IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS CASH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82060

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Petition for Writ of Habeas Corpus (Post-Conviction)
Eighth Judicial District Court, Clark County

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ROUTING STATEMENT

This case is a post-conviction appeal that involves a challenge to a judgment of conviction involving a Category A felony; therefore, this case is not presumptively assigned to the Court of Appeals under NRAP 17(b)(3).

STATEMENT OF THE ISSUES

1. Whether the District Court erred by denying Appellant's request for post-conviction counsel.
2. Whether the District Court properly concluded an evidentiary hearing was not warranted when Appellant's claims are barred under NRS 34.810(1)(b)(2) and/or are meritless.
3. Whether the District Court properly declined to find cumulative error regarding denial of counsel in post-conviction proceedings and evidentiary hearing.

STATEMENT OF THE CASE

On April 19, 2018, the State filed an Amended Information charging Thomas Cash (hereinafter "Appellant") with MURDER WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.010, 200.030, 193.165) and BATTERY WITH INTENT TO KILL (Category B Felony - NRS 200.400.3). Appellant's Appendix, Volume 6 ("6AA") at 1342-1346. The State attached an Amended Notice of Intent to Seek Punishment as Habitual Criminal to the Amended Information. Id.

On June 18, 2018, Appellant's jury trial commenced. 1AA at 1-265. After eight days of trial, the jury found Appellant guilty of SECOND DEGREE MURDER WITH USE OF A DEADLY WEAPON and not guilty of BATTERY WITH INTENT TO KILL. 6AA at 1347-48. On August 20, 2018, the Court adjudicated Appellant guilty. Id. At Appellant's sentencing hearing the State argued for habitual treatment and provided certified copies of Appellant's prior Judgments of Conviction. 6AA at 1349-1380. After argument by both parties, the Court sentenced Appellant, for Count 1, life without the possibility of parole under the large habitual criminal statute. Id. The Judgment of Conviction was filed on August 24, 2018. 6AA at 1347-48.

On September 12, 2019, the Nevada Supreme Court affirmed Appellant's Judgment of Conviction, but remanded for the Court to correct a clerical error in the habitual criminal statute citation. 6AA at 1436-42.

On August 3, 2020, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). 6AA at 1443-64; 1506-09. The State filed its Response on September 18, 2020. 7AA at 1510-49. On October 7, 2020, the District Court denied Appellant's Petition for Writ of Habeas Corpus. 7AA at 1550-53. On November 2, 2020, Appellant filed a pro per Notice of Appeal. 7AA at 1597. On November 4, 2020, the District Court filed the Findings of Fact, Conclusions of Law and Order. 7AA at 1555. On November 17, 2020, the District Court filed the Notice of Entry of Order. 7AA at 1554-96. On September 6, 2021, Appellant filed an Opening Brief in the Supreme Court of Nevada. The State's response follows.

STATEMENT OF THE FACTS

On December 11, 2017, a verbal argument led to Appellant, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. 4AA at 983.

The events of this day started when Kyriell Davis, twenty-eight years Appellant's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their child. 4AA at 878-879, 886-887, 983. Eventually, Kyriell pushed Brittney away from him with his hands. 4AA at 887-88. Upon hearing this verbal

argument, Appellant came down to intervene. 4AA at 889-90. Appellant asked whether Kyriell hit Brittney—Brittney answered no and told Appellant to mind his own business. 4AA at 888-89.

Thereafter, Appellant and Kyriell tussled. 4AA at 890-91. Appellant started this fight with Kyriell: multiple witnesses observed Appellant punch towards Kyriell when Kyriell had his back turned to Appellant, without provocation by Kyriell. 4AA at 889-893, 910-911, 961-962. Appellant later admitted he threw the first punch. 6AA at 1242. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. 4AA at 879-880, 885, 895-896, 901, 937. At about that time, two cars drove up the road and separated Ezekiel and Appellant from Kyriell. 4AA at 896. Kyriell saw a flash in Appellant's hand as the cars came by and tried to warn Ezekiel. Id. While Appellant and Kyriell were separated, Appellant stabbed Ezekiel straight through the heart. 3AA at 698, 4AA at 896. Ezekiel collapsed in the middle of the street and quickly died. 3AA at 702-03.

Kyriell testified about his recollection of the fight and the events leading up to it. 4AA at 877-96. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. 4AA at 889. He then observed Brittany yelling at Appellant. 4AA at 890. Appellant took a swing at Kyriell as he attempted to put his baby in her car seat, when his back was towards

Appellant. 4AA at 890-91. After Appellant tried to punch Kyriell, Kyriell and Appellant interlocked and Appellant tried to slam him to the ground. 4AA at 891. Kyriell never swung his fist at Appellant. 4AA at 892-93. Appellant and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. 4AA at 893-96. Kyriell saw a flash from Appellant's hand as a car drove in between the group, leaving Appellant and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. 4AA at 896. Soon after, Ezekiel fell to the ground after being stabbed by Appellant. Id.

Appellant's actions after the victim died demonstrated his consciousness of guilt. Appellant did not call 911—even though he later told police that Kyriell said he would shoot up the house after Kyriell and Brittany verbally fought. 5AA at 1001, 6AA at 1248, 4AA at 889. Despite these alleged threats and after he killed Ezekiel, Appellant locked the door, left his home, and ran from the scene. 4AA at 911. In his haste to leave, Appellant left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. 4AA at 822-823, 829, 954-955. Appellant escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. 5AA at 1032-35. Appellant also destroyed and hid the murder weapon, a knife. 6AA at 1244. Appellant did not go back to his home until just after the police left and did not account for where he went between 7:00 pm and 2:00 am

the night of the crime, when he finally turned himself in to police. 5AA at 1041; 6AA at 1245.

Appellant initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Appellant throw the first punch. 4AA at 888-896, 910-911, 5AA at 1228, 6AA at 1241-43. Brittney told police that Appellant, Brittney's stepdad, threw the first punch. 4AA at 961, 476. Brittney also stated Kyriell did not hit her. 4AA at 961, 979. Moreover, multiple witnesses stated, including Appellant, that only Appellant had a weapon. 6AA at 1242. Appellant told police he stabbed Ezekiel because he did not want to get hit again. 6AA at 1243, 1252.

Brittany also testified about her recollection of the fight. 4AA at 956-973. After she argued with Kyriell, Appellant came out of the house and tried to punch Kyriell. 4AA at 961. After Appellant started this fight with Kyriell, both Appellant and Kyriell locked together in a bear hug and after Appellant's first punch, no one threw punches. 4AA at 962-63. Both men were "equally locked up." 4AA at 963. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. 4AA at 962-63. Brittany told police she did not feel scared or threatened during her verbal argument with Kyriell. 4AA at 976. She also said that during the argument, Kyriell did not hit her or slam her into a car. 4AA at 961, 979.

Through their actions, Appellant's family telegraphed that Appellant did not act in self-defense. Appellant's family did not call the police; instead, they went back into the house and shut the door. 5AA at 1148, 1158. Furthermore, Appellant's family did not bring out towels or water or ask if the victim needed any help. 4AA at 925. Ultimately, Appellant's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. 4AA at 819-21. After Appellant left the scene, Appellant spoke with family members while police were outside his home. 5AA at 1228. Appellant told his family he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. 5AA at 1228.

SUMMARY OF THE ARGUMENT

This Court should affirm the denial of Appellant's Petition for Writ of Habeas Corpus for three main reasons. First, the District Court did not abuse its discretion by denying Appellant's request for post-conviction counsel because NRS 34.750 factors weigh against entitling Appellant to counsel. Second, an evidentiary hearing was not necessary because every claim Appellant asserted was either procedurally barred and or was repelled by the record. Third, the cumulative error is inapplicable to denial of request for counsel and evidentiary hearing. Even if it was, there are no errors.

/ / /

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S REQUEST FOR POST-CONVICTION COUNSEL BECAUSE APPELLANT IS NOT ENTITLED TO POST-CONVICTION COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution…does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when Appellant is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

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

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

> counsel to represent the Appellant. In making its determination, the court may consider whether, among other things, the severity of the consequences facing the Appellant and whether:
>
> (a) The issues are difficult;
> (b) The Appellant is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

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

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

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

Here, Appellant's case is distinguishable from Renteria-Novoa; Appellant has not satisfied the statutory factors for appointment of counsel under NRS 34.750. First, unlike the Appellant in Renteria-Novoa who faced difficulties with understanding the English language, Appellant does not claim he cannot understand English or cannot comprehend the instant proceedings. The Nevada Supreme Court indicated Renteria-Novoa's language barrier was a major indication he may have had difficulty understanding the proceedings. This is not the case here. Appellant does not have a language barrier, thus there is a strong indication he is able to understand the proceedings. Furthermore, it is clear Appellant can comprehend the instant proceedings based upon the filing of his Petition.

Appellant attempts to show his difficulty in understanding the proceedings by claiming the District Court penalized him for making certain mistakes in his petition. Appellant's Opening Brief "AOB" at 10. He claims the Court "[i]n its Order denying

Cash's pro per petition, the district court repeatedly refers to Cash not citing proper portions of the transcript (AA 1570-1572) confusing witnesses with one another (AA 1571), that his assertions are naked, not supported by case law and that he does not complete his argument regarding how an error prejudiced him (AA 1576-77; 1579) and that his claims are belied by the record because a claim is not worded correctly. AA 1569." AOB at 14-15. These assertions, however, are a mischaracterization of the Court's findings.

Appellant's Appendix 1570-1572 deals with claims of prosecutorial misconduct. The Court does not deny Appellant's claims because he did not cite to the transcript correctly, but rather the Court finds "[a]s a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222." Findings of Fact, Conclusions of Law and Order "FCL" 7AA at 1569. The Court further explained Appellant's claims would fail even if they were not procedurally barred because he did not "demonstrate good cause given all the facts underlying th[ese] claim[s] were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless." FCL, 7AA at 1569-70.

Despite finding the claims waived under NRS 34.810(1)(b)(2), the Court thereon provided a thorough analysis for resolving claims of prosecutorial misconduct and addressed each of Appellant's allegations. Id. at 1570. It concluded that even if the claims were not waived, the claims failed the two-prong test for prosecutorial misconduct. Id. The first complaint addressed was that the State allegedly expressed its personal opinion that Davis punched Appellant to get the victim away, which diluted Appellant's theory of self-defense. Id. This claim was found meritless because it was not supported by anything in the record and not because Appellant did not cite the record correctly. Id. at 1570-71.

Similarly, Appellant's second claim that the State incorrectly summarized witness-Flores' testimony was denied because it was waived under NRS 34.810(1)(b)(2) and not because Appellant confused witnesses. Id. at 1569-70. Nonetheless, the Court analyzed the claim and deemed it meritless because the record did not support Appellant's assertion. Id. at 1571.

Appellant's third claim that the State fabricated Flores' testimony was also denied on NRS 34.810(1)(b)(2) procedural grounds. Id. at 1569-70. In its analysis, the Court provided the full context of Flores' testimony and determined the State did not fabricate Flores' testimony. Therefore, the claim based on selective reading was meritless in addition to being procedurally barred. Id. at 1571, 1569.

After finding Appellant's fourth claim—second claim of testimony fabrication—waived under NRS 34.810(1)(b)(2), the Court addressed the claim on the merits. Id. at 1569, 1572. It held the State did not fabricate Flores' testimony. Id. at 1572. The Court denied Appellant's claim because it was simply not factually supported by the record, and not to penalize Appellant.

Appellant's fifth claim that the State asserted a fact not in evidence – Appellant stabbed Device twice – was barred under NRS 34.810(1)(b)(2). Id. at 1569-70, 1572. Additionally, the Court noted the claim was meritless because it was unsupported by the record. Id. at 1572.

Likewise, Appellant's issues regarding jury instructions were procedurally barred because they were not raised on appeal. Id. at 1574. But the Court did not stop there. Id. It addressed the issues and found they failed because they were naked assertions and meritless. Id.

Appellant complained about Jury Instructions Nos. 1, 17, 20, and 31. 7AA at 1575-79. Jury Instruction No. 1 discussed the judge's and jury's duties and instructed the jury to only apply the law. Id. at 1575. Jury Instruction No. 17 dealt with the use of a deadly weapon and the appropriate verdict if they found a deadly weapon was or was not used. Id. Jury Instruction No. 20 provided the definitions for battery and Offense of Battery with Intent to Kill. Id. Jury Instruction No. 31 instructed the jury to determine the Appellant's guilt or innocence based on the evidence of the case.

Id. Appellant asserted these instructions were not neutral and unbiased because they informed the jury that they could find Appellant guilty if certain conditions were met or not guilty if certain conditions were not met. Id.

In addition to these claims being naked assertions under Hargrove, 100 Nev. at 502, 686 P.2d at 225, the Court found the jury instructions were accurate statements of law. Id. at 1576. Thereby, the Court fulfilled its duty by providing proper instructions pursuant to Crawford v. State, 121 Nev. 744, 121 P.3d 582 (2005). Id.

Appellant further complains Jury Instructions Nos. 21, 25, and 27 did not instruct the jury they could find Appellant not guilty and these instructions conflict with Jury Instructions Nos. 22 and 23. Id. He further asserts Jury Instruction No. 23 failed to define "negate" and disagrees with the law that fear is an insufficient justification for killing.

Jury Instruction No. 21 defined self-defense; No. 22 provided the sufficiency for a killing; No. 23 explained an honest but unreasonable belief in the need for self-defense did not negate malice and did not reduce the offense from murder to manslaughter. Id. Jury Instruction No. 25 explained a person's right to defend from apparent danger and when such person is justified in killing. Id. at 1577. Jury Instruction No. 27 described the level of danger needed to justify a killing in self-defense. Id.

In addressing the merits of Appellant's claims, the court held as a preliminary matter, each of the instructions were accurate statements of law. Id. Noting Jury Instructions Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P3d 52, 59 (2000), a Nevada Supreme Court case, wherein stock self-defense instructions were provided. Id. The Court further held Appellant's claim – that the jury instructions did not instruct the jury they could have found Appellant innocent – meritless because the instructions did. Id. Jury Instruction No. 17 stated in part, "if you find a defendant guilty. […] If you find beyond a reasonable doubt that a deadly weapon was used..." Id. at 1575. The first sentence of Jury Instruction No. 31 was "You are here to determine the guilt or innocence of the Defendant." Id. In further support for its finding, the Court noted Jury Instruction No. 30, the Reasonable Doubt Instruction, was provided. Id. at 1577. Regarding the word "negate," Appellant's claim failed because "negate" is not a legal term required to be defined. Id.

Appellant also claimed Jury Instruction No. 37 should have been separated because it "biasly express[ed] first degree murder penalty." Id. at 1578. The first part instructed the jury not to consider the penalty or punishment and the second part explained the penalty or punishment would be considered at a different hearing if the verdict was Murder in the First Degree. Id. The Court responded the instruction

was an accurate statement of law. Id. at 1579. Accordingly, his claim failed as a naked assertion. Id.

All these claims are based on a loose and selective reading of the record. To an extent, this is understandable as Appellant wishes to make the best possible claims for his petition. This, however, does not mean that Appellant did not understand the proceedings. Pursuant to Nevada Rules of Civil Procedure Rule 52, the Findings of Fact, Conclusions of Law and Order requires that the court "find the facts specially and state its conclusions of law separately." And this is exactly what the District Court did when it explained the factual reasons for the meritless claims after finding that the claims were waived such as Appellant confused witnesses and cited incorrectly to the record. This factor, unable to understand proceedings, weighs against the Appellant.

Regarding the second factor, none one of the issues Appellant raises are difficult because his claims are either waived as substantive claims, fail to provide good cause because they are based on information Appellant had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Each claim is fully discussed below in Section II. Because Appellant's claims are barred from consideration or lack merit, not only are the issues not difficult, but they are also

non-existent. Moreover, because Appellant failed to raise these claims on direct appeal, they are procedurally barred regardless of whether he is appointed counsel or not. While the Nevada Supreme Court stated in Renteria-Novoa that the decision to appoint counsel does not necessarily depend on whether a petitioner has raised claims that have merit, neither that case nor any other Nevada case states that counsel must be appointed to present claims that are waived for habeas review. Thus, Appellant is attempting to modify the legal standard by claiming his failure to present cognizable claims necessitate the appointment of counsel. The difficulty of issues factor weighs heavily against Appellant.

Regarding the third factor, as consequence of Appellant's claims being barred from consideration and or lack merit, there is no need for counsel to proceed with discovery. As this Court pointed out in Renteria-Novoa, the decision to appoint counsel is based on whether counsel's assistance "is essential to accomplish a fair and thorough presentation of a defendant's claim(s) for collateral relief." Renteria-Novoa 133 Nev. 75, 77-78, 391 P.3d 760, 762 (2017). Counsel's assistance is not essential in Appellant's case because his claims are procedurally barred or have already been found meritless. This factor also weighs heavily against Appellant.

Lastly, although Appellant's consequences are severe as he is serving a sentence of life without the possibility of parole, this fact alone does not necessitate the appointment of counsel. It should be noted that Appellant understood he faced

the possibility of being found guilty of second-degree murder and being sentenced as a habitual criminal. 1AA at 007. Appellant declined the Court's offer to have his counsel repeat the negotiations and stated, "I heard and understood them clearly." Id. He then stated four (4) times he did not want to accept the negotiations, including when the Court told him he was "taking the chance of being found guilty of second degree…and then facing habitual criminal." Id.

In conclusion, the District Court did not abuse its discretion in denying Appellant's request for post-conviction counsel because all three (3) NRS 34.750 factors weigh against Appellant's favor and his case is distinguishable from Renteria-Novoa. Appellant does not have a language barrier which is a strong indication that he understands the proceedings. All of the issues are procedurally barred and/or are belied by the record. Accordingly, none of the issues are difficult and thus counsel is not necessary to proceed with discovery.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE PETITION WITHOUT AN EVIDENTIARY HEARING BECAUSE APPALLANT FAILED TO PRESENT CLAIMS WHICH WOULD ENTITLE HIM TO POST-CONVICTION RELIEF

NRS 34.770 determines when a defendant is entitled to an evidentiary hearing.

It reads:

> 1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

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

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

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

The District Court correctly denied an evidentiary hearing. An expansion of the record is unnecessary because Appellant has failed to assert any meritorious claims and the Petition can be disposed of with the existing record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; Mann, 118 Nev. at 356, 46 P.3d at 1231. Even if his claims regarding post-arrest silence, illegal sentence, prosecutorial misconduct, and jury instructions were meritorious, these claims are barred from consideration under NRS 34.810(1)(b)(2). Appellant is not entitled to relief.

Likewise, Appellant's ineffective assistance of counsel claims are contradicted by the record and/or are so vague that they lack the requisite specificity

to warrant an evidentiary hearing. The State will discuss every issue and sub-issue to demonstrate an evidentiary hearing was not warranted, starting with Ground Six because that is the ground Appellant specifically focused under this section.

Ground Six: Trial Counsel was Ineffective

Appellant claims trial counsel was ineffective for failing to: (1) investigate the neighborhood and named witnesses, Angel Turner and Sandi Cash and (2) hire a pathologist as an expert the positioning of the victim at the time of his death and other details regarding the stabbing, which would have supported Appellant's claim of self-defense. AOB at 20, 13.

He argues counsel did not canvass Appellant's neighbors to determine what they saw. AOB at 13. The District Court properly held this claim was belied under Molina because Appellant did not show how such testimony would have changed his trial's outcome, let alone identify what neighbors should have been interviewed. FCL, 7AA at 1581.

Appellant also argues counsel was ineffective because an expert pathologist was not used. The Court properly found this a failing claim for two reasons. FCL, 7AA at 1581. First, his claim failed under Molina because Appellant did not show how the testimony of a pathologist hired by Appellant would have changed the trial's outcome. Id. Second, it is counsel's strategic decision which witnesses to call. Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002). Id. Furthermore, this claim also fails under

Hargrove because the record shows that a pathologist did testify, Dr. Leonardo Roquero. 3AA at 682. Dr. Roquero is a medical examiner at the Clark County Office of the Coroner Medical Examiner with an education based on pathology, which focuses on the cause and manner of death. 3AA at 683. Dr. Roquero is an employee of the Clark County Office of the Coroner Medical Examiner and is not employed by the State. 3AA at 683. Thus, he is an independent, unbiased medical professional available to both the State and Defense. In fact, Dr. Roquero did determine the angle of which the knife entered the victim's body and the direction the stab wound traveled. 3AA at 699, 711. As an unbiased professional with years of experience, he testified that an autopsy can and did calculate the length and direction of the stab wound, but an autopsy cannot scientifically determine whether the victim was stabbed while standing over somebody or whether the perpetrator was on their knees when they stabbed the victim. 3AA at 714. Appellant's specific reason for wanting a pathologist was addressed at trial.

As with Appellant's other claims of ineffective assistance of trial counsel, the District Court properly held Appellant's claim that defense counsel was ineffective for failing to interview Sandi Cash failed under Molina v. State, 120 Nev. 185, 87 P.3d 533 (2004). 7AA at 1582. He could not establish how Sandi's testimony would have changed the outcome of his trial. Id. In his instant brief, Appellant expands his argument to include (1) Sandi's testimony would have corroborated Appellant's self-

defense argument; (2) an evidentiary hearing would have determined if Appellant and/or Antoinette White (Appellant's fiancé) knew of the incident Sandi described in her affidavit or knew of "other violent incidents that had occurred between Brittany and Davis"; and (3) the Court misapplied Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984);. AOB at 22-24.

First, in addition to the District Court's findings mentioned above, Appellant's claim fails because it contradicts the record. Detective Gills testified Sandi Cash's statement was not taken at the crime scene because she was not a witness at the scene and none of the witnesses mentioned her. 5AA at 1038-40. Brittney Turner testified only her two sisters, Appellant, and Appellant's sister, Sharon, were inside the residence when Kyriell arrived. 4AA at 954-55. Antoniette White testified she arrived at the residence after 2:00 am and "Sandy wasn't there. Sandy, she didn't come until later." 5AA at 1104. Because Appellant's claim is repelled by the record, his claim fails. Marshall, 110 Nev. at 1331.

Second, the alleged domestic violence incident Sandi Cash described in her affidavit is irrelevant because the District Court had already held that prior incidents of domestic violence between Kyriell Davis and Brittney Turner were inadmissible. 5AA at 1105-06. This can be reasonably inferred from the following side bench during Day 6 of the jury trial:

[Bench conference begins]

MR. LONG: The State asked this witness if Brittney lied about the domestic battery --
MS. DIGIACOMO: No, she said Brittney -- she said Angel lied.
MR. LONG: That Angel had lied about the domestic battery. And I flunk the door open and she asked -- and she said --
THE COURT: No.
MR. LONG: -- after the police report that this happens all the time --
THE COURT: No --
MR. LONG: -- between Kyriell and Brittney.
THE COURT: -- about that night.
MS. DIGIACOMO: Yeah, I was talking --
THE COURT: About the shaking of that night.
MS. DIGIACOMO: Right.
THE COURT: Not any other domestic battery.
MR. LONG: Yeah, but --
MS. DIGIACOMO: Yeah, she was talking about --
THE COURT: No, that's --
MS. DIGIACOMO: -- Angel lied that it happened.
THE COURT: Yeah.
MS. DIGIACOMO: And started the whole thing.
THE COURT: They didn't open the door to that.

5AA at 1105-06.

Thus, contrary to Appellant's claim, Antoniette White could not have been questioned about this alleged incident or any other incidents between Brittney and Kyriell.

Appellant appears to be claiming that the District Court misapplied Strickland in reviewing Appellant's claim ineffective assistance of counsel for failing to interview and call Sandi Cash as a witness. AOB 22-23. Appellant claims Sandi, if interviewed and called, would have provided new information – presumably the prior incident of domestic violence discussed above. Id. However, Appellant misconstrues the Court's findings because the Court correctly applied Strickland.

7AA at 1582. The Court explained Appellant "cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64." 7AA at 1581-82. The Court meant Appellant failed both prongs of Strickland. Appellant did not show counsel fell below an objective standard of reasonableness and that, but for counsel's error, there was a reasonable probability the trial's outcome would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (*citing* Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068). The Court concluded Sandi's testimony would not have undermined confidence in the outcome because there was a lot of evidence to support Appellant did not act in self-defense: "the jury was presented with evidence demonstrating Petitioner did not act in self-defense, including that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." 7AA at 1581-82.

Appellant alleges more ineffective assistance of counsel claims under Ground Six on page fourteen of his instant brief. Appellant further asserts trial counsel was ineffective for failing to: (1) investigate Appellant's case and prepare for trial; (2) establish Appellant's theory of defense through the jury instructions; (3) object to

Kyriell Davis' testimony; (4) protect Appellant's post arrest silence; and (5) impeach Kyriell Davis. AOB at 13-14.

a. Failure to investigate and prepare for trial

Appellant raises four sub-issues under this claim. First, he argues trial counsel prepared for trial by merely reviewing the State's open file. AOB at 13. He claims the only reason he had witnesses testify for the defense was because he told them to come to court. Id. The District Court found this claim failed under Molina, 120 Nev. at 192, 87 P.3d at 538, because Appellant did not show what a better investigation would have provided. FCL, 7AA at 1581. Appellant's three other sub-issues regarding calling a pathologist, canvassing neighbors, and calling Sandi Cash are discussed above.

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

Appellant complains counsel failed to present Appellant's theory of defense and offer jury instructions consistent with his self-defense theory. AOB at 14. Like many of his claims, this claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. The District Court held "Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on a self-defense theory. Those jury instructions properly provided the jury with the law to determine whether Appellant was justified under a theory of self-defense for protecting his stepdaughter, Brittney Turner. Id. Requesting an additional instruction would have therefore been futile.

Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument." FCL, 7AA at 1582.

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

Because Appellant's instant brief only provides the title of his sub-issue, the State derives the details of this sub-issue from the Findings of Fact, Conclusions of Law and Order in 7AA at 1583. Appellant claims counsel failed to object to Kyriell's testimony during trial wherein Kyriell's testimony was narrative in nature and repetitive. Id. Specifically, counsel should have objected when Kyriell discussed the fight he had with Appellant that ultimately led to Ezekiel's death after Ezekiel intervened to break up the altercation. Id.

The District Court denied Appellant's claim because "[a]s a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167." Id. The Court further held counsel's actions were not unreasonable because counsel could have concluded that a series of pointless objections could have harmed his credibility with the jury. 7AA at 1583-84. Even if counsel would have objected, the State would have asked questions to break up Kyriell's testimony to elicit information from its witness who saw Appellant commit the murder. 7AA at 1584. Essentially, Appellant did not satisfy either of the Strickland prongs. Id.

c. Failure to protect post-arrest silence

Appellant claims counsel failed to protect Appellant's post-arrest silence by not objecting to the State's rebuttal witness, Detective Gillis, and not requesting such testimony to be first held outside of the jury's presence to determine the prejudicial nature of said testimony. This claim has already been adjudicated as meritless because Detective Gillis' name appeared on the State's witness list prior to trial and Appellant did not unambiguously invoke his right to remain silent regarding his whereabouts or his actions after stabbing the victim. Id. "Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103." Id.

d. Failure to impeach Kyriell Davis' testimony

Because Appellant's instant brief only provides the title of his sub-issue, the State derives the details of this sub-issue from the Findings of Fact, Conclusions of Law and Order in 7AA at 1585. Appellant asserts counsel should have impeached Kyriell through several witnesses after Kyriell committed perjury by testifying that Brittney left the scene when the fight occurred, and Appellant had to call her to return for the baby. Id.

The District Court denied this sub-issue as well. Id. Appellant did not cite to the record to support his perjury contention. Id. Moreover, the Court held that even if he had, the trial's outcome would have been the same because Brittney's whereabouts during the fight was not the pinnacle of Appellant's self-defense theory.

Id. As such, Kyriell's impeachment was unnecessary to prove Appellant's self-defense theory. Id.

Additionally, Appellant's claim that trial counsel was ineffective because defense counsel did not interview and call Angel Turner to testify also fails. Despite the Court ruling this claim is belied by the record (7AA at 1589), Appellant now claims that Angel heard Kyriell threaten Brittney that she would never see their daughter, Lyndon, again. AOB at 24. Trial counsel allegedly fell below the objective standard of reasonableness because the jury did not hear this information, which supported Appellant's argument that he intended to protect Brittney. Id. Appellant's claim, however, is still belied by the record under Hargrove because the jury did hear this information on several occasions from multiple people. 4AA at 944; 4AA at 956, 958; 6AA at 1265, 1267. Kyriell admitted to threatening Brittney that she would not see Lyndon again. 4AA at 944. "Only thing I said back to her was…when you give me my kids, you ain't never got to come get them, period." Id. Brittney testified to his threat. 4AA at 956, 958. "And he [Kyriell] starting s[]aying, like, I'm not going to see Londyn anymore." 4AA at 956. Britnney responded, "Yeah" when State asked, "And you said that at some point he said, like, I'm not going – you're not going to see Londyn anymore, or something to that affect?" Id. The State also mentioned the threat twice in its closing argument. 6AA at 1265, 1267. "And during that argument, he told Brittney, fine, you're going to behave like that, you're never

going to see your daughter again." 6AA at 1265. "And that during that argument, Kyriell tells her that she is never going to see Lyndon again." 6AA at 1267. The jury had this information when it found Appellant guilty. Therefore, an evidentiary hearing is not necessary to ask counsel why he did not elicit this information from Angel.

Appellant contends his appellate counsel was also ineffective. His claim is based on appellate counsel's failure to cite relevant authority in a prosecutorial misconduct claim. AOB 25. Specifically, appellate counsel claimed the State twice improperly argued Appellant had duty to retreat but did not present any authority. Id. This claim fails because it is belied by the record.

A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). In order to satisfy Strickland's second prong, the defendant must show the issue would have had a reasonable probability of success on appeal. Id.

Appellant cannot show his prosecutorial misconduct claim had a reasonable probability of success on appeal because the record belies the claim. The State argued Appellant could have retreated, in the context of explaining that self-defense claims are not available to the original aggressor unless the original aggressor attempts to retreat. Culverson v. State, 106 Nev. 484, 481, 797 P.2d 238, 241 (1990) ("a person who as a reasonable person believes that he is about to be killed or

seriously injured by his assailant does not have a duty to retreat unless he is the original aggressor."). This statement of law directly applies to the facts of the case; multiple witnesses stated Appellant threw the first punch during the fight and Appellant claimed that he killed the victim, in self-defense. 4AA at 889-892, 910-911, 967; 5AA at 1094-1095, 1166. Thus, an evidentiary hearing is futile for the purposes of hearing a meritless claim belied by the record.

Appellant was not entitled to an evidentiary hearing based on the rest of his claims either. Pursuant to NRS 34.810(1)(b)(2), [t]he court shall dismiss a petition if the court determines that [t]he petitioner's conviction was the result of a trial and the grounds for the petition could have been [r]aised in a direct appeal….

Ground One: Appellant alleged the State used Appellant's post-arrest silence against him. AOB at 13. The District Court held this claim was waived for failure to raise on direct appeal pursuant to NRS 34.810(1)(b)(2). FCL, 7AA at 1564.

Ground Two: Appellant alleges his sentence as a habitual criminal offender is illegal. AOB at 13. This issue was already litigated on direct appeal and the Nevada Supreme Court concluded Appellant was appropriately adjudicated as a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4; FCL, 7AA at 1569. Thus, Petitioner's claim is barred under the law of case doctrine which states that issues previously decided on direct appeal may not be reargued in a habeas

petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (*citing* McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)).

Ground Three: Appellant alleges eight instances of prosecutorial misconduct: (1) The State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. (2) The State improperly stated witness, Flores, could see the altercation, even though Flores testified she could see the incident when her front door was open, and the altercation was nearly over. (3) The State fabricated Flores' testimony when it argued Flores heard the victim's impact and ran outside. (4) The State improperly claimed Flores provided testimony that she saw Appellant throw the first punch in the altercation. (5) The State argued Appellant stabbed Devine twice when there was no evidence presented to that effect. (6) The State violated Appellant's post-arrest silence, which violated his right to a fair trial. (7) The State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. (8) The State failed to file a Notice of Habitual Criminal Treatment. AOB at 13. The District Court adjudicated all eight claims are waived because Appellant failed to present them on direct appeal pursuant to NRS 34.810(1)(b)(2). FCL, 7AA at 1569. Moreover, the Court also concluded every claim was meritless. Id.

Ground Four: Appellant alleged Jury Instructions Nos. 1, 17, 20, and

31 violated his rights and Jury Instructions Nos 22 and 23 conflicted with Jury Instructions Nos. 21, 25, and 27. The District Court deemed these claims waived because Appellant failed to raise them on direct appeal pursuant to NRS 34.810(1)(b)(2). FCL, 7AA at 1574-75. Furthermore, the District Court also held these instructions were accurate statements of law. FCL, 7AA at 1576-79. Consequently, these claims are meritless.

Ground Five: Appellant argues it was improper for the Court to provide the number and the title of the jury instructions rather than repeating the instruction verbatim. The Court held this claim waived for Appellant's failure to raise on direct appeal pursuant to NRS 34.810(1)(b)(2). FCL, 7AA at 1579.

Ground Seven: Appellant claims cumulative error based on ineffective assistance of counsel. AOB at 14. The District Court's reason for denying Appellant's claim was twofold. 7AA at 1585-86.

First, this Court has never held claims of ineffective assistance of counsel can be cumulated. 7AA at 1585. Even if they could, it would be inapplicable here because there is not one instance of ineffective assistance. Id. The District Court noted United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990), which stands for the proposition that cumulative-error analysis should only evaluate the effect of matters deemed errors instead of the effect of non-errors. Id.

Second, the District Court applied the cumulative error factors under Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000) to Appellant's case and determined Appellant's claim meritless. 7AA at 1586. It found (1) the issue of guilt was not close; (2) Appellant did not assert any meritorious claims of error; thus, there were not any errors to cumulate; and (3) despite the gravity of Appellant's conviction, there was more than sufficient evidence for conviction and no error. Id.

Ground Eight: Appellant claims appellate counsel was ineffective for failing to consult with Appellant before filing Appellant's direct appeal. AOB at 14. The District Court held this claim failed for three reasons. 7AA at 1586.

First, pursuant to Rhyne, 118 Nev. at 8, 38 P.3d at 167, it is counsel's discretion to decide what claims to raise. Id. Second, "appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989)." Id. Lastly, as discussed throughout the Findings, Appellant's claims would have failed on direct appeal and thus futile to raise. Id.

Ground Nine: Appellant claims he was denied his right to a speedy trial. AOB at 14. His claim was procedurally barred and deemed baseless. 7AA at 1587-88.

Pursuant to NRS 34.810(1)(b)(2), Appellant's substantive claim was waived because it should have been asserted on appeal. 7AA at 1587. It was also deemed

eligible for summary dismissal because it was a bare and naked assertion under Hargrove. Id.

The Court found the four Barker factors weighed against finding a constitutional speedy trial violation. 7AA at 1588. Regarding the first factor, Appellant did not suffer a presumptively prejudicial delay. Id. He was arrested on December 12, 2017, and a Criminal Complaint was filed two days later. Id. Jury trial began about six months later, on June 18, 2018. Id. Concerning the second factor, the delay was for good reasons. Id. Defense counsel had a federal sentencing outside the jurisdiction that could not be reset, and the State also had a schedule conflict due to another trial. Id. Appellant's argument that his trial was continued despite his objection is belied by the record under Hargrove because his counsel requested the continuance. Id.

Supplemental Memorandum – Ground One: Appellant raises another ineffective assistance of trial counsel based on alleged failure to consult and communicate; failure to investigate and call witnesses Sandi Cash and Angel Turner; and failure to meet with Appellant. AOB at 14. The District Court denied all these claims. 7AA at 1588-91.

a. Failure to consult and communicate

Appellant asserted that counsel was ineffective because counsel consulted

with Appellant four times prior to trial; did not have defense's investigator meet with Appellant; and counsel failed to interview and call witnesses Sandi Cash and Angel Turner; and did not make appropriate objections. 7AA at 1588. The Court found Appellant's assertions were not supported by the record and thus amounted to mere allegations per Hargrove. Id. As the Court noted previously, the law does not entitle Appellant to a particular relationship with counsel as the law does not dictate a specified amount of communication if counsel provides reasonably effective representation. 7AA at 1588-89. The Court dismissed Appellant's allegation of failure to investigate under Molina because Appellant did not show what a better investigation would have revealed. Id. Appellant's assertion of prejudice was summarily dismissed for providing a mere naked assertion. 7AA at 1589.

b. *Failure to investigate and call witnesses*

Appellant's claims that counsel failed to investigate and call witness Sandi Cash and Angel Turner were summarily denied under Hargrove and denied under Molina for failure to establish what a better investigation would have revealed. Id.

Additionally, Appellant's claim that counsel failed to call Angel Turner as a witness is belied by the record because Angel testified for the defense on the sixth day of trial. Id. His claim regarding failure to interview Angel failed under Molina because Appellant failed to show how an interview would have differed from her testimony and how an interview would have improved the trial's outcome. Id. The

Court further noted that Angel provided a police statement and testified at the preliminary hearing, thus it was unclear what further interview could have accomplished. Id.

Appellant provided Sandi Cash' written statement detailing what her testimony would have been had she been called as a witness. Id. The Court determined the statement would have been inadmissible at trial because it dealt with a different incident which Sandi never told Appellant about. 7AA at 1589-90. Accordingly, the incident would not have affected Appellant's mind regarding self-defense and would have made no difference at trial. 7AA at 1590. Especially because there was evidence Appellant did not act in self-defense: he was the initial aggressor, he was the only one with a weapon, he fled the scene, and he disposed of the murder weapon. Id.

The Court also noted these claims would not satisfy the prejudice prong under Strickland because these claims were governed by Hargrove and Molina. Id.

c. *Failure to meet with Appellant*

Appellant asserted appellate counsel only met with him once. AOB at 14. Additionally, he claimed counsel did not do a "good job." 7AA at 1590. Appellant's claim was denied on merit basis. Id. Appellant's claim that counsel failed to do a "good job" was a naked assertion denied under Hargrove. Id. The Court also noted

that Appellant is not entitled to a particular relationship with counsel as held in Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). Id.

Supplemental Memorandum – Ground Two: Appellant raises two more ineffective assistance of appellate counsel for allegedly failing to file an appeal and properly raise a prosecutorial misconduct claim. AOB at 14.

Regarding the first claim, Appellant's claim was unclear, but the Court determined that the claim failed in every possible way the claim was interpreted. 7AA at 1591. If Appellant meant appellate counsel was ineffective for failing to file a direct appeal prior to consulting with Appellant, the claim fails because the law does not entitle Appellant to a particular relationship with counsel. Id. If Appellant claims counsel was ineffective for not filing a direct appeal, Appellant's claim is belied by the record and summarily denied because counsel did file a direct appeal on Appellant's behalf. Id.

The Court summarily denied Appellant's second claim under Hargrove because Appellant only offered naked assertions. Id.

Supplemental Memorandum – Additional Ground: Appellant raises another ineffective assistance of trial counsel for failure to object to State's improper argument of duty of retreat. AOB at 14. Although this claim has not been adjudicated, this claim fails because it is belied by the record.

A reasonable person who believes is about to be killed or seriously harmed has no duty to retreat unless that person is the initial aggressor. Culverson v. State, 106 Nev. 484, 481; 797 P.2d 238, 241 (1990). During closing argument, the State explained Appellant was the initial aggressor evidenced by the facts that multiple witnesses testified they saw Appellant throw the first punch during the altercation and Appellant claimed he killed the victim in self-defense. 6AA at 1292-95. The State further explained Appellant was not entitled to self-defense because as the initial aggressor he did not make a good faith effort to stop the fight before striking a mortal blow. 6AA at 1296. Thus, there was not a proper basis for an objection.

In addition to Appellant's multiple claims, he Appellant also contends the District Court abused its discretion when it adopted the State's draft of the Findings of Facts as a "literal[] [] carbon copy of the statement of facts from the State's responding brief in post-conviction litigation as well as the State's answering brief on appeal." AOB at 26. Appellant's complaint fails because this is an appropriate practice supported by law.

The court rules require the prevailing party to furnish the written order. EDCR 7.21; DCR 21. Such proposed findings must "accurately reflect[] the district court's findings." Byford v. State, 156 P.3d 691, 692 (2007). A court need only pronounce its decision "with sufficient specificity to provide guidance to the prevailing party in drafting a proposed order." Id. at 693. Accordingly, the final order "must contain

specific findings of fact and conclusions of law supporting the decision of the court." NRS 34.830(1).

The findings of fact and conclusion of this case complies with NRS 34.830 because the findings are sufficiently detailed to allow the appellate court to review the basis of the district court's decision. Additionally, Appellant has had the opportunity to challenge any perceived factual or legal errors in the findings. And nothing in the statute prohibits the inclusion of a factual summary in the findings. Thus, the District Court did not abuse its discretion by adopting the State's proposed order.

In conclusion, given that every claim is either procedurally barred or unsupported by the record, Appellant's request for an evidentiary hearing was properly denied.

III. APPELLANT HAS FAILED TO DEMONSTRATE CUMULATIVE ERROR BECAUSE CUMULATIVE ERROR ONLY APPLIES TO A DEFENDANT'S RIGHT TO A FAIR TRIAL

The Nevada Supreme Court has only recognized the cumulation of errors that occurred at trial that, when viewed cumulatively, deprived the defendant of his right to a fair trial. Mulder v. State, 116 Nev. 1, 16, 992 P.2d 845, 854 (2000); Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

Here, appellant advances the novel argument that the district court's denial of his request for counsel and an evidentiary hearing amounted to cumulative error. Appellant ignores the fact that the Mulder factors only apply when considering

whether a defendant was deprived of his right to a fair trial. Neither the Nevada Supreme Court nor the Nevada Court of Appeals has ever held that denials of post-conviction counsel or evidentiary hearings should be reviewed in a cumulative fashion. The standards of review for each type of decision clearly contemplate that a district court's decisions on these matters are to be viewed separately. Regardless, even if these claims could be considered cumulatively, it would be of no consequence because Appellant has failed to demonstrate a single error. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Thus, the District Court properly declined to find cumulative error.

CONCLUSION

Based on the foregoing, the State respectfully requests that Appellant's Denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction) be AFFIRMED.

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Dated this 6th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 9,510 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of October, 2021.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 6, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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