kyriell at that time?
A. No, ma'am.
Q. He just grabbed him?
A. Yes, ma'am.
Q. And then at that point you said Kyriell was trying to punch Tommy?
A. Yes, ma'am.
Q. How far away was Kyriell from Tommy?
A. Like not even a step away 'cause he had just pulled him off of Brittney.
Q. All right. And so when he pulled him off of Brittney, was Tommy still holding Kyriell's arms?
A. No.
Q. And he never tried to punch Kyriell?
A. I didn't see it.

Q. Where are you standing when you see this?

A. In the driveway.

Q. And where -- how far away is Tommy and Kyriell and Brittney from where you are?

A. Brittney is like two steps and they're like in front of her, so --

Q. Are they by the car? In the street? Are they in the driveway?

A. They're like at the curve of the driveway and the car was parked in front of the driveway that Kyriell and Ezekiel came in and so they were -- it started right there in front of the driveway.

Q. All right. So the car that Kyriell and Ezekiel was in, it was in the street?

A. Mm-hmm.

Q. Is that a yes?

A. Yes.

Q. We're recording everything so you have to say yes or no.

A. Oh, I'm sorry.

Q. You're fine.

So when Tommy first went out and he grabbed Kyriell away from Brittney, is that when Kyriell immediately tries to punch Tommy?

A. I didn't see the first punch.

Q. You didn't?

A. No.

Q. So you don't know who threw the first punch?

A. No.

Q. So what do you see Kyriell and Tommy doing?

A. I see them fighting, but I didn't see the first punch.
Q. Well, okay, so they're both throwing punches at each other?
A. Yes.
Q. Did you ever see either one of them kind of holding onto the other one so they couldn't throw punches?
A. No.
Q. And when they're trying to throw punches at each other, do they move or do they stay right there by the car?
A. They moved.
Q. Where did they move to?
A. Like they get in the street and started -- well, they were running. Thomas was running up and down the street like he didn't wanna fight him.
Q. Fight Kyriell?
A. Yes.
Q. So he's running away from him?
A. Yes.
Q. And Ezekiel then gets out of the car?
A. Yes.
Q. And so Ezekiel does what?
A. Start -- he starts fighting Tommy, too.
Q. Okay. So if Thomas or Tommy is running away from Kyriell, how are they fighting? They're far apart from each other, right?
A. No, it wasn't like -- I can't explain it. Have you ever seen a fight? It's like they were backing up from each other. Like it was a fight.
Q. Okay. So Tommy's --

A. It wasn't far away like 15 steps away. They were close to each other. It was like have you ever seen boxing? It's like they weren't far away from each other.

Q. So Kyriell and Tommy are not far away from each other, and they're fighting in the street?

A. Yes.

Q. And Ezekiel gets out?

A. Yes.

Q. And then he starts fighting Tommy?

A. Yes.

Q. And did you see Ezekiel and Tommy throwing punches at each other?

A. I seen -- yes.

Q. Okay. Do you know who threw the first punch between Ezekiel and Tommy?

A. Ezekiel.

Q. And it's your testimony here today the reason you took Londyn in the house was because Kyriell was threatening that Brittney's never gonna see her again?

A. Yes, ma'am.

Q. Okay. What point in the fight that Kyriell's having with Tommy does he say that to Brittney?

A. Like you mean the middle or the end point or . . . ?

Q. When does he say it? When is he saying this? You said that when you came outside, Tommy and Kyriell immediately got into it --

A. Mm-hmm.

Q. -- and then Tommy's going down the street and Kyriell's going and they're fighting --

A. Mm-hmm.

Q. -- so when did Kyriell tell Brittney, you're never gonna see her again?

A. As they were fighting, he was telling her, you're never gonna see her again.

Q. So as he's fighting Thomas, he's yelling back to Brittney, you're never gonna see Londyn again?

A. Yes.

Q. Okay. And then you said that -- that Kyriell made threats about shooting somebody?

A. Yes.

Q. Okay. So who made the threat?

A. Kyriell.

Q. What did he say?

A. He said, "I have something for you. Go get my thing out the car," referring to Ezekiel.

Q. Okay. And so Kyriell's talking to Tommy?

A. Yes.

Q. And Ezekiel's standing right next to him?

A. Yes.

Q. Where is this taking place?

A. Outside.

Q. I know outside, but where outside?
A. Like a little down the street from the car.
Q. Okay. So in the middle of the street?
A. Yeah.
Q. And at what point do you leave with Londyn?
A. At the end.
Q. All right. Now do you remember telling the police that the reason you took Londyn in the house was 'cause Brittney was yelling at you to take her in the house, take her in the house? Do you remember telling the police that?
A. I don't -- I don't know. I don't remember.
Q. But your testimony today is you didn't take Londyn in the house because of what Brittney told you, correct?
A. I took her in the house because what both of them are saying.
Q. So what was Brittney saying?
A. She was saying, "Get my baby and take her in the house." And he was saying, "You're never gonna see her again."
Q. Okay. And that's when he's fighting with Thomas he says this?
A. Yes.
Q. So when you were in your room, you heard something slam against a car, but you didn't see it, correct?
A. I did see it when I looked out the window.
Q. All right. But you told the police you only heard it, you didn't see it, correct?
A. I told them I heard it and then I saw it.

Q. Okay. Who else was outside during this?
A. Thomas (indiscernible) Tamisha.
Q. At what point did Tamisha come out?
A. She ran out with me and Thomas. She was behind me.
Q. Okay. Where was she when this was going on?
A. She was standing by me. She was moving around.
Q. At what point -- what point was it that you went back inside the house?
A. Towards the end of the fight.
Q. How do you know it was the end of the fight?
A. Because Thomas ran in the house after me.
Q. Okay. So the minute you're in the house, Thomas runs in after you?
A. Yes.
Q. Where did he go?
A. He went to go get something for his nose was bleeding.
Q. Okay. Well, don't tell me what you think he did. Just tell me where in the house he went to.
A. He went in the kitchen to get a paper towel for his nose.
Q. Okay. Then what did he do?
A. He left.
Q. Where did he leave?
A. He left the house.
Q. Okay. How did he get out of the house to leave it?
A. I don't know. I was in the house.

Q. Okay. So you didn't see if he went out the back door or the front door?

A. Oh, he left out the back door.

Q. Okay. Is that out a sliding glass door?

A. Yes.

Q. All right. So he left out the back door, and then did you see him again that night?

A. Yes.

Q. When did you see him again?

A. Like right before he turned his self in.

Q. He came home before he turned himself in?

A. Yes.

Q. Did you ever see him when he came into the house with a knife?

A. No.

Q. When he came over before he turned himself in, what happened at that point?

A. He was just hugging my sister and he was on the phone with the detective saying that he was gonna come and turn his self in.

Q. Did you ever see where Ezekiel ended up?

A. Like on the floor?

Q. Or outside, yeah. Did you ever go back outside after it was over?

A. Yes.

Q. Where was he?

A. He was on the floor like in the neighbor's front -- well, not their front yard but like in the street on the floor but he was in the neighbor's street.

Q. So he was in front of a neighbor's house, not in front of yours?
A. Correct.
Q. Now you said that at some point Tommy fell when he was out in the street?
A. Yes.
Q. How did he fall?
A. I think he just slipped. Like I don't know --
Q. He fell backwards?
A. No, he didn't fall backwards. He fell forward.
Q. But he slipped, it wasn't because Kyriell or Ezekiel were next to him?
A. Correct.
Q. Now you saw the injury that Tommy had to his nose when he came back in the house?
A. Yes.
Q. But you didn't see how he got that injury, did you?
A. Ezekiel socked him in the nose.
Q. Who?
A. Ezekiel.
Q. Ezekiel socked him in the nose?
A. Yes.
Q. Okay. But it wasn't Kyriell that did that?
A. No.
Q. When you went in the house with Londyn, where did you go?
A. First I was downstairs with her. That's when Tommy ran in behind

me. Then I ran upstairs to grab Payton 'cause she was crying, and I ran to my room and looked out the window and saw how he was on the floor, Ezekiel was on the floor.

Q. Okay. And then how did you see Tommy leave out the back door?

A. He left out as soon as he was -- he didn't want my sister to see him like that, so he just got the paper towel and left.

Q. And then what did you do after Tommy left?

A. I called my mom.

Q. Was she not at home for this?

A. No.

Q. Did Brittney come back in and grab Londyn from you?

A. Yes.

Q. After Brittney grabbed Londyn, she left in her car, correct?

A. Yes.

Q. And you were watching from your window?

A. Watching her leave, no, because I was downstairs with Londyn and she was -- and she just took her from me and left.

Q. Okay. So how did you see her leave in her car?

A. She said she was leaving in her car.

Q. Okay. So you didn't see it, she just said she was gonna do that?

A. Yes.

Q. What was the next time you saw Brittney?

A. She came back. I think she came back with my mom 'cause I -- I didn't see her until after the police let me go back with my mom.

Q. Okay. Now you never saw Kyriell with a weapon, correct?

A. Correct.

Q. And you never saw Ezekiel with a weapon, correct?

A. Correct.

Q. Did you ever see Tommy with a weapon?

A. No.

Q. When you went outside with Tommy and you said that Kyriell was holding Brittney, what were they saying to each other, if anything?

A. Before I -- before we went outside, I heard them arguing. She was just saying, "I hate you. I don't wanna talk to you anymore." He was just like, "I love you too much for this."

Q. Okay. And when you went outside, were they still saying stuff before Tommy got involved?

A. Yes.

Q. What were they saying, same stuff or --

A. Yes.

Q. -- different?

Just the same stuff?

A. Yes.

Q. Okay. All right, now how -- I guess you looked out your window and saw Ezekiel on the ground. How did you find out that he had been stabbed? Who told you?

A. Brittney.

Q. When did Brittney tell you that?

A. When she went in the house to get Londyn.

Q. Okay. She had seen that he had been stabbed?

MR. LONG: Objection. Speculation. Asking --

THE COURT: Yeah, I think the form of the question is -- the line of questioning is obviously okay, just the form of that question.

BY MS. DIGIACOMO:

Q. Okay. So when Brittney came in, what was her demeanor?

A. All she said was, "I have to leave. He stabbed him. I have to leave."

Q. Was she kind of upset when she said it?

A. Yeah.

Q. And that's all she said, "He stabbed him. I have to leave"?

A. Yeah.

Q. Did you even know who stabbed who when she said that?

A. No.

Q. You didn't know who she was talking about?

A. No.

Q. And I think the word you used with the police was she left in a panic, correct?

A. Yes.

Q. So after Brittney leaves, is that when you go upstairs and look out your window, or do you go back outside?

A. I go upstairs and look out the window.

Q. All right. And can you hear what Kyriell or Ezekiel are saying?

A. So Brittney didn't leave right away, so when I went to look out the window, I seen Kyriell dragging Ezekiel. He was telling Brittney, "Brittney, get the car." And Kyriell ended up getting the car. He drove it from in front of my

house to across the street on the other side, and he was still trying to drag him, but Brittney had called the paramedics.

Q. So Kyriell was gonna try and take Ezekiel to the hospital himself?

A. Mm-hmm.

Q. Yes?

A. Yes.

Q. Okay.

A. Sorry.

Q. And could you hear what Kyriell was saying to Ezekiel or if Ezekiel was saying anything?

A. No.

Q. All right. Do you remember telling the police that you heard Kyriell saying, "I got you, man. I got you, man."?

A. Oh, yes.

Q. All right. And you said that Kyriell's yelling to Brittney to start the car up?

A. Yes.

Q. But he actually goes and gets the car?

A. Yes.

Q. And you didn't know who this other person was that got stabbed that night?

A. No.

Q. And Ezekiel didn't get out of the car because he was inside the front passenger's seat?

A. Yes, ma'am.

Q. He didn't get out of the car until Kyriell and Tommy were --
A. Fighting.
Q. -- fighting?
A. Yes.
Q. When Tommy and Kyriell are fighting, that's when Brittney was yelling at Tommy to stop it, correct?
A. She was yelling at both of them.
Q. I know, but she specifically said, "Stop, Tommy. Stop," correct?
A. Yes.
Q. Now you originally told the police that it was Kyriell that busted Tommy's nose, correct?
A. I don't remember.
Q. Okay. But today it was Ezekiel that busted Tommy's nose, correct?
A. Yes.
Q. Now when you said Kyriell said, "I have something for you. Go get my thing," do you remember saying that?
A. Yes.
Q. Okay. At what point in the fight was that said?
A. Like beginning middle when they were first -- when he first -- when Ezekiel first got out the car and they were running behind it in the middle of the street, that's when he said it.
Q. Okay. So Thomas -- or, excuse me. Kyriell tells Ezekiel, "Go get my thing."?
A. Yes.
Q. But Ezekiel never ran back to the car at that point, correct?

A. Correct.
Q. He stayed in the fight?
A. Yes.
Q. Now before Brittney left, you were calling her stupid and yelling at her, correct?
A. Yes.
Q. And she was yelling back at you?
A. Yes.
Q. And you have no idea what was going on outside when you and Brittney are having this exchange inside, correct?
A. What Thomas did and Ezekiel, ma'am?
Q. Yes.
A. Correct.
Q. And you -- again, you never saw Tommy and Kyriell in a hold where they were like (indiscernible) with each other, not punching, correct?
A. When Brittney was telling -- you know, Brittney was telling him to stop, she was kind of getting in the middle of it, so.
Q. So Brittney was trying to break up Kyriell and Tommy from fighting?
A. Yes, she did.
Q. How did she do that?
A. When she got in the middle, Tommy backed up and got in the street.
Q. Okay. So then the fight wasn't going on anymore?
A. It was.
Q. Okay. I'm --

A. So she broke up the fight for like two seconds, and Kyriell went around the car, and they were fighting again.

Q. And this was before Ezekiel gets out of the car?

A. While he's getting out the car.

Q. I thought you said before that Kyriell and Tommy are throwing punches when Ezekiel got out of the car?

A. They were.

Q. Okay. So Brittney had broken it up, they started fighting again, and then Ezekiel got out of the car?

A. Yes.

Q. Okay. What was happening when you stopped watching the fight to grab Londyn to go inside? What was going on the exact minute you stopped watching? What was the last thing you saw?

A. I saw Tommy fall.

Q. What were Ezekiel and Tom-- I'm sorry -- Kyriell doing when you saw Tommy fall?

A. I don't know. I didn't -- they were right there. He fell.

Q. Okay. But you said Tommy fell 'cause he slipped and went down?

A. Uh-huh.

Q. Yes?

A. Yes.

Q. Okay.

A. They weren't fighting. He just slipped.

Q. They weren't fighting?

A. Yes.

Q. Okay. Did you see Tommy get up?

A. Yes.

Q. And then that's when he went towards the house?

A. Yes.

Q. What were Ezekiel and Kyriell doing?

A. They were down the street.

Q. They were down the street?

A. Yeah.

Q. Okay. So Kyriell and Tom-- sorry. Kyriell and Ezekiel are down the street, Tommy starts coming back towards the house, and that's when he slipped, fell, got up and kept going towards the house?

A. Yes.

MS. DIGIACOMO: I have nothing further.

THE COURT: Any redirect?

MR. LONG: Just briefly.

REDIRECT EXAMINATION

BY MR. LONG:

Q. What did Ezekiel do when he first got out of the car? I want you just to describe Ezekiel getting out of the car.

A. So he ran around the car to where Tommy and Kyriell were and he socked him.

Q. Okay. Now when you went to get Thomas and you and Thomas ran out, did you see Thomas stop anywhere, like did he go to the kitchen to get a knife or anything?

A. No.
Q. Did you see that he had a knife?
A. No.
Q. Does he usually have a knife?
A. Yes.
Q. Why?
MS. DIGIACOMO: Objection. Speculation.
MR. LONG: If she knows, it's not speculation.
MS. DIGIACOMO: And it -- no, 'cause it would be hearsay if he told her.
THE COURT: For her to know why your client usually has a knife on him, I think at this point would be speculation. I'm gonna sustain the objection.
BY MR. LONG:
Q. Do you know what Thomas does for work?
MS. DIGIACOMO: Objection. Relevance.
THE COURT: It goes towards the knife?
MR. LONG: Yes.
THE COURT: I'll allow it.
BY MR. LONG:
Q. Do you know what kind of work Thomas does?
A. (No audible response).
Q. If you don't know, it's fine.
A. No.
Q. Okay.

A. I just know what kind of work he does around the house to where he needs to have a pocketknife like Mr. Handyman around the house.

Q. Okay. Well, I don't have a question pending right now.

When you saw Thomas after the fight, what did his shirt look like?

A. It had blood on there.

Q. How much?

A. A lot.

Q. And when -- when you heard arguing that made you go look out the window, what were you doing in your room?

A. Watching TV.

Q. Okay. Volume on?

A. Yes.

Q. How loud was your television?

A. It was -- it's always loud 'cause he always has to come in there and tell me to turn it down. It's like --

Q. Who?

A. Thomas.

Q. Okay. And so it's your testimony that you could hear the arguing over the television?

A. Yes.

Q. Now I know that we've gone over how this fight happened a lot, but I'm just gonna ask you one question, okay? Did you ever see Ezekiel and Kyriell at the same time fighting Thomas?

A. Yes.

MR. LONG: I don't have anything else, your Honor.

THE COURT: All right.

RECROSS-EXAMINATION

BY MS. DIGIACOMO:

Q. How did you see that? I want details blow by blow. What did you see Ezekiel and Kyriell doing to Thomas?

A. Socking him.

Q. Okay. So tell me how. So we have Kyriell and Thomas fighting when Ezekiel gets out, correct?

A. Yes.

Q. You said Ezekiel immediately punches Tommy, correct?

A. Yes.

Q. What does Tommy do at that point?

A. He backs up and then they start fighting.

Q. Who's "they"?

A. Tommy, Ezekiel, Kyriell.

Q. Okay. So you're saying they're all fighting?

A. Yes.

Q. Okay. And then does the fight continue until you get Londyn and leave?

A. Yes.

Q. Okay. So tell me what you see in this fight where they're all three fighting. Explain what you see.

A. I only seen like socks, like hands getting thrown. I seen socking in the face, in the chest, everywhere. I seen Tommy backing up trying to get

away from them. He was running across the street and back across the street.

Q. So he's running back and forth across the street?

A. Not like that but --

Q. Tommy?

A. Yes.

Q. Okay. Trying to get away from Kyriell and Ezekiel who are both coming at him?

A. Yes.

Q. All right. Did you ever see a car come down the street?

A. No

Q. No car ever comes down the street?

A. No.

Q. Ever?

A. No.

Q. Okay. And as Kyriell and Ezekiel are following Tommy, are there still more blows given or how does it end? What's the last thing you see?

A. The last thing I saw was Tommy fall.

Q. Okay. But he fell --

A. Coming towards the house.

Q. Towards the house as Kyriell and Ezekiel are down the street?

A. Yes.

Q. Did you ever see Ezekiel fall?

A. No.

Q. And at that point where Tommy falls coming back to the house, Kyriell and Ezekiel aren't following him, correct?