

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

THOMAS CASH

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Supreme Court Case No. 82060  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPELLANT'S APPENDIX  
Volume VII**

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**Cash v. State Case No. 82060**  
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# 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 RECEIVED 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 THOROUGHLY RESEARCH THE AND EXERCISE JUDGEMENT IN IDENTIFYING THE ARGUMENTS THAT MAY BE ADVANCED ON APPEAL.

1 Appellate Counsel was neglectful for  
2 not perfecting the direct appeal, the  
3 result was that appellant was deprived  
4 of his right to a direct appeal. The  
5 negligent failure to perfect an appeal  
6 amounts to a complete denial of assistance  
7 of counsel during a critical stage of the  
8 criminal proceedings.

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

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

1 COUNSEL WAS INEFFECTIVE BECAUSE THE  
2 ATTORNEY FAILED TO ADEQUATELY PRESENT  
3 ARGUMENTS, AND RAISE ISSUES ON DIRECT  
4 APPEAL. MR. CASH REPLY BRIEF WAS FILED  
5 ON 22ND OF APRIL 2019. MR. RUTLEDGE  
6 FAILED AGAIN TO CONSULT WITH MR.  
7 CASH. COUNSEL OBLIGATION TO ASSIST THE  
8 DEFENDANT ON IMPORTANT DECISION  
9 INCLUDES A DUTY TO CONSULT WITH THE  
10 DEFENDANT "STRICKLAND 466 U.S. AT 688."

1 \*GROUND 2: INEFFECTIVE ASSISTANCE OF  
2 APPELLATE COUNSEL IN VIOLATION OF THE  
3 PETITIONER'S SIXTH AND FOURTEENTH  
4 AMENDMENT RIGHT TO THE U.S. CONSTITUTION.

5 The Constitution to effective  
6 ASSISTANCE OF COUNSEL EXTENDS TO A DIRECT  
7 APPEAL, BURKE V. STATE, 110 NEV. 1366, 1368  
8 P.2D 267, 268 (1994). A CRIMINAL DEFENDANT IS  
9 ENTITLED TO CONSTITUTIONALLY EFFECTIVE  
10 ASSISTANCE OF COUNSEL ON DIRECT APPEAL  
11 (EVITT'S V. LUCEY, 469 U.S. 387, 394 (1985)) IN  
12 ORDER TO PROVE INEFFECTIVE ASSISTANCE  
13 OF COUNSEL, A PETITIONER MUST FIRST  
14 SHOW THAT HIS ATTORNEY'S PERFORMANCE  
15 WAS DEFICIENT AND, SECOND, DEMONSTRATE  
16 THAT SUCH DEFICIENCY CAUSED HIM  
17 PREJUDICE. IN STRICKLAND, 416 U.S. AT  
18 687. SEE ALSO ROE V. FLORES-ORTEGA, 528 U.S.  
19 470, 145 L. ED. 2D 985 (2000) (HOLDING THE  
20 STRICKLAND TEST APPLIES TO CLAIMS THAT  
21 COUNSEL WAS INEFFECTIVE FOR FAILING  
22 TO CONSULT.) THE SUPREME COURT EXPLAINED  
23 THAT A COUNSEL'S FAILURE TO CONSULT WITH  
24 DEFENDANT ABOUT AN APPEAL CONSTITUTES  
25 DEFICIENT PERFORMANCE IF THE ATTORNEY  
26 HAD A DUTY TO CONSULT. AN ATTORNEY MAY  
27 NOT SPEAK CURSORILY WITH A DEFENDANT  
28 ABOUT HIS RIGHT TO APPEAL AND CALL IT

1 "CONSULTATION". FROM STRICKLAND, WHICH  
2 MADE IT CLEAR, THAT THE ADVICE AN ATTORNEY  
3 DISPENSES DURING CONSULTATION "MUST"  
4 MEET AN "OBJECTIVE STANDARD OF  
5 REASONABLENESS."

6 MR. BRIAN RUTLEDGE, APPELLATE COUNSEL  
7 KNEW THAT PETITIONER WANTED HIM TO  
8 FILE A DIRECT APPEAL. A DEFENDANT HAS  
9 THE ULTIMATE AUTHORITY TO MAKE THE  
10 FUNDAMENTAL DECISION AS TO WHETHER TO  
11 TAKE AN APPEAL, AND COUNSEL'S OBLIGATION  
12 TO ASSIST A DEFENDANT INCLUDES A DUTY  
13 TO CONSULT WITH THE DEFENDANT ON  
14 IMPORTANT DECISIONS. MR. RUTLEDGE CAME  
15 TO SEE PETITIONER ON MARCH 13TH, 2019 AT  
16 HIGH DESERT STATE PRISON ONE TIME.  
17 MR. RUTLEDGE MADE THE REPRESENTATION  
18 TO THE PETITIONER THAT HE WAS GOING  
19 TO FILE A DIRECT APPEAL. MR. RUTLEDGE  
20 CONSULTATION ON MARCH 13, 2019 ONLY  
21 LASTED 10 MINUTES, WHICH HE PROMISED  
22 TO RETURN TO HIGH DESERT STATE  
23 PRISON TO SPEAK WITH PETITIONER  
24 AGAIN, WHICH HE NEVER DID. MR. RUTLEDGE  
25 FILLED APPELLATE OPENING BRIEF ON  
26 MARCH 14TH, 2019. COUNSEL'S OBLIGATION IS  
27 TO ASSIST THE DEFENDANT INCLUDES A  
28 DUTY TO CONSULT WITH DEFENDANT ON

1 IMPORTANT DECISIONS STRICKLAND, 4166  
2 U.S. AT 688. NOT ONLY DID MR. RUTLEDGE  
3 MAKE REPRESENTATION TO THE PETITIONER  
4 BUT HE ALSO MADE THEM TO THE COURT...  
5 WELL SIT THERE AND FRETTER OUT WHAT THOSE  
6 ISSUES ARE AND PUT THOSE ALL IN A  
7 APPEAL BECAUSE ~~HE~~ HE HAS THAT RIGHT.  
8 THE PETITIONER ALSO MAILED LETTERS TO  
9 APPELLATE COUNSEL MR. RUTLEDGE.  
10 (SEE EXHIBITS 2)

11 THERE IS NO QUESTION THAT THE PETITIONER  
12 WAS UNHAPPY WITH THE COURT'S PREVIOUS RULINGS  
13 (DENIAL OF MOTION TO DISMISS MURDER  
14 CHARGE, MOTION TO DISMISS BATTERY CHARGE  
15 AS A LESSER INCLUDED OFFENSE, AND DENIAL  
16 OF MOTION TO STRIKE HABITUAL CRIMINAL  
17 ENHANCEMENT) AND THE NUMEROUS MOTIONS,  
18 MEMORANDUMS, AND LETTERS TO THE COURT THAT  
19 THE PETITIONER FILED.

20 COUNSEL HAS A CONSTITUTIONAL DUTY TO  
21 CONSULT WITH A DEFENDANT ABOUT AN APPEAL  
22 WHEN; 1) ANY RATIONAL DEFENDANT ~~WOULD~~ WOULD  
23 WANT AN APPEAL; OR 2) THE DEFENDANT  
24 REASONABLE DEMONSTRATED AN INTEREST IN  
25 APPEALING - FLORES - ORTEGA, 528 US AT 480.

26 IN ORDER TO ESTABLISH THAT HE WAS  
27 PREJUDICED BY COUNSEL'S UNPROFESSIONAL ACTS  
28 WHICH WERE UNREASONABLE. THE DEFENDANT

1 must show that "there is a reasonable  
2 probability that but for counsel's deficient  
3 failure to consult with him about an  
4 appeal," Flores-Ortega 528 US at 484, he  
5 would have file an appeal.

6 A defendant has a right to pursue a direct  
7 appeal even if frivolous, which counsel  
8 must assist as "an active advocate on  
9 behalf of his client." Anders v. California,  
10 386 US, 738, 744, 87 S.Ct. 1319 (1967).

11 The United States Supreme Court  
12 held that the "fundamental decision of  
13 whether to appeal rests with the defendant."  
14 Jones v. Barnes, 463 US, 745, 751, 103 S.Ct.  
15 3208 (1983).

16 There is no question that the  
17 petitioner wanted a direct appeal and  
18 that he was prejudiced by Mr. Rutledge's  
19 ineffectiveness, because he was not  
20 afforded a direct appeal with consultation  
21 in violation of the Sixth and Fourteenth  
22 Amendment right to the U.S. Constitution  
23 and Article 1, section 8 to the Nevada  
24 Constitution. Therefore petitioner is  
25 entitled to relief, the conviction must  
26 be reversed and remanded for a new  
27 trial.

1 \*GROUND 3

2 REQUEST FOR EVIDENTIARY HEARING

3  
4 IN BERRY V. STATE, 363 P.3D 1143  
5 (NEV. 2015), RELYING ON MANN V. STATE, 46 P.3D  
6 1228, 1230 (NEV. 2002). THE COURT HAS LONG  
7 RECOGNIZED A PETITIONER'S ASSERTS A  
8 CLAIM SUPPORTED BY SPECIFIC FACTUAL  
9 ALLEGATION NOT BELIED BY THE RECORD THAT,  
10 IF TRUE, WOULD ENTITILE YOU TO RELIEF. ID  
11 AT 368, AT 1155, SEE ALSO HATHAWAY V. STATE,  
12 71 P.3D 503, 508 (NEV. 2003) (REVERSING AND  
13 REMANDING DISTRICT COURT'S DENIAL OF A  
14 WRIT OF HABEAS CORPUS FOR DISTRICT  
15 COURT TO CONDUCT AN EVIDENTIARY HEARING  
16 ON PETITIONER'S SPECIFIC FACTUAL  
17 ALLEGATIONS CONTAINED IN THE SWORN  
18 AFFIDAVIT NOT BELIED BY THE RECORD.)

19 MR. CASH WRIT OF HABEAS CORPUS/POST-  
20 CONVICTION PETITION CHALLENGES THE  
21 VALIDITY OF THE JURY'S VERDICT AND  
22 RESULTING IN A CONVICTION BASED ON  
23 A CLAIMS OF INEFFECTIVE ASSISTIVE OF  
24 COUNSEL. AS THE INEFFECTIVE ASSISTIVE OF  
25 COUNSEL CLAIMS ARE SUPPORTED BY SPECIFIC  
26 FACTUAL ALLEGATIONS, EVIDENCE AND THE  
27 SWORN AFFIDAVIT, SEE ~~VA~~ VAILLANCOURT V.  
28 WARDEN, 529 P.2D 204 (NEV. 1974) ("IT'S ERROR

1 to resolve apparent factual dispute  
2 without granting the accused a  
3 evidentiary hearing.")

4 Mr. Cash asserts that his trial and  
5 appellate counsel's was ineffective and  
6 in ascertaining his claims he makes  
7 specific factual allegation of events  
8 outside the record that warrant and  
9 evidentiary hearing. See Down-Morgan  
10 v. United States, 765 F.2d 1534 (11th Cir. 1985)  
11 (concluding that the defendant was entitled  
12 to an ~~an~~ evidentiary hearing to  
13 determine whether counsel was ineffective  
14 base upon the underlying arguments and  
15 factual assertions presented in the  
16 defendant's affidavits. When considering  
17 the totality of the circumstances of the  
18 factual allegations, evidence and  
19 constitutional violations alleged  
20 within the petition and supported by  
21 Mr. Cash sworn affidavits, he is entitled  
22 to an evidentiary hearing to resolve  
23 apparent factual disputes within the  
24 record and claims of ineffective  
25 assistance of counsel. Good cause  
26 appearing, the court must appoint  
27 counsel and conduct an evidentiary  
28 hearing. RELIEF IS WARRANTED.

1 CONCLUSION

2 Wherefore, Mr. Cash respectfully request  
3 of this court to grant the petition in its  
4 entirety and award the relief so  
5 requested of a new trial. In the  
6 alternative appoint counsel and conduct  
7 an evidentiary hearing on the claims  
8 of ineffective assistance of counsel,  
9 and grant the appropriate relief. Grant  
10 and other relief deemed appropriate.

11  
12  
13 Date this 16 day of July 2020.

14  
15 PRINT NAME: THOMAS CASH

16 SIGNATURE: Thomas Cash

17 NUMBER #1203562

18 ADDRESS: P.O. Box 1989

19 ELY, NEVADA,

20 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~~ <sup>Jan</sup> 2020.

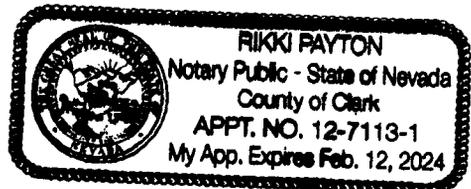
*Sandi M Cash* x

State of Nevada  
County of Clark

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

Notary Signature

*[Signature]*



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.

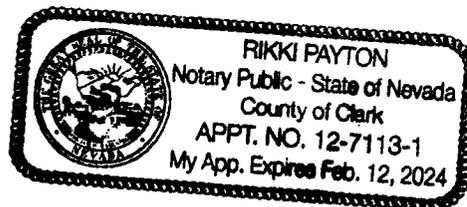
Date this Jan 13 / 2020 day of Jan 20 . Angel Turner

x

State of Nevada  
County of Clark

This instrument was acknowledged before me on the day of 01/13/2020, by Angel Turner and N/A

Notary Signature [Signature]



# **EXHIBIT 2**

Thomas Cash  
1203562\*  
H.D.S.P.  
P.O. Box 650  
INDIAN SPRINGS  
NV. 89070

October 22, 2018

DEAR MR. RUTLEDGE

MR. RUTLEDGE MY NAME IS THOMAS CASH YOU WERE APPOINTED TO BE MY ATTORNEY ON ~~THE~~ 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 HAS NOW BEEN (3) THREE WEEKS AND YOU HAVE NOT COME TO SEE ME, I WOULD LIKE TO KNOW WHEN YOU ARE 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

AA1504

Exh. No 1, Page 1

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 WRITING TO YOU AGAIN, BECAUSE I HAVE NOW BEEN OVER (2) TWO MONTHS SINCE I LAST WROTE TO YOU ABOUT COMING TO SEE ME. I WOULD LIKE TO KNOW WHEN YOU'RE 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~~ 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 03 2020

*Alvin D. Williams*  
CLERK OF COURT

(COURT CLERK: COURTNEY)  
COPY PLEASE

1 THOMAS CASH  
2 1203562  
3 P.O. Box 1989  
ELY, NV. 89301

A-20-818971-W  
Dept. 9

4  
5  
6  
7  
8 IN THE Eighth DISTRICT COURT OF THE  
9 STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

10  
11 CASE NUMBER: C-18-329699-1

12 THOMAS CASH  
Petitioner,

13 vs.

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

14  
15 GITTERE WILLIAM  
Warden; State of Nevada,  
16 Respondents.

17  
18 COMES NOW, THOMAS CASH the Petitioner, in proper person, and moves this Court  
19 for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This  
20 motion is made and based in the interest of justice.

21 Pursuant to NRS 34.750(1):

22 A petition may allege that the petitioner is unable to pay the costs of the  
23 proceedings or to employ counsel. If the court is satisfied that the  
24 allegation of indigency is true and the petitioner is not dismissed  
25 summarily, the court may appoint counsel to represent the petitioner. In  
26 making its determination, the court may consider, among other things, the  
27 severity of the consequences facing the petitioner and whether:

- 28
- (a) The issues presented are difficult;
  - (b) The petitioner is unable to comprehend the proceedings, or

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(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*

1 CERTIFICATE OF SERVICE

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

4 That on 7-16-20, 2020, he served a copy of the foregoing Ex Parte Motion for  
5 Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

6  
7 District Attorney's Office  
8 Address:

9 200 LEWIS AVE. 8th Floor  
LAS VEGAS, NV. 89155-1160

10  
11  
12 Warden WILLIAM GITTERE  
13 Address:

14 P.O. Box 1989  
15 ELY, NV. 89301

16  
17 Thomas Cash  
18 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 618-329699-1

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-

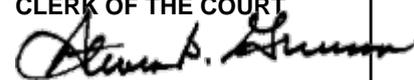
B. For the administration of a public program or for an application for a federal or state grant.

Thomas Cash  
Signature

7-16-20  
Date

THOMAS CASH  
Print Name

PETITIONER  
Title



1 **RSPN**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JONATHAN E. VANBOSKERCK  
6 Chief Deputy District Attorney  
7 Nevada Bar #006528  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Respondent

7  
8 DISTRICT COURT  
9 CLARK COUNTY, NEVADA

9 THOMAS CASH,  
10 #7053124  
11 Petitioner,

11 -vs-

12 THE STATE OF NEVADA,  
13 Respondent.

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

14  
15 **STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF**  
16 **HABEAS CORPUS (POST-CONVICTION), MEMORANDUM OF POINTS**  
17 **AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS**  
18 **CORPUS (POST-CONVICTION), MOTION FOR APPOINTMENT OF**  
19 **COUNSEL, AND REQUEST FOR AN EVIDENTIARY HEARING**

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

20 COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County  
21 District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District  
22 Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's  
23 Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities  
24 in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment  
25 of Counsel, and Request for an Evidentiary Hearing.

26 ///

27 ///

28 ///

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

4 **POINTS AND AUTHORITIES**

5 **STATEMENT OF THE CASE**

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

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

19 On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019,  
20 the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for  
21 the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed  
22 an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS  
23 207.010(1)(b).

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

1 STATEMENT OF FACTS<sup>1</sup>

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

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

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

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

27 \_\_\_\_\_  
28 <sup>1</sup> 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."

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

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

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

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

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

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

## 6 ARGUMENT

### 7 **I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF**

8 The Sixth Amendment to the United States Constitution provides that, “[i]n all criminal  
9 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his  
10 defense.” The United States Supreme Court has long recognized that “the right to counsel is  
11 the right to the effective assistance of counsel.” Strickland v. Washington, 466 U.S. 668, 686,  
12 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323  
13 (1993).

14 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
15 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of  
16 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865  
17 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's  
18 representation fell below an objective standard of reasonableness, and second, that but for  
19 counsel's errors, there is a reasonable probability that the result of the proceedings would have  
20 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison  
21 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).  
22 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the  
23 inquiry in the same order or even to address both components of the inquiry if the defendant  
24 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

25 The court begins with the presumption of effectiveness and then must determine  
26 whether the defendant has demonstrated by a preponderance of the evidence that counsel was  
27 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel  
28 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of

1 competence demanded of attorneys in criminal cases.” Jackson v. Warden, 91 Nev. 430, 432,  
2 537 P.2d 473, 474 (1975).

3 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
4 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
5 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
6 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
7 (2002).

8 Based on the above law, the role of a court in considering allegations of ineffective  
9 assistance of counsel is “not to pass upon the merits of the action not taken but to determine  
10 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
11 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711  
12 (1978). This analysis does not mean that the court should “second guess reasoned choices  
13 between trial tactics nor does it mean that defense counsel, to protect himself against  
14 allegations of inadequacy, must make every conceivable motion no matter how remote the  
15 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel  
16 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel  
17 cannot create one and may disserve the interests of his client by attempting a useless charade.”  
18 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

19 “There are countless ways to provide effective assistance in any given case. Even the  
20 best criminal defense attorneys would not defend a particular client in the same way.”  
21 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
22 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
23 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
24 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s  
25 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s  
26 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

27 Even if a defendant can demonstrate that his counsel’s representation fell below an  
28 objective standard of reasonableness, he must still demonstrate prejudice and show a

1 reasonable probability that, but for counsel's errors, the result of the trial would have been  
2 different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
3 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability  
4 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89,  
5 694, 104 S. Ct. at 2064-65, 2068).

6 The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the  
7 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of  
8 the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,  
9 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must  
10 be supported with specific factual allegations, which if true, would entitle the petitioner to  
11 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked"  
12 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS  
13 34.735(6) states in relevant part, "[Petitioner] *must* allege specific facts supporting the claims  
14 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your  
15 petition to be dismissed." (emphasis added).

16 The decision not to call witnesses is within the discretion of trial counsel, and will not  
17 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,  
18 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland  
19 does not enact Newton's third law for the presentation of evidence, requiring for every  
20 prosecution expert an equal and opposite expert from the defense. In many instances cross-  
21 examination will be sufficient to expose defects in an expert's presentation. When defense  
22 counsel does not have a solid case, the best strategy can be to say that there is too much doubt  
23 about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578  
24 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the  
25 plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d  
26 593, 596 (1992).

27 Additionally, there is a strong presumption that appellate counsel's performance was  
28 reasonable and fell within "the wide range of reasonable professional assistance." See United

1 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104  
2 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-  
3 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114  
4 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted  
5 issue would have had a reasonable probability of success on appeal. Id.

6 The professional diligence and competence required on appeal involves "winnowing  
7 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a  
8 few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In  
9 particular, a "brief that raises every colorable issue runs the risk of burying good arguments .  
10 . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313.  
11 For judges to second-guess reasonable professional judgments and impose on appointed  
12 counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very  
13 goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

14 Appellate counsel is not required to raise every issue that Defendant felt was pertinent  
15 to the case. The United States Supreme Court has held that there is a constitutional right to  
16 effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v.  
17 Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev.  
18 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim  
19 ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of  
20 deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626,  
21 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath  
22 v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

23 There is a strong presumption that counsel's performance was reasonable and fell  
24 within "the wide range of reasonable professional assistance." See United States v. Aguirre,  
25 912 F.2d 555, 560 (2nd Cir. 1990). This Court has held that all appeals must be "pursued in a  
26 manner meeting high standards of diligence, professionalism and competence." Burke, 110  
27 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error  
28 was prejudicial, a defendant must show that the omitted issue would have had a reasonable

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

4 The defendant has the ultimate authority to make fundamental decisions regarding his  
5 case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the  
6 defendant does not have a constitutional right to “compel appointed counsel to press  
7 nonfrivolous points requested by the client, if counsel, as a matter of professional judgment,  
8 decides not to present those points.” Id. In reaching this conclusion the United States Supreme  
9 Court has recognized the “importance of winnowing out weaker arguments on appeal and  
10 focusing on one central issue if possible, or at most on a few key issues.” Id. at 751-752, 103  
11 S. Ct. at 3313. In particular, a “brief that raises every colorable issue runs the risk of burying  
12 good arguments . . . in a verbal mound made up of strong and weak contentions.” Id. at 753,  
13 103 S. Ct. at 3313. The Court also held that, “for judges to second-guess reasonable  
14 professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim  
15 suggested by a client would disserve the very goal of vigorous and effective advocacy.” Id. at  
16 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate  
17 counsel may well be more effective by not raising every conceivable issue on appeal. Ford v.  
18 State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

19 **A. Petitioner’s Claims in his Post-Conviction Writ of Habeas Corpus Should be**  
20 **Denied**

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

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

26 As a preliminary matter, these substantive claims are waived due to Petitioner’s failure  
27 to raise them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans v. State, 117  
28 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d

1 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d  
2 222 (1999). Additionally, Petitioner cannot and does not demonstrate good cause because all  
3 of the facts and law related to these claims were available at the time Petitioner filed his direct  
4 appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default  
5 because the underlying claims are meritless.

6 Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established  
7 requirements to assure protection of the Fifth Amendment right against self-incrimination  
8 under “inherently coercive” circumstances. Pursuant to Miranda, a suspect may not be  
9 subjected to an interrogation in official custody unless that person has previously been advised  
10 of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to  
11 the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at  
12 444, 86 S.Ct. at 1612 (emphasis added).

13 Additionally, “[i]t is well settled that the prosecution is forbidden at trial to comment  
14 upon an accused's election to remain silent following his arrest and after he has been advised  
15 of his rights as required by Miranda v. Arizona ...” Morris v. State, 112 Nev. 260, 263, 913  
16 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217  
17 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d  
18 653, 657 (1995), and concluded that the “use of a defendant’s post-arrest silence for  
19 impeachment purposes may constitute prosecutorial misconduct.” However, this Court has  
20 also stated that comments made about the defendant’s silence during cross-examination are  
21 not prohibited if the questions “merely inquire[] into prior inconsistent statements.” Gaxiola  
22 v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if  
23 the references to “the defendant’s post-arrest silence are harmless beyond a reasonable doubt.”  
24 Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290  
25 (1989)). Indeed, this Court has concluded that

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

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

2 In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's  
3 questions during its cross-examination of the defendant amounted to prosecutorial misconduct.  
4 Specifically, the Court evaluated whether the State's comments about the defendant's silence  
5 for impeachment purposes resulted in a due process violation. Id. The Court determined that  
6 the State's comment on the defendant's silence was harmless error due to the overwhelming  
7 evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the  
8 case was not based solely on the defendant's testimony and the victim's, but that there was  
9 both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664,  
10 895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's  
11 comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that  
12 the State's comment during closing argument that, "[the defendant] had nine months to think  
13 about what his theory would be," was not an attempt to draw attention to the defendant's  
14 silence and was merely a passing reference followed by the strong evidence that corroborated  
15 the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court  
16 affirmed the defendant's conviction. Id.

17 In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments  
18 made by the State on the defendant's post-arrest silence during its case in chief resulted in  
19 prosecutorial misconduct. The Court concluded that by making such comments in its case in  
20 chief, the defendant is prejudiced because he would feel pressure to testify in order to explain  
21 his silence resulting in an infringement on his or right to prevent self-incrimination. Id.  
22 Ultimately, the Court determined that the State's comments were not made in passing  
23 reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at  
24 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that  
25 the defendant's denial of the crime and the other witness's presenting conflicting stories as  
26 well as admitting to not getting a good look at the shooter cast enough doubt that the evidence  
27 of the defendant's guilt was not overwhelming. Id.

28 ///

1           Although Petitioner offers a span of pages of where he believes the State commented  
2 on his post-arrest silence, he does not indicate the exact comments for which he takes issue.  
3 Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the  
4 State to respond. Regardless, there are two instances in which Petitioner might be taking issue.  
5 First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary  
6 statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018,  
7 at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine  
8 hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed  
9 December 14, 2018, at 11. Additionally, during the State's closing argument, the State  
10 commented on Petitioner's actions after the altercation. The State utilized the testimony  
11 elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell  
12 police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even  
13 tell the detectives where he was that whole time or why he didn't come home or an opportunity  
14 to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14,  
15 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner  
16 may have had.

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

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

13 Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal  
14 witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at  
15 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are  
16 those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice  
17 of Witnesses and/or Expert Witness filed on April 12, 2018, prior to trial.

18 Therefore, Petitioner's claims should be denied.

## 19 **2. Ground Two: Petitioner's sentence is illegal**

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

24 First, Petitioner's claim is waived because it is a substantive claim that should have  
25 been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-  
26 47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,  
27 Thomas, 115 Nev. 148, 979 P.2d 222.

28 ///

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

5 [A] person convicted in this state of:

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

14 (1) *For life without the possibility of parole;*

15 (2) *For life with the possibility of parole, with eligibility for*  
16 *parole beginning when a minimum of 10 years has been*  
17 *served; or*

18 (3) *For a definite term of 25 years, with eligibility for parole*  
19 *beginning when a minimum of 10 years has been served.*

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

28 Notwithstanding this claim's lack of merit, this issue was already litigated on direct  
29 appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated  
30 a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's  
31 claim is barred under the law of case doctrine which states that issues previously decided on  
32 direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879,  
33 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263,

1 1275 (1999)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of  
2 Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim should be denied.

3 **3. Ground Three: Prosecutorial misconduct**

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

6 As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure  
7 to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at  
8 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other  
9 grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot  
10 demonstrate good cause because all of the facts underlying this claim were available when he  
11 filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural  
12 default since his underlying claims are meritless.

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

21 With respect to the second step, the Court will not reverse if the misconduct was  
22 harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-  
23 error review depends on whether the prosecutorial misconduct is of a constitutional dimension.  
24 Id. at 1188-89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments  
25 on the exercise of a constitutional right, or the misconduct "so infected the trial with unfairness  
26 as to make the resulting conviction a denial of due process." Id. 124 Nev. at 1189, 196 P.3d  
27 476-77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986)). When  
28 the misconduct is of constitutional dimension, this Court will reverse unless the State

1 demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d  
2 476–77. When the misconduct is not of constitutional dimension, this Court “will reverse only  
3 if the error substantially affects the jury’s verdict.” Id.

4 First, Petitioner complains that the State expressed its personal opinion that Davis  
5 punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner’s theory of  
6 self-defense. Petition at 9. However, there is no indication from the record that the State argued  
7 Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not  
8 reflect such argument. Recorder’s Transcript of Proceedings: Jury Trial Day 7, filed December  
9 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched  
10 Petitioner in the face. Recorder’s Transcript of Proceedings: Jury Trial Day 5, filed December  
11 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter’s  
12 Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

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

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

27 when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's  
28 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

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

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

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

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

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

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

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

7 Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile  
8 criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad  
9 discretion in imposing a sentence, and absent an abuse of discretion, the court's determination  
10 will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v.  
11 State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide  
12 discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does  
13 not demonstrate prejudice resulting from consideration of information or accusations founded  
14 on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev.  
15 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159,  
16 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported  
17 solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161  
18 (emphasis in original).

19 A sentencing judge may consider a variety of information to ensure "the punishment  
20 fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735,  
21 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a  
22 defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406  
23 (2014). A court may consider information that would be inadmissible at trial as well as  
24 information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v.  
25 State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct  
26 of which defendant has been acquitted, so long as that conduct has been proved by  
27 preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

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1 Here, the State made reference to Petitioner’s juvenile history at sentencing. However,  
2 Petitioner’s criminal record does not constitute highly suspect or impalpable evidence. Silks,  
3 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied  
4 on Petitioner’s juvenile history when rendering Petitioner’s sentence. Prabhu v. Levine, 112  
5 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to  
6 support the actions of counsel and the court below). Indeed, the Court merely explained that it  
7 would use its discretion and find Petitioner as a habitual criminal, a status he qualified for  
8 based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

9 Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal  
10 Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at  
11 502, 686 P.2d at 225. Indeed, the State’s Notice of Intent to Seek Punishment as a Habitual  
12 Criminal was attached to the Information filed on February 7, 2018. Additionally, the State  
13 attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed  
14 its Amended Information on April 19, 2018. Accordingly, Petitioner’s additional argument  
15 that appellate counsel should have raised a notice issue fails as doing so would have been  
16 futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues  
17 that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its  
18 statutory obligation as discussed *infra*.

19 Notwithstanding the lack of merit in Petitioner’s claims, any error was insufficiently  
20 prejudicial to warrant ignoring the procedural default since this trial was essentially a  
21 credibility contest between Petitioner and the other witnesses and a court will not overturn a  
22 criminal conviction “on the basis of a prosecutor’s comments standing alone.” Leonard v.  
23 State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1,  
24 11, 105 S. Ct. 1038 (1985)). Petitioner has failed to establish good cause and prejudice to  
25 overcome the procedural default and his claim should be denied.

26 **4. Ground Four: Certain jury instructions violated Petitioner’s rights**

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

1 claims that he failed to raise on direct appeal, they are also naked assertions and meritless as  
2 discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d  
3 at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas,  
4 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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

8 Jury Instruction No. 1 stated,

9 It is now my duty as judge to instruct you in the law that applies to  
10 this case. It is your duty as jurors to follow these instructions and to apply  
11 the rules of law to the facts as you find them from the evidence.

12 You must not be concerned with the wisdom of any rule of law stated  
13 in these instructions. Regardless of any opinion you may have as to what the  
14 law ought to be, it would be a violation of your oath to base a verdict upon  
15 any other view of the law than that given in the instructions of the Court.

16 Jury Instruction No. 17 stated,

17 You are instructed that if you find a defendant guilty of murder in the  
18 first degree, murder in the second degree, or voluntary manslaughter, you  
19 must also determine whether or not a deadly weapon was used in the  
20 commission of this crime.

21 If you find beyond a reasonable doubt that a deadly weapon was used  
22 in the commission of such an offense, then you shall return the appropriate  
23 guilty verdict reflecting "With Use of a Deadly Weapon."

24 If, however, you find that a deadly weapon was not used in the  
25 commission of such an offense, but you find that it was committed, then you  
26 shall return the appropriate guilty verdict reflecting that a deadly weapon was  
27 not used.

28 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

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

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

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

15 Jury Instruction No. 21 stated,

16 The killing or attempted killing of another person in self-defense is  
17 justified and not unlawful when the person who does the killing actually and  
18 reasonably believes:

- 19 1. That there is imminent danger that the assailant will either kill him  
20 or cause him great bodily injury to himself or to another person; and
- 21 2. That it is absolutely necessary under the circumstances for him to  
22 use in self-defense force or means that might cause the death of the  
23 other person; for the purpose of avoiding death or great bodily  
24 injury to himself or to another person.

25 Jury Instruction No. 22 stated,

26 A bare fear of death or great bodily injury is not sufficient to justify a  
27 killing. To justify taking the life of another in self-defense, the circumstances  
28 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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1 Jury Instruction No. 25 stated,

2 Actual danger is not necessary to justify a killing in self-defense. A  
3 person has a right to defend from apparent danger to the same extent as he  
4 would from actual danger. The person killing is justified if:

5 1. He is confronted by the appearance of imminent danger which  
6 arouses in his mind an honest belief and fear that he or another  
7 person is about to be killed or suffer great bodily injury; and

8 2. He acts solely upon these appearances and his fear and actual  
9 beliefs; and

10 3. A reasonable person in a similar situation would believe himself or  
11 another person to be in like danger.

12 The killing is justified even if it develops afterward that the person  
13 killing was mistaken about the extent of the danger.

14 Jury Instruction No. 27 stated,

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

22 As a preliminary matter, each of these instructions are accurate statements of law.  
23 Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev.  
24 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-  
25 defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200.  
26 Moreover, Petitioner's argument that these instructions failed to instruct the jury that they  
27 could find Petitioner not guilty is meritless. The jury was provided with multiple instructions  
28 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

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

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

7 Jury Instruction No. 30 stated,

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

18 If you have a reasonable doubt as to the guilt of the Defendant, he is  
19 entitled to a verdict of not guilty.

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

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

27 Jury Instruction No. 37 stated,

28 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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1 In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his  
2 claim should also be denied because this instruction was an accurate statement of law.  
3 Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035,  
4 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt  
5 with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196  
6 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing  
7 the jury not to involve the question of guilt with a consideration of the penalty is proper.").

##### 8 **5. Ground Five: Settling of jury instructions**

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

13 As a preliminary matter, this is a substantive claim that is waived due to the failure to  
14 raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47,  
15 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,  
16 Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to  
17 demonstrate good cause because all of the facts and law necessary for such claim were  
18 available when he filed his direct appeal.

19 Petitioner also cannot demonstrate prejudice to ignore his omission because his claim  
20 is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make  
21 objections to the jury instructions, and, thus, did not have the right to represent himself to  
22 object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3  
23 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an  
24 accused is not entitled to participate with counsel in the presentation of the defense"); see also,  
25 Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v.  
26 Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871  
27 (10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010);

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

6 Notwithstanding these claims being waived, dismissed, and meritless, any error in these  
7 instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default  
8 since the jury was properly instructed on the burden of proof and the weighing of witness  
9 credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have  
10 been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to  
11 the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury  
12 was also presented with evidence that Petitioner was not justified in doing so. The State  
13 introduced credible and sufficient evidence of Petitioner's actions after the crime, which  
14 demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call  
15 911—even though he later told police that Davis said that he would shoot up the house after  
16 Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed  
17 Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave,  
18 Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece  
19 in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by  
20 jumping two walls and jumping down from a high point of one of the walls. Petitioner also  
21 destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just  
22 after the police left and did not account for where he went between 7:00 PM and 2:00 AM the  
23 night of the crime, when he turned himself in to police. Therefore, Petitioner's claims should  
24 be denied.

25 **6. Ground Six: Trial counsel was ineffective**

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

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

3 **a. *Failure to investigate and prepare for trial***

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

6 First, Petitioner argues that counsel did nothing, but review the State's open file to  
7 prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify  
8 for the defense was because he told them to come to court. Id. This claim fails under Molina,  
9 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better  
10 investigation would have shown.

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

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

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

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

3 In sum, Petitioner cannot demonstrate he was prejudiced by counsel’s actions, let alone  
4 that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-  
5 87, 104 S. Ct. at 2063–64. Therefore, Petitioner’s claims should be denied.

6 ***b. Failure to establish Petitioner’s theory of defense through jury***  
7 ***instructions***

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

12 Petitioner’s complaint that counsel was ineffective because there was no self-defense  
13 jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.  
14 Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of  
15 self-defense. Those jury instructions properly provided the jury with the law to determine  
16 whether Petitioner was justified under a theory of self-defense for protecting his daughter,  
17 Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis,  
18 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory  
19 throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to  
20 demonstrate what additional instruction he believes should have been given to demonstrate  
21 prejudice.

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

26 Now, this man sitting here, Thomas Cash, he's 52 years old. He works  
27 at Sears. *He's an HVAC technician.* He carries a tool belt around his waist.  
28 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.

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

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

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

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

13 Petitioner argues that counsel was ineffective for failing to object to a portion of Davis'  
14 testimony during trial wherein he discussed the altercation he had with Petitioner that  
15 ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at  
16 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at  
17 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature  
18 of Davis' testimony and when the same information was repeated. Petition at 15-16;  
19 Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

20 Petitioner's claim should be denied. As a preliminary matter, when to object is a  
21 strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the  
22 subject matter of Davis' testimony, counsel could have concluded that it would have damaged  
23 his credibility with the jury if he made a series of pointless objections that could be perceived  
24 as disrespectful to the witness or as achieving nothing more than delaying the process. Also,  
25 if the information was going to be presented to the jury regardless, counsel did not need to  
26 offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if  
27 the State had asked more questions to break up Davis' testimony, the State would have elicited  
28 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.

1           Additionally, Petitioner mistakenly claims that counsel should have objected when  
2 Davis' testimony was repeated. Any information that was repeated was for the purposes of  
3 clarification and asking further questions about what Davis' previous testimony. Recorder's  
4 Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174.  
5 Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137  
6 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of  
7 reasonableness, let alone prejudice so his claim should be denied. Strickland, 466 U.S. at 686-  
8 87, 104 S. Ct. at 2063-64.

9                           **d. Failure to protect post-arrest silence**

10           Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because  
11 he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16.  
12 Petitioner claims that counsel should have requested that the rebuttal witness first testify  
13 outside the presence of the jury to determine the prejudicial nature of his testimony. Petition  
14 at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is  
15 referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed  
16 as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence  
17 regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at  
18 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis,  
19 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

20                           **e. Failure to impeach Kyriell Davis' testimony**

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

28   ///

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

14 **7. Ground Seven: Cumulative error**

15 Petitioner asserts a claim of cumulative error in the context of ineffective assistance of  
16 counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that  
17 instances of ineffective assistance of counsel can be cumulated; it is the State's position that  
18 they cannot. However, even if they could be, it would be of no consequence as there was no  
19 single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900  
20 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the  
21 effect of matters determined to be error, not the cumulative effect of non-errors.").  
22 Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a  
23 claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and  
24 character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1,  
25 17, 992 P.2d 845, 855 (2000).

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

28 ///

1           Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there  
2 is no error to cumulate. Regardless, any errors that occurred at trial, which the State does not  
3 concede, would have been minimal in quantity and character, and a defendant “is not entitled  
4 to a perfect trial, but only a fair trial.” Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115  
5 (1975).

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

9           **8. Ground Eight: Appellate counsel was ineffective for failing to consult prior**  
10           **to filing Petitioner’s direct appeal**

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

15           First, which claims to raise is a strategic decision left to the discretion of counsel.  
16 Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when  
17 limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.  
18 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the  
19 reasons discussed throughout this Petition, Petitioner’s claims would not have been effective  
20 on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706,  
21 137 P.3d at 1103. Therefore, Petitioner’s claims should be denied.

22           **9. Ground Nine: Petitioner’s right to a speedy trial was violated**

23           Petitioner argues that the Court violated his right to a speedy trial. Petition at 18.  
24 Specifically, he claims that the Court erroneously continued his trial against the parties’  
25 consent. Id. Not only is this claim a bare and naked assertion suitable only for summary  
26 dismissal, but also it is waived as a substantive claim that should have been raised on appeal.  
27 Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans,  
28 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved

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

4 NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought  
5 to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there  
6 is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970).  
7 “Simply to trigger a speedy trial analysis, an accused must allege that the interval between  
8 accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial  
9 delay.” Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992).  
10 Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S.  
11 at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230,  
12 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold  
13 requirement noting that “by definition he cannot complain that the government has denied him  
14 a ‘speedy trial’ if it has, in fact, prosecuted the case with customary promptness.” Id. at 651-  
15 52, 112 S.Ct. at 2690-91.

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

25 While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant  
26 was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14,  
27 2017. Petitioner’s jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at  
28 most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett,

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

3 Moreover, the reason for the delay was that defense counsel had to attend a federal  
4 sentencing outside of the jurisdiction which could not be reset and the State had another trial  
5 on that date. Accordingly, Petitioner's argument that his trial was continued over his objection  
6 is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502,  
7 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy  
8 on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct.  
9 at 2192. Therefore, Petitioner's claim should be denied.

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

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

12 **a. *Failure to consult and communicate***

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

17 Petitioner's claims should be denied as they amount to nothing more substantive than  
18 naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686  
19 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel.  
20 Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for  
21 any specific amount of communication as long as counsel is reasonably effective in his  
22 representation. See id. Moreover, Petitioner's failure to investigate allegations fail since  
23 Petitioner does not demonstrate what a better investigation would have uncovered. Molina,  
24 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers  
25 nothing more than a naked assertion that further proves summary dismissal is warranted.  
26 Hargrove, 100 Nev. at 502, 686 P.2d at 225.

27 ///

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1                                   **b. *Failure to investigate and call witnesses***

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

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

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

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

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

11 ***c. Failure to meet with Petitioner***

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

16 First, as with trial counsel, Petitioner is not entitled to a particular relationship with  
17 counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate  
18 counsel failed to do a "good job" is a naked assertion that should be denied. Hargrove, 100  
19 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel  
20 ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim  
21 raising insufficiency of the evidence, he has not explained how such complaint is relevant or  
22 how it would have made a difference on appeal. Notably, appellate counsel is more effective  
23 when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103  
24 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).  
25 Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne,  
26 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122  
27 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

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1                   **2. Ground Two: Appellate counsel was ineffective**

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

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

11                   To the extent Petitioner is complaining that counsel did not consult and include his  
12 issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable  
13 only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in  
14 the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues  
15 and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105  
16 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the  
17 decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d  
18 at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference  
19 and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87,  
20 104 S. Ct. at 2063-64. Therefore, Petitioner's claim should be denied.

21                   **II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF**  
22                   **COUNSEL**

23                   Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-  
24 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566  
25 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada  
26 Supreme Court similarly observed that “[t]he Nevada Constitution...does not guarantee a right  
27 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to  
28 counsel provision as being coextensive with the Sixth Amendment to the United States

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

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

8 A petition may allege that the Defendant is unable to pay the  
9 costs of the proceedings or employ counsel. If the court is  
10 satisfied that the allegation of indigency is true and the petition  
11 is not dismissed summarily, the court may appoint counsel to  
12 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:

- 13 (a) The issues are difficult;
- 14 (b) The petitioner is unable to comprehend the proceedings; or
- 15 (c) Counsel is necessary to proceed with discovery.

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

18 More recently, the Nevada Supreme Court examined whether a district court  
19 appropriately denied a defendant’s request for appointment of counsel based upon the factors  
20 listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-  
21 Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75,  
22 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant  
23 filed a pro se post-conviction petition for writ of habeas corpus and requested counsel be  
24 appointed. Id. The district court ultimately denied the petitioner’s petition and his appointment  
25 of counsel request. Id. In reviewing the district court’s decision, the Nevada Supreme Court  
26 examined the statutory factors listed under NRS 34.750 and concluded that the district court’s  
27 decision should be reversed and remanded. Id. The Court explained that the petitioner was  
28 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

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

8 Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors  
9 for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are  
10 severe as he is serving a sentence of life without the possibility of parole, that fact alone does  
11 not require the appointment of counsel. Indeed, none of the issues Petitioner raises are  
12 particularly difficult as his claims are either waived as substantive claims, fail to provide good  
13 cause because they are based on information Petitioner had for his direct appeal, or are  
14 meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523;  
15 Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev.  
16 148, 979 P.2d 222.

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

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

### 24 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 26 1. The judge or justice, upon review of the return, answer and all supporting  
27 documents which are filed, shall determine whether an evidentiary hearing is  
28 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.*

1 2. If the judge or justice determines that the petitioner is not entitled to relief  
2 and an evidentiary hearing is not required, he shall dismiss the petition without  
3 a hearing.

4 3. If the judge or justice determines that an evidentiary hearing is required, he  
5 shall grant the writ and shall set a date for the hearing.

6 The Nevada Supreme Court has held that if a petition can be resolved without  
7 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.  
8 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A  
9 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual  
10 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled  
11 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100  
12 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction  
13 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the  
14 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it  
15 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It  
16 is improper to hold an evidentiary hearing simply to make a complete record. See State v.  
17 Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district  
18 court considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make  
19 as complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

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

5 **CONCLUSION**

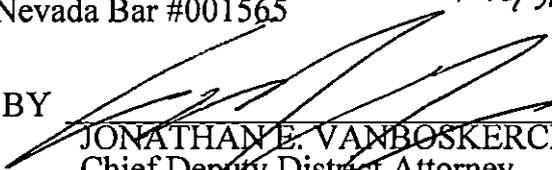
6 Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ  
7 of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of  
8 Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel,  
9 and Request for an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

10 DATED this 18th day of September, 2020.

11 Respectfully submitted,

12 STEVEN B. WOLFSON  
13 Clark County District Attorney #14560  
14 Nevada Bar #001565

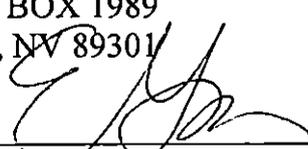
15 BY

  
16 JONATHAN E. VANBOSKERCK  
17 Chief Deputy District Attorney  
18 Nevada Bar #006528

19 **CERTIFICATE OF SERVICE**

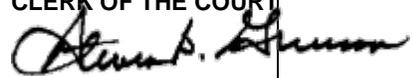
20 I hereby certify that service of the State's Response to Petitioner's Petition for Writ of  
21 habeas corpus (post-conviction), memorandum of points and authorities in support of petition  
22 for writ of habeas corpus (post-conviction), motion for appointment of counsel, and request  
23 for an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

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

27 By: 

28 Secretary for the District Attorney's Office

17FN2591X/JEV/bg/Appeals



1 RTRAN

2  
3  
4 DISTRICT COURT  
5 CLARK COUNTY, NEVADA

6  
7 THOMAS CASH,

8 Plaintiff,

9 vs.

10 WILLIAM GITTERE,

11 Defendant.

CASE#: A-20-818971-W

DEPT. IX

12  
13 BEFORE THE HONORABLE CRISTINA D. SILVA, DISTRICT COURT JUDGE

14 WEDNESDAY, OCTOBER 7, 2020

15 **RECORDER'S TRANSCRIPT OF HEARING:**  
16 **PETITION FOR WRIT OF HABEAS CORPUS**  
17 **PLAINTIFF'S EX PARTE MOTION FOR APPOINTMENT OF COUNSEL**  
18 **AND REQUEST FOR EVIDENTIARY HEARING**  
19 **PLAINTIFF'S EX PARTE MOTION FOR ORDER TO TRANSPORT**  
20 **PETITIONER**

21 APPEARANCES:

22 For the Plaintiff:

Not present

23 For the Defendant:

24 JOHN TORRE, ESQ.  
Deputy District Attorney

25 RECORDED BY: GINA VILLANI, COURT RECORDER

1 Las Vegas, Nevada, Wednesday, October 7, 2020

2  
3 [Hearing began at 4:16 p.m.]

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

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

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

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

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

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

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

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

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

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

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

13 State, any questions?

14 MR. TORRE: No, Your Honor.

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

17 MR. TORRE: Thank you, Your Honor.

18

19 [Hearing concluded at 4:21 p.m.]

20 \* \* \* \* \*

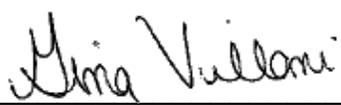
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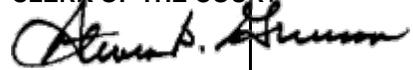
22 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
23 audio/video proceedings in the above-entitled case to the best of my ability.

23

24

25

  
\_\_\_\_\_  
Gina Villani  
Court Recorder/Transcriber  
District Court Dept. IX



1 NEO

2 **DISTRICT COURT**  
3 **CLARK COUNTY, NEVADA**

4 THOMAS CASH,

5  
6 Petitioner,

Case No: C-18-329699-1

Dept No: IX

7 vs.

8 THE STATE OF NEVADA,

9 Respondent,

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

10  
11 **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.

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

15 STEVEN D. GRIERSON, CLERK OF THE COURT

16 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

17  
18 CERTIFICATE OF E-SERVICE / MAILING

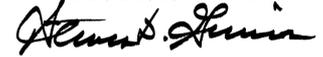
19 I hereby certify that on this 17 day of November 2020, I served a copy of this Notice of Entry on the  
20 following:

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

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

28 /s/ Amanda Hampton

Amanda Hampton, Deputy Clerk



CLERK OF THE COURT

1 **FCL**  
2 STEVEN B. WOLFSON  
3 Clark County District Attorney  
4 Nevada Bar #001565  
5 JONATHAN VANBOSKERCK  
6 Chief Deputy District Attorney  
7 Nevada Bar #06528  
8 200 Lewis Avenue  
9 Las Vegas, Nevada 89155-2212  
10 (702) 671-2500  
11 Attorney for Respondent

7 DISTRICT COURT  
8 CLARK COUNTY, NEVADA

9 THOMAS CASH, #7053124  
10 Petitioner,  
11 -vs-  
12 ~~THE STATE OF NEVADA,~~  
13 WILLIAM GITTERE,  
14 Respondent.

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

15 **FINDINGS OF FACT, CONCLUSIONS OF**  
16 **LAW AND ORDER**

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

Cristina D. Silva

18 THIS CAUSE having come on for hearing before the Honorable ~~JUDGE NAME~~,  
19 District Judge, on the 7th day of October, 2020, the Petitioner in proper person, the Respondent  
20 being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and  
21 through JOHN TORRE, Deputy District Attorney, and the Court having considered the matter,  
22 including briefs, transcripts, arguments of counsel, and documents on file herein, now  
23 therefore, the Court makes the following findings of fact and conclusions of law:

24 //  
25 //  
26 //  
27 //  
28 //

1 FINDINGS OF FACT, CONCLUSIONS OF LAW

2 PROCEDURAL HISTORY

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

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

16 On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019,  
17 the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for  
18 the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed  
19 an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS  
20 207.010(1)(b).

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

27 //

28 //

1 **FACTUAL BACKGROUND**

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

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

12 Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell:  
13 multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back  
14 turned to Petitioner, without provocation by Kyriell. Jury Trial Day 5 at 135-38, 156-57, 213.  
15 Petitioner later admitted that he threw the first punch. Jury Trial Day 7 at 9. Ezekiel, who had  
16 been sitting in the car having a video chat and who only came to help with the child exchange,  
17 was alerted to the fight and attempted to break it up. Jury Trial Day 5 at 124-25, 131, 141, 183.  
18 At about that time, two cars drove up the road and separated Ezekiel and Petitioner from  
19 Kyriell. Jury Trial Day 5 at 142. Kyriell saw a flash in Petitioner's hand as the cars came by  
20 and tried to warn Ezekiel. Jury Trial Day 5 at 142. While Petitioner and Kyriell were separated,  
21 Petitioner stabbed Ezekiel straight through the heart. Jury Trial Day 3 at 192; Jury Trial Day  
22 5 at 142. Ezekiel collapsed in the middle of the street and quickly died. Jury Trial Day 3 at  
23 196-97, 224.

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

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

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

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

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

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

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

## 22 ANALYSIS

### 23 **I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF**

24 The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal  
25 prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his  
26 defense." The United States Supreme Court has long recognized that "the right to counsel is  
27 the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686,  
28

1 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323  
2 (1993).

3 To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove  
4 he was denied “reasonably effective assistance” of counsel by satisfying the two-prong test of  
5 Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865  
6 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's  
7 representation fell below an objective standard of reasonableness, and second, that but for  
8 counsel's errors, there is a reasonable probability that the result of the proceedings would have  
9 been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison  
10 v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test).  
11 “[T]here is no reason for a court deciding an ineffective assistance claim to approach the  
12 inquiry in the same order or even to address both components of the inquiry if the defendant  
13 makes an insufficient showing on one.” Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

14 The court begins with the presumption of effectiveness and then must determine  
15 whether the defendant has demonstrated by a preponderance of the evidence that counsel was  
16 ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). “Effective counsel  
17 does not mean errorless counsel, but rather counsel whose assistance is ‘[w]ithin the range of  
18 competence demanded of attorneys in criminal cases.’” Jackson v. Warden, 91 Nev. 430, 432,  
19 537 P.2d 473, 474 (1975).

20 Counsel cannot be ineffective for failing to make futile objections or arguments. See  
21 Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the  
22 “immediate and ultimate responsibility of deciding if and when to object, which witnesses, if  
23 any, to call, and what defenses to develop.” Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167  
24 (2002).

25 Based on the above law, the role of a court in considering allegations of ineffective  
26 assistance of counsel is “not to pass upon the merits of the action not taken but to determine  
27 whether, under the particular facts and circumstances of the case, trial counsel failed to render  
28 reasonably effective assistance.” Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711

1 (1978). This analysis does not mean that the court should “second guess reasoned choices  
2 between trial tactics nor does it mean that defense counsel, to protect himself against  
3 allegations of inadequacy, must make every conceivable motion no matter how remote the  
4 possibilities are of success.” Id. To be effective, the constitution “does not require that counsel  
5 do what is impossible or unethical. If there is no bona fide defense to the charge, counsel  
6 cannot create one and may disserve the interests of his client by attempting a useless charade.”  
7 United States v. Cronin, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

8 “There are countless ways to provide effective assistance in any given case. Even the  
9 best criminal defense attorneys would not defend a particular client in the same way.”  
10 Strickland, 466 U.S. at 689, 104 S. Ct. at 689. “Strategic choices made by counsel after  
11 thoroughly investigating the plausible options are almost unchallengeable.” Dawson v. State,  
12 108 Nev. 112, 117, 825 P.2d 593, 596 (1992); see also Ford v. State, 105 Nev. 850, 853, 784  
13 P.2d 951, 953 (1989). In essence, the court must “judge the reasonableness of counsel’s  
14 challenged conduct on the facts of the particular case, viewed as of the time of counsel’s  
15 conduct.” Strickland, 466 U.S. at 690, 104 S. Ct. at 2066.

16 Even if a defendant can demonstrate that his counsel’s representation fell below an  
17 objective standard of reasonableness, he must still demonstrate prejudice and show a  
18 reasonable probability that, but for counsel’s errors, the result of the trial would have been  
19 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing  
20 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). “A reasonable probability is a probability  
21 sufficient to undermine confidence in the outcome.” Id. (citing Strickland, 466 U.S. at 687-89,  
22 694, 104 S. Ct. at 2064–65, 2068).

23 The Nevada Supreme Court has held “that a habeas corpus petitioner must prove the  
24 disputed factual allegations underlying his ineffective-assistance claim by a preponderance of  
25 the evidence.” Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore,  
26 claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must  
27 be supported with specific factual allegations, which if true, would entitle the petitioner to  
28 relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). “Bare” and “naked”

1 allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS  
2 34.735(6) states in relevant part, “[Petitioner] *must* allege specific facts supporting the claims  
3 in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your  
4 petition to be dismissed.” (emphasis added).

5 The decision not to call witnesses is within the discretion of trial counsel, and will not  
6 be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1,  
7 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland  
8 does not enact Newton's third law for the presentation of evidence, requiring for every  
9 prosecution expert an equal and opposite expert from the defense. In many instances cross-  
10 examination will be sufficient to expose defects in an expert's presentation. When defense  
11 counsel does not have a solid case, the best strategy can be to say that there is too much doubt  
12 about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578  
13 F.3d. 944 (2011). “Strategic choices made by counsel after thoroughly investigating the  
14 plausible options are almost unchallengeable.” Dawson v. State, 108 Nev. 112, 117, 825 P.2d  
15 593, 596 (1992).

16 Additionally, there is a strong presumption that appellate counsel's performance was  
17 reasonable and fell within “the wide range of reasonable professional assistance.” See United  
18 States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104  
19 S. Ct. at 2065. A claim of ineffective assistance of appellate counsel must satisfy the two-  
20 prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114  
21 (1996). In order to satisfy Strickland's second prong, the defendant must show that the omitted  
22 issue would have had a reasonable probability of success on appeal. Id.

23 The professional diligence and competence required on appeal involves “winnowing  
24 out weaker arguments on appeal and focusing on one central issue if possible, or at most on a  
25 few key issues.” Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In  
26 particular, a “brief that raises every colorable issue runs the risk of burying good arguments .  
27 . . in a verbal mound made up of strong and weak contentions.” Id. at 753, 103 S. Ct. at 3313.  
28 For judges to second-guess reasonable professional judgments and impose on appointed

1 counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very  
2 goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314.

3 Appellate counsel is not required to raise every issue that Defendant felt was pertinent  
4 to the case. The United States Supreme Court has held that there is a constitutional right to  
5 effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v.  
6 Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev.  
7 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim  
8 ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of  
9 deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626,  
10 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath  
11 v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

12 There is a strong presumption that counsel's performance was reasonable and fell  
13 within "the wide range of reasonable professional assistance." See United States v. Aguirre,  
14 912 F.2d 555, 560 (2nd Cir. 1990). This Court has held that all appeals must be "pursued in a  
15 manner meeting high standards of diligence, professionalism and competence." Burke, 110  
16 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error  
17 was prejudicial, a defendant must show that the omitted issue would have had a reasonable  
18 probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992);  
19 Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey,  
20 112 Nev. at 498, 923 P.2d at 1114.

21 The defendant has the ultimate authority to make fundamental decisions regarding his  
22 case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the  
23 defendant does not have a constitutional right to "compel appointed counsel to press  
24 nonfrivolous points requested by the client, if counsel, as a matter of professional judgment,  
25 decides not to present those points." Id. In reaching this conclusion the United States Supreme  
26 Court has recognized the "importance of winnowing out weaker arguments on appeal and  
27 focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103  
28 S. Ct. at 3313. In particular, a "brief that raises every colorable issue runs the risk of burying

1 good arguments . . . in a verbal mound made up of strong and weak contentions.” Id. at 753,  
2 103 S. Ct. at 3313. The Court also held that, “for judges to second-guess reasonable  
3 professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim  
4 suggested by a client would disserve the very goal of vigorous and effective advocacy.” Id. at  
5 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate  
6 counsel may well be more effective by not raising every conceivable issue on appeal. Ford v.  
7 State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

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

9 **1. Ground One: The State did not use Petitioner’s post-arrest silence against**  
10 **him**

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

15 As a preliminary matter, these substantive claims are waived due to Petitioner’s failure  
16 to raise them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans v. State, 117  
17 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d  
18 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d  
19 222 (1999). Additionally, Petitioner cannot and does not demonstrate good cause because all  
20 of the facts and law related to these claims were available at the time Petitioner filed his direct  
21 appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default  
22 because the underlying claims are meritless.

23 Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established  
24 requirements to assure protection of the Fifth Amendment right against self-incrimination  
25 under “inherently coercive” circumstances. Pursuant to Miranda, a suspect may not be  
26 subjected to an interrogation in official custody unless that person has previously been advised  
27 of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to  
28

1 the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at  
2 444, 86 S.Ct. at 1612 (emphasis added).

3 Additionally, “[i]t is well settled that the prosecution is forbidden at trial to comment  
4 upon an accused's election to remain silent following his arrest and after he has been advised  
5 of his rights as required by Miranda v. Arizona ...” Morris v. State, 112 Nev. 260, 263, 913  
6 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217  
7 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d  
8 653, 657 (1995), and concluded that the “use of a defendant’s post-arrest silence for  
9 impeachment purposes may constitute prosecutorial misconduct.” However, this Court has  
10 also stated that comments made about the defendant’s silence during cross-examination are  
11 not prohibited if the questions “merely inquire[] into prior inconsistent statements.” Gaxiola  
12 v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if  
13 the references to “the defendant’s post-arrest silence are harmless beyond a reasonable doubt.”  
14 Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290  
15 (1989)). Indeed, this Court has concluded that

16  
17 [c]omments on the defendant's post-arrest silence will be harmless beyond a  
18 reasonable doubt if (1) at trial there was only a mere passing reference, without  
19 more, to an accused's post-arrest silence or (2) there is overwhelming evidence  
of guilt.

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

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

1 895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's  
2 comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that  
3 the State's comment during closing argument that, "[the defendant] had nine months to think  
4 about what his theory would be," was not an attempt to draw attention to the defendant's  
5 silence and was merely a passing reference followed by the strong evidence that corroborated  
6 the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court  
7 affirmed the defendant's conviction. Id.

8 In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments  
9 made by the State on the defendant's post-arrest silence during its case in chief resulted in  
10 prosecutorial misconduct. The Court concluded that by making such comments in its case in  
11 chief, the defendant is prejudiced because he would feel pressure to testify in order to explain  
12 his silence resulting in an infringement on his or right to prevent self-incrimination. Id.  
13 Ultimately, the Court determined that the State's comments were not made in passing  
14 reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at  
15 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that  
16 the defendant's denial of the crime and the other witness's presenting conflicting stories as  
17 well as admitting to not getting a good look at the shooter cast enough doubt that the evidence  
18 of the defendant's guilt was not overwhelming. Id.

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

1 elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell  
2 police where he was “between 7 o’clock and 2 o’clock in the morning,” and “he didn’t even  
3 tell the detectives where he was that whole time or why he didn’t come home or an opportunity  
4 to come home.” Recorder’s Transcript of Proceedings: Jury Trial Day 7, filed December 14,  
5 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner  
6 may have had.

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

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

3 Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal  
4 witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at  
5 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are  
6 those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice  
7 of Witnesses And/Or Expert Witness filed on April 12, 2018, prior to trial.

8 Therefore, Petitioner's claims are denied.

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

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

14 First, Petitioner's claim is waived because it is a substantive claim that should have  
15 been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-  
16 47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,  
17 Thomas, 115 Nev. 148, 979 P.2d 222.

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

22 [A] person convicted in this state of:

23 (b) *Any felony, who has previously been three times convicted,*  
24 *whether in this state or elsewhere, of any crime which under the laws*  
25 *of the situs of the crime or of this state would amount to a felony, or*  
26 *who has previously been five times convicted, whether in this state or*  
27 *elsewhere, of petit larceny, or of any misdemeanor or gross*  
28 *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 (1) For life without the possibility of parole;  
2 (2) For life with the possibility of parole, with eligibility for  
3 parole beginning when a minimum of 10 years has been  
4 served; or  
5 (3) For a definite term of 25 years, with eligibility for parole  
6 beginning when a minimum of 10 years has been served.

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

14 Notwithstanding this claim's lack of merit, this issue was already litigated on direct  
15 appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated  
16 a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's  
17 claim is barred under the law of case doctrine which states that issues previously decided on  
18 direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879,  
19 34 P.3d 519, 532 (2001) (citing McNelson v. State, 115 Nev. 396, 414-15, 990 P.2d 1263,  
20 1275 (1999)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of  
21 Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim is denied.

22 **3. Ground Three: Prosecutorial misconduct**

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

25 As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure  
26 to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at  
27 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other  
28 grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot

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

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

12 With respect to the second step, the Court will not reverse if the misconduct was  
13 harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-  
14 error review depends on whether the prosecutorial misconduct is of a constitutional dimension.  
15 Id. at 1188–89, 196 P.3d at 476. Misconduct may be constitutional if a prosecutor comments  
16 on the exercise of a constitutional right, or the misconduct “so infected the trial with unfairness  
17 as to make the resulting conviction a denial of due process.” Id. 124 Nev. at 1189, 196 P.3d  
18 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986)). When  
19 the misconduct is of constitutional dimension, this Court will reverse unless the State  
20 demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d  
21 476–77. When the misconduct is not of constitutional dimension, this Court “will reverse only  
22 if the error substantially affects the jury's verdict.” Id.

23 First, Petitioner complains that the State expressed its personal opinion that Davis  
24 punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of  
25 self-defense. Petition at 9. However, there is no indication from the record that the State argued  
26 Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not  
27 reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December  
28 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched

1 Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December  
2 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's  
3 Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

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

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

18  
19 when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's  
20 attempting to get Brittney to go somewhere, that's at the point when Kyriell  
21 is going to Zek and to the Defendant and Brittney is trying to pull him back  
22 and hold him back. And how do we know that that's true? Because the very  
23 next thing she hears is an impact. And she runs outside and Zek has just  
24 fallen.

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

28 //

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

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

13  
14 And what the State would ask you to look at is not only the pictures but also  
15 the testimony of Dr. Roquero, who was the medical examiner. And what did  
16 he say? He said that there were two sharp force injuries to Ezekiel. One of  
17 them was a stab wound, that would be from like a jabbing or a plunging type  
18 action. And then the second one was an incised wound, meaning that it's  
19 longer than it is deep into the body.

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

26 Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the  
27 State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As  
28 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

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

3 Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile  
4 criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad  
5 discretion in imposing a sentence, and absent an abuse of discretion, the court's determination  
6 will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v.  
7 State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide  
8 discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does  
9 not demonstrate prejudice resulting from consideration of information or accusations founded  
10 on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev.  
11 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159,  
12 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported  
13 solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161  
14 (emphasis in original).

15 A sentencing judge may consider a variety of information to ensure "the punishment  
16 fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735,  
17 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a  
18 defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406  
19 (2014). A court may consider information that would be inadmissible at trial as well as  
20 information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v.  
21 State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct  
22 of which defendant has been acquitted, so long as that conduct has been proved by  
23 preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

24 Here, the State made reference to Petitioner's juvenile history at sentencing. However,  
25 Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks,  
26 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied  
27 on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112  
28 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to

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

4 Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal  
5 Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at  
6 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual  
7 Criminal was attached to the Information filed on February 7, 2018. Additionally, the State  
8 attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed  
9 its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument  
10 that appellate counsel should have raised a notice issue fails as doing so would have been  
11 futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues  
12 that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its  
13 statutory obligation as discussed *infra*.

14 Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently  
15 prejudicial to warrant ignoring the procedural default since this trial was essentially a  
16 credibility contest between Petitioner and the other witnesses and a court will not overturn a  
17 criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v.  
18 State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1,  
19 11, 105 S. Ct. 1038 (1985)). Petitioner has failed to establish good cause and prejudice to  
20 overcome the procedural default and his claim is denied.

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

22 Petitioner complains that several of the jury instructions provided at trial violated his  
23 rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive  
24 claims that he failed to raise on direct appeal, they are also naked assertions and meritless as  
25 discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d  
26 at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas,  
27 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

28 //

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

4 Jury Instruction No. 1 stated,

5  
6 It is now my duty as judge to instruct you in the law that applies to  
7 this case. It is your duty as jurors to follow these instructions and to apply  
8 the rules of law to the facts as you find them from the evidence.

9 You must not be concerned with the wisdom of any rule of law stated  
10 in these instructions. Regardless of any opinion you may have as to what the  
11 law ought to be, it would be a violation of your oath to base a verdict upon  
12 any other view of the law than that given in the instructions of the Court.

13  
14 Jury Instruction No. 17 stated,

15 You are instructed that if you find a defendant guilty of murder in the  
16 first degree, murder in the second degree, or voluntary manslaughter, you  
17 must also determine whether or not a deadly weapon was used in the  
18 commission of this crime.

19 If you find beyond a reasonable doubt that a deadly weapon was used  
20 in the commission of such an offense, then you shall return the appropriate  
21 guilty verdict reflecting "With Use of a Deadly Weapon."

22 If, however, you find that a deadly weapon was not used in the  
23 commission of such an offense, but you find that it was committed, then you  
24 shall return the appropriate guilty verdict reflecting that a deadly weapon was  
25 not used.

26  
27 Jury Instruction No. 20 stated,

28 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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1 As a preliminary matter, Petitioner's claims are summarily dismissed as he has provided  
2 only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner  
3 has not attempted to and cannot demonstrate good cause to overcome the procedural default.  
4 Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are  
5 accurate statements of law, which the Court properly permitted. See Crawford v. State, 121  
6 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the  
7 jury is properly instructed and is permitted to complete instructions sua sponte).

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

13 Jury Instruction No. 21 stated,

14 The killing or attempted killing of another person in self-defense is  
15 justified and not unlawful when the person who does the killing actually and  
reasonably believes:

- 16 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
- 17 2. That it is absolutely necessary under the circumstances for him to  
18 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  
19 injury to himself or to another person.

20 Jury Instruction No. 22 stated,

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

25 Jury instruction No. 23 stated,

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

28 //

1 Jury Instruction No. 25 stated,

2 Actual danger is not necessary to justify a killing in self-defense. A  
3 person has a right to defend from apparent danger to the same extent as he  
4 would from actual danger. The person killing is justified if:

- 5 1. He is confronted by the appearance of imminent danger which  
6 arouses in his mind an honest belief and fear that he or another  
7 person is about to be killed or suffer great bodily injury; and
- 8 2. He acts solely upon these appearances and his fear and actual  
9 beliefs; and
- 10 3. A reasonable person in a similar situation would believe himself or  
11 another person to be in like danger.

12 The killing is justified even if it develops afterward that the person  
13 killing was mistaken about the extent of the danger.

14 Jury Instruction No. 27 stated,

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

22 As a preliminary matter, each of these instructions are accurate statements of law.  
23 Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev.  
24 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-  
25 defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200.  
26 Moreover, Petitioner's argument that these instructions failed to instruct the jury that they  
27 could find Petitioner not guilty is meritless. The jury was provided with multiple instructions  
28 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.

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

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

7 Jury Instruction No. 30 stated,  
8

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

19 If you have a reasonable doubt as to the guilt of the Defendant, he is  
20 entitled to a verdict of not guilty.

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

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

28 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.

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

3 In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his  
4 claim is also denied because this instruction was an accurate statement of law. Hargrove, 100  
5 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972)  
6 (stating that an instruction "directing the jury not to involve the question of guilt with a  
7 consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465,  
8 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury  
9 not to involve the question of guilt with a consideration of the penalty is proper.").

##### 10 **5. Ground Five: Settling of jury instructions**

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

15 As a preliminary matter, this is a substantive claim that is waived due to the failure to  
16 raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47,  
17 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds,  
18 Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to  
19 demonstrate good cause because all of the facts and law necessary for such claim were  
20 available when he filed his direct appeal.

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

1 (10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010);  
2 People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523  
3 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986).  
4 If Petitioner wanted to represent himself, he should have made a request of the Court to canvass  
5 pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly,  
6 Petitioner's claim is denied.

7 Notwithstanding these claims being waived, dismissed, and meritless, any error in these  
8 instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default  
9 since the jury was properly instructed on the burden of proof and the weighing of witness  
10 credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have  
11 been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to  
12 the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury  
13 was also presented with evidence that Petitioner was not justified in doing so. The State  
14 introduced credible and sufficient evidence of Petitioner's actions after the crime, which  
15 demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call  
16 911—even though he later told police that Davis said that he would shoot up the house after  
17 Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed  
18 Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave,  
19 Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece  
20 in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by  
21 jumping two walls and jumping down from a high point of one of the walls. Petitioner also  
22 destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just  
23 after the police left and did not account for where he went between 7:00 PM and 2:00 AM the  
24 night of the crime, when he turned himself in to police. Therefore, Petitioner's claims are  
25 denied.

#### 26 **6. Ground Six: Trial counsel was not ineffective**

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

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

4 **a. *Failure to investigate and prepare for trial***

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

7 First, Petitioner argues that counsel did nothing, but review the State's open file to  
8 prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify  
9 for the defense was because he told them to come to court. Id. This claim fails under Molina,  
10 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better  
11 investigation would have shown.

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

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

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

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

4 In sum, Petitioner cannot demonstrate he was prejudiced by counsel’s actions, let alone  
5 that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-  
6 87, 104 S. Ct. at 2063–64. Therefore, Petitioner’s claims are denied.

7 ***b. Failure to establish Petitioner’s theory of defense through jury***  
8 ***instructions***

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

13 Petitioner’s complaint that counsel was ineffective because there was no self-defense  
14 jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.  
15 Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of  
16 self-defense. Those jury instructions properly provided the jury with the law to determine  
17 whether Petitioner was justified under a theory of self-defense for protecting his daughter,  
18 Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis,  
19 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory  
20 throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to  
21 demonstrate what additional instruction he believes should have been given to demonstrate  
22 prejudice.

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

27 //

28 //

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

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

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

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

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

18 Petitioner argues that counsel was ineffective for failing to object to a portion of Davis'  
19 testimony during trial wherein he discussed the altercation he had with Petitioner that  
20 ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at  
21 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at  
22 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature  
23 of Davis' testimony and when the same information was repeated. Petition at 15-16;  
24 Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

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

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

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

16 **d. *Failure to protect post-arrest silence***

17 Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because  
18 he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16.  
19 Petitioner claims that counsel should have requested that the rebuttal witness first testify  
20 outside the presence of the jury to determine the prejudicial nature of his testimony. Petition  
21 at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is  
22 referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed  
23 as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence  
24 regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at  
25 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis,  
26 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

27 **e. *Failure to impeach Kyriell Davis' testimony***

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

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

21           **7. Ground Seven: Cumulative error**

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

1 Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a  
2 claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and  
3 character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1,  
4 17, 992 P.2d 845, 855 (2000).

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

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

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

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

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

20 First, which claims to raise is a strategic decision left to the discretion of counsel.  
21 Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when  
22 limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.  
23 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the  
24 reasons discussed throughout this Petition, Petitioner's claims would not have been effective  
25 on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706,  
26 137 P.3d at 1103. Therefore, Petitioner's claims are denied.

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

2                   Petitioner argues that the Court violated his right to a speedy trial. Petition at 18.  
3                   Specifically, he claims that the Court erroneously continued his trial against the parties'  
4                   consent. Id. Not only is this claim a bare and naked assertion suitable only for summary  
5                   dismissal, but also it is waived as a substantive claim that should have been raised on appeal.  
6                   Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans,  
7                   117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved  
8                   on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot  
9                   attempt to demonstrate good cause as these claims were available for direct appeal and he  
10                  cannot demonstrate prejudice because his claim is meritless.

11                  NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought  
12                  to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there  
13                  is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970).  
14                  “Simply to trigger a speedy trial analysis, an accused must allege that the interval between  
15                  accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial  
16                  delay.” Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992).  
17                  Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S.  
18                  at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230,  
19                  994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold  
20                  requirement noting that “by definition he cannot complain that the government has denied him  
21                  a ‘speedy trial’ if it has, in fact, prosecuted the case with customary promptness.” Id. at 651-  
22                  52, 112 S.Ct. at 2690-91.

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

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

4 While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant  
5 was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14,  
6 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at  
7 most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett,  
8 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230,  
9 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

10 Moreover, the reason for the delay was that defense counsel had to attend a federal  
11 sentencing outside of the jurisdiction which could not be reset and the State had another trial  
12 on that date. Accordingly, Petitioner's argument that his trial was continued over his objection  
13 is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502,  
14 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy  
15 on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct.  
16 at 2192. Therefore, Petitioner's claim is denied.

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

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

19 **a. *Failure to consult and communicate***

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

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

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

6 ***b. Failure to investigate and call witnesses***

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

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

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

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

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

16 ***c. Failure to meet with Petitioner***

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

21 First, as with trial counsel, Petitioner is not entitled to a particular relationship with  
22 counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate  
23 counsel failed to do a "good job" is a naked assertion that is denied. Hargrove, 100 Nev. at  
24 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively  
25 failed to include citations and prosecutorial misconduct law in his appellate claim raising  
26 insufficiency of the evidence, he has not explained how such complaint is relevant or how it  
27 would have made a difference on appeal. Notably, appellate counsel is more effective when  
28 limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.

1 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover,  
2 which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev.  
3 at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at  
4 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

5 **2. Ground Two: Appellate counsel was not ineffective**

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

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

14 To the extent Petitioner is complaining that counsel did not consult and include his  
15 issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable  
16 only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in  
17 the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues  
18 and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105  
19 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the  
20 decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d  
21 at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference  
22 and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87,  
23 104 S. Ct. at 2063-64. Therefore, Petitioner's claim is denied.

24 **II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL**

25 Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-  
26 conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566  
27 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada  
28 Supreme Court similarly observed that "[t]he Nevada Constitution... does not guarantee a right

1 to counsel in post-conviction proceedings, as we interpret the Nevada Constitution’s right to  
2 counsel provision as being coextensive with the Sixth Amendment to the United States  
3 Constitution.” The McKague Court specifically held that with the exception of NRS  
4 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one  
5 does not have “any constitutional or statutory right to counsel at all” in post-conviction  
6 proceedings. Id. at 164, 912 P.2d at 258.

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

10  
11 A petition may allege that the Defendant is unable to pay the  
12 costs of the proceedings or employ counsel. If the court is  
13 satisfied that the allegation of indigency is true and the petition  
14 is not dismissed summarily, the court may appoint counsel to  
15 represent the petitioner. In making its determination, the court  
16 may consider whether, among other things, the severity of the  
17 consequences facing the petitioner and whether:  
18 (a) The issues are difficult;  
19 (b) The petitioner is unable to comprehend the proceedings; or  
20 (c) Counsel is necessary to proceed with discovery.

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

23 More recently, the Nevada Supreme Court examined whether a district court  
24 appropriately denied a defendant’s request for appointment of counsel based upon the factors  
25 listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-  
26 Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75,  
27 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant  
28 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

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

11 Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors  
12 for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are  
13 severe as he is serving a sentence of life without the possibility of parole, that fact alone does  
14 not require the appointment of counsel. Indeed, none of the issues Petitioner raises are  
15 particularly difficult as his claims are either waived as substantive claims, fail to provide good  
16 cause because they are based on information Petitioner had for his direct appeal, or are  
17 meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523;  
18 Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev.  
19 148, 979 P.2d 222.

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

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

### 27 **III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

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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

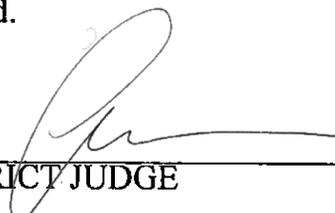
1 issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing  
2 Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the  
3 *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466  
4 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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

9 **ORDER**

10 THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief  
11 and associated pleadings shall be, and are, hereby denied. Dated this 4th day of November, 2020

12 DATED this \_\_\_\_\_ day of October, 2020.

13  
14   
\_\_\_\_\_  
DISTRICT JUDGE

EC

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

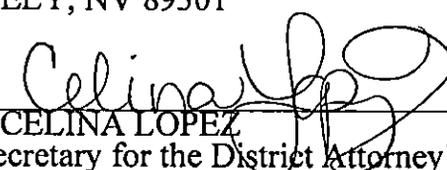
21A 498 D2C0 0B90  
Cristina D. Silva  
District Court Judge

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

20 **CERTIFICATE OF MAILING**

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

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

26 BY   
27 CELINA LOPEZ  
Secretary for the District Attorney's Office

28 JVB/bg/Appeals

1 **CSERV**

2  
3 **DISTRICT COURT**  
4 **CLARK COUNTY, NEVADA**

5  
6 **Thomas Cash, Plaintiff(s)**

**CASE NO: A-20-818971-W**

7 **vs.**

**DEPT. NO. Department 9**

8 **William Gittere, Defendant(s)**

9  
10 **AUTOMATED CERTIFICATE OF SERVICE**

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

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Court Clerk's Office  
Courtesy Copy Please

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

Electronically Filed  
11/02/2020 11:49 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Thomas Cash 3  
\*1203562 Plaintiff, 3 CASE No. A-20-818971-W  
3 Dept. No. IX

v.

William Gittere,  
Warden,

STATE OF NEVADA 3  
Defendant, 3

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

RECEIVED

NOV 02 2020

CLERK OF THE COURT

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 scaled envelope with postage thereon fully prepaid, in the United States MAIL at Ely State Prison, NEVADA

By: Thomas Cash  
THOMAS CASH  
Appellant

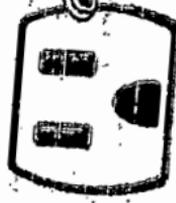
THOMAS CASH 1203562#  
P.O. Box 1989  
ELY, NV. 89301

LEGAL MAIL

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

99101-630000



1 MS. DIGIACOMO: We could address it then?

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

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

7

8 **ANGEL TURNER,**

9 having been first duly sworn

10 was examined and testified as follows:

11

12 THE BAILIFF: Have a seat for me, please.

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

16 THE WITNESS: Angel Turner

17 THE BAILIFF: (Indiscernible).

18 THE WITNESS: Want me to say my name again?

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

20 THE COURT: And then spell your --

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

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

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

25 THE COURT: Okay, thank you.

1 Mr. Long.

2

3

**DIRECT EXAMINATION**

4 BY MR. LONG:

5 Q. Okay. Angel, how old are you?

6 A. Seventeen.

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

8 A. I go to school at Mohave.

9 Q. And what year are you?

10 A. 2018.

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

12 A. Yes, sir.

13 Q. What are your plans after you graduate?

14 MS. DIGIACOMO: Objection. Relevance.

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

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

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

20 THE COURT: All right, sustained.

21 BY MR. LONG:

22 Q. Okay. Angel, do you remember December 11<sup>th</sup>, 2017?

23 A. Yes, sir.

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

1 MS. DIGIACOMO: Objection. Leading.

2 MR. LONG: I'll rephrase it.

3 THE COURT: Okay, thank you.

4 BY MR. LONG:

5 Q. Angel, who is your stepfather?

6 A. Thomas Cash.

7 Q. Do you see Thomas here in the courtroom?

8 A. Yes, sir.

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

10 A. Blue.

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

12 THE COURT: The record will so reflect.

13 BY MR. LONG:

14 Q. What happened on December 11<sup>th</sup>, 2017?

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

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

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

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

19 A. Upstairs.

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

22 A. Like my window faces the driveway.

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

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

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

3 A. Brittney.

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

5 A. Yes, sir.

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

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

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

11 A. Yes.

12 Q. Who was doing that?

13 A. Kyriell.

14 Q. All right. And do you know Kyriell?

15 A. Yes, sir.

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

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

19 Q. Okay. Where was Thomas?

20 A. He was in the room.

21 Q. Okay. Also upstairs?

22 A. Yes.

23 Q. What was he doing?

24 A. He was wrapping the Christmas gifts.

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

1 A. We ran outside.

2 Q. Now "we." Who was first, you or Thomas?

3 A. Thomas.

4 Q. Okay. But you were right behind him?

5 A. Yes, sir.

6 Q. Okay. What did Thomas do when he got outside?

7 A. He grabbed Kyriell off of Brittney.

8 Q. Okay. What was Kyriell doing when Thomas got outside?

9 A. He still had Brittney by her arms.

10 Q. Now you're moving your -- it looks like your hands are kind of

11 around your biceps?

12 A. Yeah.

13 Q. Where did Kyriell have Brittney?

14 A. Right there.

15 Q. Okay. And by "right there," you mean biceps?

16 A. Yes, sir.

17 MR. LONG: And if the record could reflect she's got both her hands

18 on her biceps.

19 THE COURT: Sure. That's accurate.

20 BY MR. LONG:

21 Q. Okay. And so what was it that Thomas did?

22 A. He got Kyriell off of Brittney.

23 Q. Okay. Were any punches thrown?

24 A. No.

25 Q. Okay. So after Thomas got Kyriell off Brittney, what happened

1 next?

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

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

4 A. No.

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

6 A. Yes.

7 Q. -- on Thomas?

8 Okay. Did you see where?

9 A. It was, I mean, more than once but one was in the face and I seen

10 the neck. It was just up ---

11 Q. Okay. Was Thomas punching back?

12 A. Yes.

13 Q. Okay. What happened next?

14 A. They started to move -- okay. You know, there was a car right

15 there, so they started to move like behind the car that was parked in front of

16 the driveway. And Ezekiel got out the car and they started to fight Thomas

17 together.

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

19 A. Yes.

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

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

22 Q. All right. And who's Londyn?

23 A. Brittney and Kyriell's daughter.

24 Q. Okay. How old is she?

25 A. One.

1 Q. Okay. And so a baby.

2 A. Yes.

3 Q. Are you holding the baby?

4 A. No.

5 Q. Okay. Where is the baby?

6 A. She was kind of hanging out the car.

7 Q. Okay. Now did you hear either Kyriell or Thomas say any threats

8 -- I mean, Kyriell or Ezekiel say any threats?

9 MS. DIGIACOMO: Objection. Leading.

10 MR. LONG: I can rephrase it, your Honor.

11 THE COURT: All right, thank you.

12 BY MR. LONG:

13 Q. Did you hear anybody say anything during this fight?

14 A. Kyriell did.

15 Q. And do you remember what Kyriell said?

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

17 Q. "Go get my thing out of the car"?

18 A. Yes.

19 Q. All right. He didn't say what that thing was?

20 A. No.

21 Q. Did they say they were gonna do anything to Thomas?

22 A. Yes.

23 Q. What?

24 A. Shoot him.

25 Q. All right. Shoot him and --

1 MS. DIGIACOMO: Objection. Leading.

2 MR. LONG: It's not leading.

3 MS. DIGIACOMO: She answered the question.

4 BY MR. LONG:

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

6 A. I didn't hear it.

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

8 A. I didn't hear anything else.

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

10 A. The end, meaning?

11 Q. When Thomas went back inside.

12 A. No.

13 Q. Okay. What did you do?

14 A. So they were fighting --

15 Q. Uh-huh.

16 A. -- and Kyriell was threatening Brittney saying you're never gonna

17 see Londyn again. And so I grabbed her out the car while they were still

18 fighting and then -- but I know the fight, it was like going like somewhere. So

19 I ran in the house and Thomas ran in the house behind me.

20 Q. Okay. So you never saw Ezekiel fall?

21 A. No.

22 Q. Okay. Did anybody tell you to grab the baby or is that just

23 something you did?

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

25 Q. Okay. Did Brittney say why?

1 A. No. She just said, "Get my baby."  
2 Q. Okay. Did you think --  
3 MS. DIGIACOMO: Objection.  
4 THE COURT: I'll let you finish --  
5 MS. DIGIACOMO: It's leading.  
6 THE COURT: -- that question.  
7 MS. DIGIACOMO: It's leading.  
8 MR. LONG: (Indiscernible) finish that question.  
9 THE COURT: I'm gonna allow it.  
10 MS. DIGIACOMO: Well, your Honor, he's gonna be putting --  
11 THE COURT: Yeah, I understand.  
12 MS. DIGIACOMO: -- what she's supposed to say in that question,  
13 so I'm objecting to leading.  
14 THE COURT: I'll take that into account.  
15 Go ahead, Mr. Long.  
16 BY MR. LONG:  
17 Q. When you grabbed the baby, why did you do it?  
18 A. Because he was threatening Brittney saying that she would never  
19 see her again.  
20 Q. Who was threatening Brittney?  
21 A. Kyriell.  
22 MR. LONG: Okay. And those are all the questions that I have.  
23 THE COURT: All right, thank you.  
24 Ms. DiGiacomo, cross.  
25 MS. DIGIACOMO: Thank you.

1 **CROSS-EXAMINATION**

2 BY MS. DIGIACOMO:

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

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

6 Q. You heard who?

7 A. Brittney.

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

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

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

13 A. Yes.

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

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

16 Q. Okay.

17 A. -- standing up in her car seat.

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

20 A. Yes.

21 Q. Do you know who he was?

22 A. No.

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

24 A. No.

25 Q. So you've since learned his name?

1 A. Yes.

2 Q. Okay. All right. So you go and tell Tommy --

3 A. Mm-hmm.

4 Q. -- what's going on, correct?

5 A. Yes, ma'am.

6 Q. All right. And then the two of you run outside, correct?

7 A. Yes, ma'am.

8 Q. And he went -- Tommy went first?

9 A. Yes, ma'am.

10 Q. And he ran out and went straight to Kyriell outside?

11 A. Yes, ma'am.

12 Q. And you never saw Thomas try and punch Kyriell at that time?

13 A. No, ma'am.

14 Q. He just grabbed him?

15 A. Yes, ma'am.

16 Q. And then at that point you said Kyriell was trying to punch Tommy?

17 A. Yes, ma'am.

18 Q. How far away was Kyriell from Tommy?

19 A. Like not even a step away 'cause he had just pulled him off of

20 Brittney.

21 Q. All right. And so when he pulled him off of Brittney, was Tommy

22 still holding Kyriell's arms?

23 A. No.

24 Q. And he never tried to punch Kyriell?

25 A. I didn't see it.

1 Q. Where are you standing when you see this?

2 A. In the driveway.

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

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

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

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

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

12 A. Mm-hmm.

13 Q. Is that a yes?

14 A. Yes.

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

16 A. Oh, I'm sorry.

17 Q. You're fine.

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

20 A. I didn't see the first punch.

21 Q. You didn't?

22 A. No.

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

24 A. No.

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

1 A. I see them fighting, but I didn't see the first punch.

2 Q. Well, okay, so they're both throwing punches at each other?

3 A. Yes.

4 Q. Did you ever see either one of them kind of holding onto the other

5 one so they couldn't throw punches?

6 A. No.

7 Q. And when they're trying to throw punches at each other, do they

8 move or do they stay right there by the car?

9 A. They moved.

10 Q. Where did they move to?

11 A. Like they get in the street and started -- well, they were running.

12 Thomas was running up and down the street like he didn't wanna fight him.

13 Q. Fight Kyriell?

14 A. Yes.

15 Q. So he's running away from him?

16 A. Yes.

17 Q. And Ezekiel then gets out of the car?

18 A. Yes.

19 Q. And so Ezekiel does what?

20 A. Start -- he starts fighting Tommy, too.

21 Q. Okay. So if Thomas or Tommy is running away from Kyriell, how

22 are they fighting? They're far apart from each other, right?

23 A. No, it wasn't like -- I can't explain it. Have you ever seen a fight?

24 It's like they were backing up from each other. Like it was a fight.

25 Q. Okay. So Tommy's --

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

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

6 A. Yes.

7 Q. And Ezekiel gets out?

8 A. Yes.

9 Q. And then he starts fighting Tommy?

10 A. Yes.

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

13 A. I seen -- yes.

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

16 A. Ezekiel.

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

20 A. Yes, ma'am.

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

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

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

1 A. Mm-hmm.

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

4 A. Mm-hmm.

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

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

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

11 A. Yes.

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

14 A. Yes.

15 Q. Okay. So who made the threat?

16 A. Kyriell.

17 Q. What did he say?

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

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

21 A. Yes.

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

23 A. Yes.

24 Q. Where is this taking place?

25 A. Outside.

1 Q. I know outside, but where outside?

2 A. Like a little down the street from the car.

3 Q. Okay. So in the middle of the street?

4 A. Yeah.

5 Q. And at what point do you leave with Londyn?

6 A. At the end.

7 Q. All right. Now do you remember telling the police that the reason

8 you took Londyn in the house was 'cause Brittney was yelling at you to take

9 her in the house, take her in the house? Do you remember telling the police

10 that?

11 A. I don't -- I don't know. I don't remember.

12 Q. But your testimony today is you didn't take Londyn in the house

13 because of what Brittney told you, correct?

14 A. I took her in the house because what both of them are saying.

15 Q. So what was Brittney saying?

16 A. She was saying, "Get my baby and take her in the house." And he

17 was saying, "You're never gonna see her again."

18 Q. Okay. And that's when he's fighting with Thomas he says this?

19 A. Yes.

20 Q. So when you were in your room, you heard something slam against

21 a car, but you didn't see it, correct?

22 A. I did see it when I looked out the window.

23 Q. All right. But you told the police you only heard it, you didn't see it,

24 correct?

25 A. I told them I heard it and then I saw it.

1 Q. Okay. Who else was outside during this?

2 A. Thomas (indiscernible) Tamisha.

3 Q. At what point did Tamisha come out?

4 A. She ran out with me and Thomas. She was behind me.

5 Q. Okay. Where was she when this was going on?

6 A. She was standing by me. She was moving around.

7 Q. At what point -- what point was it that you went back inside the

8 house?

9 A. Towards the end of the fight.

10 Q. How do you know it was the end of the fight?

11 A. Because Thomas ran in the house after me.

12 Q. Okay. So the minute you're in the house, Thomas runs in after

13 you?

14 A. Yes.

15 Q. Where did he go?

16 A. He went to go get something for his nose was bleeding.

17 Q. Okay. Well, don't tell me what you think he did. Just tell me

18 where in the house he went to.

19 A. He went in the kitchen to get a paper towel for his nose.

20 Q. Okay. Then what did he do?

21 A. He left.

22 Q. Where did he leave?

23 A. He left the house.

24 Q. Okay. How did he get out of the house to leave it?

25 A. I don't know. I was in the house.

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

3 A. Oh, he left out the back door.

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

5 A. Yes.

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

8 A. Yes.

9 Q. When did you see him again?

10 A. Like right before he turned his self in.

11 Q. He came home before he turned himself in?

12 A. Yes.

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

14 A. No.

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

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

19 Q. Did you ever see where Ezekiel ended up?

20 A. Like on the floor?

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

22 A. Yes.

23 Q. Where was he?

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

1 Q. So he was in front of a neighbor's house, not in front of yours?

2 A. Correct.

3 Q. Now you said that at some point Tommy fell when he was out in

4 the street?

5 A. Yes.

6 Q. How did he fall?

7 A. I think he just slipped. Like I don't know --

8 Q. He fell backwards?

9 A. No, he didn't fall backwards. He fell forward.

10 Q. But he slipped, it wasn't because Kyriell or Ezekiel were next to

11 him?

12 A. Correct.

13 Q. Now you saw the injury that Tommy had to his nose when he came

14 back in the house?

15 A. Yes.

16 Q. But you didn't see how he got that injury, did you?

17 A. Ezekiel socked him in the nose.

18 Q. Who?

19 A. Ezekiel.

20 Q. Ezekiel socked him in the nose?

21 A. Yes.

22 Q. Okay. But it wasn't Kyriell that did that?

23 A. No.

24 Q. When you went in the house with Londyn, where did you go?

25 A. First I was downstairs with her. That's when Tommy ran in behind

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

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

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

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

8 A. I called my mom.

9 Q. Was she not at home for this?

10 A. No.

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

12 A. Yes.

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

14 A. Yes.

15 Q. And you were watching from your window?

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

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

19 A. She said she was leaving in her car.

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

21 A. Yes.

22 Q. What was the next time you saw Brittney?

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

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

1 A. Correct.

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

3 A. Correct.

4 Q. Did you ever see Tommy with a weapon?

5 A. No.

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

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

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

13 A. Yes.

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

15 A. Yes.

16 Q. -- different?

17 Just the same stuff?

18 A. Yes.

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

22 A. Brittney.

23 Q. When did Brittney tell you that?

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

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

1 MR. LONG: Objection. Speculation. Asking --

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

4 BY MS. DIGIACOMO:

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

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

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

9 A. Yeah.

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

11 A. Yeah.

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

13 A. No.

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

15 A. No.

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

18 A. Yes.

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

21 A. I go upstairs and look out the window.

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

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

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

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

4 A. Mm-hmm.

5 Q. Yes?

6 A. Yes.

7 Q. Okay.

8 A. Sorry.

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

11 A. No.

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

14 A. Oh, yes.

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

17 A. Yes.

18 Q. But he actually goes and gets the car?

19 A. Yes.

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

22 A. No.

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

25 A. Yes, ma'am.

1 Q. He didn't get out of the car until Kyriell and Tommy were --  
2 A. Fighting.  
3 Q. -- fighting?  
4 A. Yes.  
5 Q. When Tommy and Kyriell are fighting, that's when Brittney was  
6 yelling at Tommy to stop it, correct?  
7 A. She was yelling at both of them.  
8 Q. I know, but she specifically said, "Stop, Tommy. Stop," correct?  
9 A. Yes.  
10 Q. Now you originally told the police that it was Kyriell that busted  
11 Tommy's nose, correct?  
12 A. I don't remember.  
13 Q. Okay. But today it was Ezekiel that busted Tommy's nose, correct?  
14 A. Yes.  
15 Q. Now when you said Kyriell said, "I have something for you. Go get  
16 my thing," do you remember saying that?  
17 A. Yes.  
18 Q. Okay. At what point in the fight was that said?  
19 A. Like beginning middle when they were first -- when he first --  
20 when Ezekiel first got out the car and they were running behind it in the middle  
21 of the street, that's when he said it.  
22 Q. Okay. So Thomas -- or, excuse me. Kyriell tells Ezekiel, "Go get  
23 my thing."?  
24 A. Yes.  
25 Q. But Ezekiel never ran back to the car at that point, correct?

1 A. Correct.

2 Q. He stayed in the fight?

3 A. Yes.

4 Q. Now before Brittney left, you were calling her stupid and yelling at  
5 her, correct?

6 A. Yes.

7 Q. And she was yelling back at you?

8 A. Yes.

9 Q. And you have no idea what was going on outside when you and  
10 Brittney are having this exchange inside, correct?

11 A. What Thomas did and Ezekiel, ma'am?

12 Q. Yes.

13 A. Correct.

14 Q. And you -- again, you never saw Tommy and Kyriell in a hold  
15 where they were like (indiscernible) with each other, not punching, correct?

16 A. When Brittney was telling -- you know, Brittney was telling him to  
17 stop, she was kind of getting in the middle of it, so.

18 Q. So Brittney was trying to break up Kyriell and Tommy from fighting?

19 A. Yes, she did.

20 Q. How did she do that?

21 A. When she got in the middle, Tommy backed up and got in the  
22 street.

23 Q. Okay. So then the fight wasn't going on anymore?

24 A. It was.

25 Q. Okay. I'm --

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

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

4 A. While he's getting out the car.

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

7 A. They were.

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

10 A. Yes.

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

14 A. I saw Tommy fall.

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

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

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

19 A. Uh-huh.

20 Q. Yes?

21 A. Yes.

22 Q. Okay.

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

24 Q. They weren't fighting?

25 A. Yes.

1 Q. Okay. Did you see Tommy get up?

2 A. Yes.

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

4 A. Yes.

5 Q. What were Ezekiel and Kyriell doing?

6 A. They were down the street.

7 Q. They were down the street?

8 A. Yeah.

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

12 A. Yes.

13 MS. DIGIACOMO: I have nothing further.

14 THE COURT: Any redirect?

15 MR. LONG: Just briefly.

16

17 **REDIRECT EXAMINATION**

18 BY MR. LONG:

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

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

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

1 A. No.

2 Q. Did you see that he had a knife?

3 A. No.

4 Q. Does he usually have a knife?

5 A. Yes.

6 Q. Why?

7 MS. DIGIACOMO: Objection. Speculation.

8 MR. LONG: If she knows, it's not speculation.

9 MS. DIGIACOMO: And it -- no, 'cause it would be hearsay if he  
10 told her.

11 THE COURT: For her to know why your client usually has a knife  
12 on him, I think at this point would be speculation. I'm gonna sustain the  
13 objection.

14 BY MR. LONG:

15 Q. Do you know what Thomas does for work?

16 MS. DIGIACOMO: Objection. Relevance.

17 THE COURT: It goes towards the knife?

18 MR. LONG: Yes.

19 THE COURT: I'll allow it.

20 BY MR. LONG:

21 Q. Do you know what kind of work Thomas does?

22 A. (No audible response).

23 Q. If you don't know, it's fine.

24 A. No.

25 Q. Okay.

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

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

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

5 A. It had blood on there.

6 Q. How much?

7 A. A lot.

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

10 A. Watching TV.

11 Q. Okay. Volume on?

12 A. Yes.

13 Q. How loud was your television?

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

16 Q. Who?

17 A. Thomas.

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

20 A. Yes.

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

24 A. Yes.

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

1 THE COURT: All right.

2

3

**RECROSS-EXAMINATION**

4 BY MS. DIGIACOMO:

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

7 A. Socking him.

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

10 A. Yes.

11 Q. You said Ezekiel immediately punches Tommy, correct?

12 A. Yes.

13 Q. What does Tommy do at that point?

14 A. He backs up and then they start fighting.

15 Q. Who's "they"?

16 A. Tommy, Ezekiel, Kyriell.

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

18 A. Yes.

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

21 A. Yes.

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

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

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

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

3 A. Not like that but --

4 Q. Tommy?

5 A. Yes.

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

8 A. Yes.

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

10 A. No

11 Q. No car ever comes down the street?

12 A. No.

13 Q. Ever?

14 A. No.

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

17 A. The last thing I saw was Tommy fall.

18 Q. Okay. But he fell --

19 A. Coming towards the house.

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

21 A. Yes.

22 Q. Did you ever see Ezekiel fall?

23 A. No.

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