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FEB 26 2021

Elizabeth A. Brown
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Elizabeth A. Brown
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1 Calvin Thomas Elam #1187304
2 In Proper Person
3 P.O. Box 650 H.D.S.P.
4 Indian Springs, Nevada 89018

5 8th DISTRICT COURT
6 CLARK COUNTY NEVADA

7
8 CALVIN THOMAS ELAM,
9 Appellant,
10 -v-
11 THE STATE OF NEVADA,
12 Respondent.

Case No. C-15-305949-1
Dept. No. _____
Docket _____

14 NOTICE OF APPEAL

15 Notice is hereby given that the Appellant, Calvin Thomas Elam
16 #1187304, by and through himself in proper person, does now appeal
17 to the Supreme Court of the State of Nevada, the decision of the District
18 Court, and the denial of my Petition for Writ of Habeas Corpus.

20
21 Dated this date, this 19th day of February, 2021.

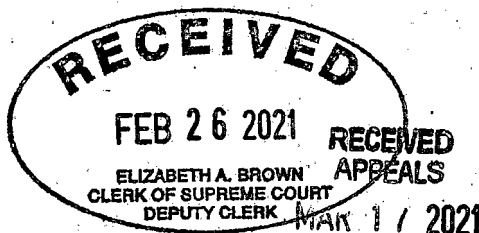
C-15-305949-1
NOASC
Notice of Appeal (criminal)
4947654



23 Respectfully Submitted,

24 *[Signature]*

25 In Proper Person



28 CLERK OF THE COURT

Docket 82637 Document 2021-07736

30

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On April 17, 2015, Calvin Elam (hereinafter "Petitioner") was indicted by way of grand
4 jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B
5 Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE
6 KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310,
7 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON
8 (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF
9 AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one
10 (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A
11 Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE
12 OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC
13 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY
14 WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121);
15 and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
16 PERSON (Category B Felony – NRS 202.360 – NOC 51460).

17 Petitioner's jury trial started on June 19, 2017, and ended on June 27, 2017. The jury
18 found Defendant guilty of Count 1— CONSPIRACY TO COMMIT KIDNAPPING (Category
19 B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST
20 DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
21 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY
22 WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY
23 WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 –
24 NOC 50157).

25 The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN
26 ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count
27 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
28 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

1 WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366,
2 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally
3 dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
4 PERSON (Category B Felony - NRS 202.360 - NOC 51460).

5 On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to
6 Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months
7 in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole
8 after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum
9 of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department
10 of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12)
11 months and a maximum of seventy-two (72) months in the Nevada Department of Corrections
12 to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2)
13 years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner
14 received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were
15 dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special
16 sentence of lifetime supervision to commence upon release from any term of probation, parole,
17 or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance
18 with NRS 199D.460 within 48 hours after release.

19 Petitioner's Judgment of Conviction was filed on October 31, 2017.

20 On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the
21 Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on
22 May 7, 2019.

23 On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May
24 27, 2020, Petitioner filed a Motion to Withdraw Judgment on Petition for Writ of habeas
25 Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response.
26 On August 18, 2020, the Court granted Petitioner's Motion to Withdraw Judgment on Petition
27 for Writ of Habeas Corpus, and allowed Petitioner to file a Supplemental Petition by October
28 20, 2020. Also on August 18, 2020, the Court denied Petitioner's Motion for Appointment of

1 Counsel without prejudice, and articulated that if issues were unduly complex counsel
2 appointment would be considered. Petitioner never filed a Supplemental Petition. On
3 December 1, 2020, the Court denied Petitioner's Petition. The Court's written Order follows.

4 **STATEMENT OF THE FACTS**

5 On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile
6 (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and
7 neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to
8 visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog
9 to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and
10 Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing.
11 Webster saw Petitioner and he said, "what's up" and motioned for her to come over. He was
12 downstairs in front of his apartment when Webster saw him.

13 Webster did not know Petitioner's name was Calvin because she called him "cuz"
14 because he was in a dating relationship with Webster's cousin, Joanique, by marriage. She
15 knew Petitioner only for a few months before the incident took place. When he motioned for
16 her to come over, Webster went because she wanted to explain the situation that occurred with
17 his pit bull puppies that went missing.

18 Previously, while Webster was visiting her friend Edward Brown, who lived in the
19 building next to Petitioner, she discovered Petitioner's girlfriend looking for the puppies.
20 When Webster saw Petitioner's girlfriend looking for the puppies she decided to help her look
21 for them, but they could not find them and everyone went their separate ways. Webster
22 understood that Petitioner was upset and believed someone had taken his puppies so when he
23 motioned for her to come over she wanted to explain that she had nothing to do with the
24 missing puppies.

25 Webster left her dog Payton with Gentile and Yancy and went and talked with
26 Petitioner. As she walked up to the apartment, he was already in the apartment, so they started
27 talking in the kitchen. She began to explain that she heard what had happened to the puppies
28 and told Petitioner she did not have anything to do with it. Petitioner insisted that she did have

1 something to do with it and Webster explained again that she did not. Webster testified that
2 Petitioner's voice changed in the tone. Petitioner began to get aggressive, loud, and scary. He
3 told her if she did not have anything to do with it, to not worry about it, but told her to turn
4 around and get on her knees. She asked him if he was serious, but could tell by his voice that
5 he was serious so she turned around and got on her knees.

6 Petitioner then tied her up with electrical cords and tape, stuffed her mouth with fabric,
7 covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her
8 back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her
9 mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game."
10 Petitioner beat her with a belt multiple times, pulled her pants down, and took the broom and
11 angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had
12 something to do with the missing dogs. 3 He then made a phone call, and within minutes there
13 were three women and another male that came to the door. During the call Webster heard him
14 saying, "I have one of them here. Come over." The individuals that came in starting videoing
15 what was taking place. Webster started to hear laughter, and then Petitioner pulled out a taser
16 and came extremely close to her face with the taser and then tased her. There was two or three
17 black males and one black female.

18 Webster described Petitioner as a tall and lighter skinned man with a medium build.
19 Webster believed Petitioner was going to stick the broomstick in her anus, she was so
20 distraught that she blacked out. The beating took place over a couple of hours. Petitioner
21 touched Webster with the broomstick on her buttocks area. While Petitioner was doing this,
22 Webster had her chest on the floor because she had fallen from her knees. She repeatedly told
23 Petitioner she had nothing to do with the missing dogs. The broomstick touched her behind in
24 several places and Webster testified "at one point I just braced myself for him to just do it, and
25 then I just blanked out." She believed Petitioner was going to stick the broomstick in her anus.
26 If he did do it, she did not remember because she passed out.

27 //

28 //

1 Petitioner pulled Webster's shorts and underwear down and started beating her with a
2 leather belt. Webster heard Petitioner and the other man say things along the lines of "[w]e're
3 going to put the bitch in the trunk and—and it's not just going to happen to you. We're going
4 to go over there and get everybody else because the puppies are going to come up." At one
5 point during the beating, Webster played dead so they would stop beating and tasing her and
6 she heard them say, "is that bitch dead?" She then heard them say "wake her up, tase her
7 again."

8 Petitioner made a phone call about picking kids up from school. She realized the
9 individuals were gone because they did not respond when she said something. Webster was
10 then able to roll and scoot herself to the door and somehow got to her knees. She was able to
11 unlock the door and threw herself outside and onto the pavement. Gentile was still on her deck,
12 saw Webster, and ran down to help her.

13 Gentile and two men helped untie her and take the stuffing out of her mouth. One of
14 the individuals had to use a knife to untie Webster. Webster was so afraid that she told the
15 individuals to help her faster because she wanted to get out of there. After she was untied,
16 within seconds, Petitioner returned in a vehicle, noticed Webster and rolled right past her.
17 Petitioner went to Tony's house. Shortly thereafter, Webster saw Petitioner walking towards
18 his house. Petitioner looked directly at Webster, throwing up signs and looked like Snoop
19 Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte
20 Patterson. She explained to him what just happened and he immediately called the police.
21 When officers arrived Webster explained what happened. Webster had a bruise on her lip and
22 injuries on her legs.

23 The next day or soon thereafter the incident Webster went to the UMC. Webster told
24 the Sexual Assault Nurse Examiner that Petitioner put the broom between her butt cheeks. She
25 told Detective Ryland, a female detective, that her rectum felt sore. She also told Detective
26 Ryland and another female detective that the broomstick went between the two butt cheeks,
27 but she was not sure if it went into her anus. She told them she was touched anally, that is why
28 she scooted repeatedly over and over again. She also told them she was so scared during the

1 beating that she urinated herself.

2 Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat
3 Fox's four-year-old daughter while Fox worked. On March 10, 2015, Fox dropped her
4 daughter off with Yancy in the early afternoon. After she dropped the baby off, Fox went
5 downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling
6 for help. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were
7 tied, and she had something wrapped around her mouth. Fox began to help her. Webster said,
8 "please help me," and "please call the cops," in a panicked and scared voice.

9 Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived
10 near Gentile and Yancy. He also knew Petitioner and Webster. On March 10, 2015, he saw
11 Webster hopping, jumping, trying to get away and rolling. She was rolling away from
12 Petitioner's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth
13 was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile
14 began cutting the wires and plastic off to free Webster.

15 Before he saw Webster come out of the apartment, he saw a black male, who was about
16 5'11" to 6', with dark skin, weighing about 250 pounds. He also saw three women come out
17 of the apartment. He had seen the black male before with Petitioner. Id. However, he had never
18 seen the females before. The four people left in a burgundy car with dark tinted windows. Then
19 he saw Petitioner come out of the apartment after the four people had left. Id. Petitioner left in
20 a car. He testified that he had previously seen Petitioner drive in a small white four-door car.
21 Petitioner later in the day came back to the apartment complex in the white car. Petitioner
22 cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and
23 Petitioner threw it in the dumpster near his apartment.

24 Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las
25 Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed
26 Joanique in his vehicle at 1108 North Jones, near Petitioner's apartment. Cardenas called a
27 phone number for Petitioner that he obtained. Petitioner answered the phone and Cardenas
28 asked him if he knew Webster. Petitioner acknowledged knowing her. Cardenas asked him to

1 come back to the crime scene and Petitioner decided not to. Cardenas then participated in
2 serving a search warrant on Petitioner's apartment.

3 Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took
4 photos of Webster when he arrived on the scene. One of the photos depicted bruising on
5 Webster's inner and lower lips. She had abrasions on her knees and shins. He testified that she
6 complained of pain in her wrists and forearms and that there may be have some redness on her
7 wrists.

8 He then went to 900 North Jones. He collected what he described as a fitted bed sheet
9 and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the
10 parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black
11 twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The
12 dumpster was in front of Petitioner's apartment approximately 20-30 feet away. Inside the
13 apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also
14 found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with
15 Petitioner's name on it. He also found Petitioner's ID in the east dresser in the northwest
16 bedroom.

17 Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he
18 located a Nissan Sentra. He recovered a blue LA hat on a shelf in the southeast bedroom. He
19 also recovered an ID with Petitioner's name on it. Grover swabbed the barrel of the shotgun
20 and the end of the broomstick to later be tested for DNA.

21 Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner,
22 performed a sexual assault evaluation on Webster. Webster chose to have the fourth
23 examination which was the full forensic sexual assault exam, including requests for the
24 criminal investigation of a sexual assault and the medical component. She testified that
25 Webster told her she was a victim of a sexual assault, that she had been blindfolded and
26 hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her
27 rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her
28 body. When asked if she passed out or lost consciousness during the assault, Webster stated

1 she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the
2 injury was similar to other injuries she had observed where guns had been put into people's
3 mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified
4 that was not abnormal considering it had been 50 hours since the incident. When shown
5 pictures of Webster's legs that were taken right after the attack, she described there were
6 abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have
7 been interested in looking at had those injuries been apparent when Webster came in.

8 Dermanelian classified the injuries she was shown in court as superficial, meaning they
9 would not last long. During the vaginal examination she did not find signs of blunt force
10 trauma. She explained that because she had seen Webster two days after the assault, it was
11 likely that any injuries had healed such that she could not observe them. During the rectal
12 exam there were no injuries of blunt force trauma. She also testified that based on her past
13 experience it did not appear that Webster was under the influence of a controlled substance.

14 Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD
15 lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun,
16 for DNA along with three reference standards. She was asked to run the three reference
17 standards for Webster, Gentile, and Petitioner. The swab that came from the end of the shotgun
18 barrel was consistent with Webster.

19 ANALYSIS

20 **I. GROUND TWO IS PROCEDURALLY BARRED**

21 **A. Any Substantive Claims Were Waived**

22 NRS 34.810(1) reads:

23 The court shall dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or guilty
25 but mentally ill and the petition is not based upon an allegation that
26 the plea was involuntarily or unknowingly or that the plea was
entered without effective assistance of counsel.

27 (b) The petitioner's conviction was the result of a trial and the
28 grounds for the petition could have been:

...

1 (2) Raised in a direct appeal or a prior petition for a writ of habeas
2 corpus or postconviction relief.

3 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
4 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
5 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
6 pursued on direct appeal, or they will be considered waived in subsequent proceedings.”
7 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
8 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
9 court must dismiss a habeas petition if it presents claims that either were or could have been
10 presented in an earlier proceeding, unless the court finds both cause for failing to present the
11 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
12 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

13 Further, substantive claims are beyond the scope of habeas and waived. NRS
14 34.724(2)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v.
15 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas
16 v. State, 115 Nev. 148, 979 P.2d 222 (1999). A defendant may only escape these procedural
17 bars if they meet the burden of establishing good cause and prejudice:

18 3. Pursuant to subsections 1 and 2, the petitioner has the burden of
19 pleading and proving specific facts that demonstrate:

20 (a) Good cause for the petitioner's failure to present the claim or for
21 presenting the claim again; and

22 (b) Actual prejudice to the petitioner.

23 NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of
24 error upon direct appeal, the district court is not obliged to consider them in post-conviction
25 proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

26 Petitioner brings substantive claims that should have been raised on direct appeal. In
27 Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at
28 7-7A. The Court finds that such a substantive claim is waived for not bringing it on appeal.
Further, to the extent Ground Three is construed as a claim of prosecutorial misconduct, such

1 a claim is substantive and should have been raised on direct appeal. Therefore, the Court finds
2 that unless Petitioner can demonstrate good cause and prejudice, these claims were waived
3 pursuant to NRS 34.810.

4 **B. Petitioner Has Not Demonstrated Good Cause Sufficient to Overcome the**
5 **Procedural Bar**

6 A showing of good cause and prejudice may overcome procedural bars. “To establish
7 good cause, appellants must show that an impediment external to the defense prevented their
8 compliance with the applicable procedural rule. A qualifying impediment might be shown
9 where the factual or legal basis for a claim was not reasonably available at the time of default.”
10 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court
11 continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526.
12 In order to establish prejudice, the defendant must show “not merely that the errors of [the
13 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
14 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
15 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
16 Fraday, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a
17 “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252,
18 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
19 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner.
20 NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural default rules must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d
23 at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that
25 a claim reasonably available to the petitioner during the statutory time period did not constitute
26 good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot
27 constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077
28 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Here, the Court finds Petitioner has not even alleged, must less shown, good cause to
2 overcome the procedural bar.¹ All the relevant facts and law necessary to present this claim
3 were known to petitioner at the time he raised his direct appeal. As such, there is no good cause
4 sufficient to over the procedural bar, and this ground is denied.

5 II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

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

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

¹ Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).

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.

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28 //

1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89,
7 694, 104 S. Ct. at 2064-65, 2068).

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

18 **A. Counsel Was Not Ineffective for Not Moving to Dismiss the Complaint**

19 In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to
20 dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. Counsel
21 cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State,
22 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The remedy for a finding of insufficient
23 evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State,
24 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence
25 to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a
26 judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be
27 that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

28 //

1 “In reviewing a claim of insufficient evidence, the relevant inquiry is ‘whether, after
2 reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact
3 could have found the essential elements of the crime beyond a reasonable doubt.’” Origel-
4 Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100
5 Nev. 245, 250, 681 P.2d 44, 47 (1984)). “Clearly, this standard does not allow the district court
6 to act as a “thirteenth juror” and reevaluate the evidence and the credibility of the witnesses.”
7 Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

8 The Court finds that a Motion for Acquittal due to insufficiency of the evidence would
9 have been futile in the instant case. As the Nevada Supreme Court noted when affirming
10 Petitioner’s sentence, there was “overwhelming evidence that supported the jury’s verdict,
11 which included eyewitness and independent witness testimony, DNA evidence, physical
12 injuries on the victim, and recovery of items used to bind and gag the victim.” Order of
13 Affirmance, at 3. Therefore, such a motion would have been futile. Under Ennis, counsel has
14 no obligation to raise futile motions.

15 The Court further finds that even if counsel’s decision not to raise this motion had been
16 unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when
17 affirming Petitioner’s conviction, there was such overwhelming evidence of Petitioner’s guilt
18 introduced at trial that it was not plain error for the Court to allow alleged prior bad act
19 evidence to be admitted. Given that the standard for prejudice under ineffective assistance of
20 counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate
21 that he was prejudiced by his counsel’s actions. See Gordon v. United States, 518 F.3d 1291,
22 1300 (11th Cir. 2008). As such, Petitioner’s counsel cannot be found ineffective and this claim
23 is denied.

24 Likewise, the Court finds that Petitioner’s related claim under Ground Two that his
25 conviction is invalid because of insufficient evidence is similarly without merit. Petitioner’s
26 chief complaint seems to be that there was no evidence admitted as to his intent sufficient to
27 warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined
28 as “a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals,

1 kidnaps, or carries away a person ... for the purpose of committing sexual assault... or for the
2 purpose of killing the person or inflicting substantial bodily harm.” NRS 200.310. The State
3 admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her
4 mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further
5 angled a broomstick towards the victim’s anal opening, as if to stick the broom handle in the
6 victim’s anal opening. Id. As such, and consistent with the Supreme Court of Nevada’s
7 holding, there is no doubt that sufficient evidence was introduced against Petitioner to support
8 his conviction of first-degree kidnapping.

9 As such, this claim is without merit. Since this claim is without merit, Petitioner would
10 not be prejudiced by its denial. Since Petitioner would not be prejudiced by this claims denial,
11 nor has he shown good cause sufficient to overcome the procedural bars (see Section I(B)),
12 this claim is denied under NRS 34.810.

13 **B. Petitioner’s Counsel Was Not Ineffective for Not Objecting to the Prosecutor’s**
14 **Comments**

15 Petitioner next argues that his counsel was ineffective for failing to object to various
16 instances of alleged prosecutorial misconduct. Pet at 8- 8D. However, the Court finds that none
17 of the instances mentioned by Petitioner amount to prosecutorial misconduct, and there was
18 therefore nothing for counsel to object to.

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

24 In resolving claims of prosecutorial misconduct, the Court undertakes a two-step
25 analysis: determining whether the comments were improper; and deciding whether the
26 comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172,
27 1188. The Court views the statements in context, and will not lightly overturn a jury’s verdict
28 based upon a prosecutor’s statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the

1 defendant must show that an error was prejudicial in order to establish that it affected
2 substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

3 With respect to the second step, this Court will not reverse if the misconduct was
4 harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless error review
5 depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-
6 89. Misconduct may be constitutional if a prosecutor comments on the exercise of a
7 constitutional right, or the misconduct “so infected the trial with unfairness as to make the
8 resulting conviction a denial of due process.” Id. 124 Nev. at 1189 (quoting Darden v.
9 Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension,
10 this Court will reverse unless the State demonstrates that the error did not contribute to the
11 verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, this
12 Court “will reverse only if the error substantially affects the jury’s verdict.” Id.

13 The State is permitted to offer commentary on the evidence that is supported by the
14 record. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). In Rose, the prosecutor
15 called the appellant a predator for using his daughter as a lure to reach other victims, but the
16 Nevada Supreme Court accepted it as appropriate commentary supported by the evidence and
17 as insufficiently prejudicial to warrant relief. Rose, 123 Nev. at 209–10, 163 P.3d at 418–19.

18 Further, the State may respond to defense theories and arguments. Williams v. State,
19 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant’s failure to
20 substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116
21 Nev. 752, 762 (2000), citing State v. Green, 81 Nev. 173, 176 (1965) (“The prosecutor had a
22 right to comment upon the testimony and to ask the jury to draw inferences from the evidence,
23 and has the right to state fully his views as to what the evidence shows.”). Further, if the
24 defendant presents a theory of defense, but fails to present evidence thereon, the State may
25 comment upon the failure to support the supposed theory. Evans v. State, 117 Nev. 609, 630-
26 631 (2001); see McNelton v. State, 115 Nev. 396, 408–09 (1999).

27 //

28 //

1 Petitioner objects to four different statements as alleged prosecutorial misconduct that
2 his counsel should have objected to. Petitioner first takes issue with the State claiming during
3 closing argument that: "The purpose was to either inflict substantial bodily harm or kill her --
4 so first -- first degree kidnapping was met." Pet. at 8; Jury Trial Day 6: June 26, 2017, at 118,
5 filed February 13, 2018. In context, the State's statement was as follows:

6 All of this demonstrates the fact that she was hogtied, kidnapped. So
7 for what purpose? Was it to inflict substantial bodily harm? To kill
8 her? To sexually assault? You heard the defendant was angry she said.
9 When he brought her into the apartment, everything was fine, and then
10 all of a sudden his body language changed. His demeanor changed.
11 He got loud. He got mean, and ultimately she was beat. She was beat
with a belt. She was beat with a broom. She was beat with a -- or she
was stunned. She had the shotgun in her mouth. What do you think
the purpose was? The purpose was to either inflict substantial bodily
harm or kill her, and then you heard about the broomstick. So first --
first-degree kidnapping was met.

12 Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The State's argument was
13 clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner's
14 intent could be deduced from the actions he undertook while he had the victim hogtied. The
15 Court finds that such a commentary is proper during closing arguments, and is not
16 prosecutorial misconduct.

17 Petitioner next takes issue with the State allegedly offering an incorrect definition of
18 Battery with Intent to Commit Sexual Assault. Petitioner references page 125 and 128 of Jury
19 Trial Day 6: June 26, 2017 and claims that the State defined Battery With Intent to Commit
20 Sexual Assault as

21 The fact that she is physically restrained substantially increased her
22 risk of potentially death or substantial bodily harm because she can't
get out.

23 So the putting her down, whacking her with the broomstick and the
24 putting the broomstick up at her butt, Battery With the Intent to
Commit a Sexual Assault.

25 Pet. at 8-A; Jury Trial Day 6: June 26, 2017 at 124-25, 128 respectively.

26 In regards to the first statement, the Court notes that the State was not discussing the
27 crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner
28 could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim

1 is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial
2 Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the
3 case, the jury could find that Petitioner had committed kidnapping in the first degree by
4 substantially increasing the risk of substantially bodily harm, and also find that Petitioner had
5 committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere
6 in the excerpt does the State define any of these offenses. In fact, the State made regular
7 mention to the jury instructions that properly defined these offenses. Id. As such, the Court
8 finds that Petitioner's notion that the State incorrectly defined Battery with Intent to Commit
9 Sexual Assault is belied by the record.

10 In regards to the second statement, the State was not defining Battery With Intent to
11 Commit Sexual Assault. In fact, the Court notes that the State specifically referenced the jury
12 to Jury Instruction 17 for a statement of the law regarding this crime. Id. at 128. The State was
13 arguing that these were the actions that constituted Battery with Intent to Commit Sexual
14 Assault. Given that proof of these actions had been admitted at trial, the State was entitled to
15 argue that the evidence satisfied the elements of the crime charged.

16 Petitioner further takes issue with the State claiming "the fact that she is physically
17 restrained substantially increases her risk of potentially death or substantial bodily harm." Pet.
18 at 8-B; Jury Trial Day 6: June 26, 2017 at 124-25. Such a statement was clearly a commentary
19 on the evidence. Pursuant to Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), such
20 a statement does not establish prosecutorial misconduct.

21 Given that trial counsel has the ultimate responsibility of deciding what objections to
22 make, and that none of the statements Petitioner here complains of constituted prosecutorial
23 misconduct, the Court finds that it was not unreasonable for Petitioner's counsel to not object
24 to these statements.

25 Further, even if counsel's decision had been unreasonable, the Court finds that
26 Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's
27 conviction, there was such overwhelming evidence of Petitioner's guilt introduced at trial that
28 it was not plain error for the Court to allow alleged prior bad act evidence to be admitted.

1 Given that the standard for prejudice under ineffective assistance of counsel is the same as the
2 standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by
3 his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As
4 such, Petitioner's counsel cannot be found ineffective and this claim is denied.

5 **C. Counsel Was Not Ineffective for Not Requesting a Jury Instruction**

6 Petitioner argues in Ground Three that his counsel was ineffective for not requesting a
7 jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C.
8 Petitioner alleges that it was unreasonable for his counsel not to request an instruction
9 reflecting this standard because the State had charged him with Battery with Intent to Commit
10 Sexual Assault, which the State could not prove without showing that the crime resulted in
11 substantial bodily harm. Id.

12 Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an
13 individual may be convicted of Battery with Intent to Commit Sexual Assault even when no
14 substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only
15 charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit
16 Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence
17 for this crime (life with the eligibility to parole after two (2) years) also reflects that he was
18 only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to
19 Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4);
20 Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason
21 for Petitioner's counsel to request the jury instruction in question. Therefore, the Court finds
22 that this decision was not an unreasonable one.

23 Further, even if counsel's decision had been unreasonable, Petitioner was not
24 prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there
25 was such overwhelming evidence of Petitioner's guilt introduced at trial that it was not plain
26 error for the Court to allow alleged prior bad act evidence to be admitted. Given that the
27 standard for prejudice under ineffective assistance of counsel is the same as the standard for
28 plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's

1 actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such,
2 Petitioner's counsel cannot be found ineffective and this claim is denied.

3 **D. Counsel Did Not Fail to Subject the Case to a Meaningful Adversary Process**

4 Petitioner next argues that counsel was ineffective for failing to (1) do any pretrial
5 investigation; (2) failing to file the following motions: Motion to Strike Aggravators, Motion
6 to Exclude Argument Constituting Prosecutorial Misconduct; Motion to Suppress Evidence;
7 Motion in Limine to Preclude Admission of Prejudicial Evidence; Motion to Dismiss For
8 Insufficient Information Charging Petitioner; (3) failure to object to damaging and prejudicial
9 statements during closing arguments; and (4) failure to call any witnesses on Petitioner's
10 behalf.

11 The Court finds that each of these allegations is a bare and naked claim suitable only
12 for summary dismissal. In regard to the failure to investigate claim, Petitioner does not even
13 allege, much less show, what a better investigation would have turned up. Pursuant to Molina
14 v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533,
15 538 (2004) (stating that a defendant who contends his attorney was ineffective because he did
16 not adequately investigate must show how a better investigation would have rendered a more
17 favorable outcome probable).

18 Regarding the various motions Petitioner alleges his counsel should have filed,
19 Petitioner has neither alleged nor shown that any of these motions would have been successful.
20 For some of these motions, Petitioner has only offered bare and naked assertions that counsel
21 not filing them constitutes ineffective assistance of counsel. For example, Petitioner claims
22 that his counsel should have filed a motion to suppress evidence. But he does not even
23 articulate what evidence he claims should have been suppressed. On other motions, there was
24 clearly no legal grounds to bring the motion (such as the motion to exclude argument
25 constituting prosecutorial misconduct as more fully articulated in Section II(C)). Given that
26 Petitioner has not alleged any grounds claiming why these Motions would have been
27 successful, the Court finds that counsel's decision not to file them cannot constitute ineffective
28 assistance of counsel.

1 Regarding counsel's alleged failure to object to prejudicial statements, Petitioner has
2 not identified what statements he now complains of. To the extent he is referring to the
3 statements he alleged constituted prosecutorial conduct under Ground Three, the Court has
4 already articulated why counsel cannot be found ineffective for not objecting to these
5 statements. As such, the Court finds that this claim is either meritless for the reasons articulated
6 in Section II(C), or this claim is a bare and naked allegation suitable only for summary
7 dismissal under Hargrove. 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

8 Similarly, the Court finds that Petitioner claim that counsel was ineffective for failing
9 to call any witnesses on his behalf is a bare and naked allegation suitable only for summary
10 dismissal. Petitioner does not articulate what witnesses were available to be called, why they
11 should have been called, or how they would have assisted his case.

12 Further, even if Petitioner had alleged enough facts for this Court to consider whether
13 it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be
14 unable to establish that any of these decisions would have prejudiced him at trial. As the
15 Nevada Supreme Court held when affirming Petitioner's conviction, there was such
16 overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the
17 Court to allow alleged prior bad act evidence to be admitted. Given that the standard for
18 prejudice under ineffective assistance of counsel is the same as the standard for plain error
19 review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions.
20 See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). Therefore, counsel cannot
21 be found ineffective for any of the reasons articulated in this section, and these claims are
22 denied.

23 **III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW**

24 Petitioner asserts a claim of cumulative error in the context of ineffective assistance of
25 counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of
26 counsel can be cumulated. However, even if they could be, it would be of no moment as there
27 was no single instance of ineffective assistance in Petitioner's case. See United States v.
28 Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate

1 only the effect of matters determined to be error, not the cumulative effect of non-errors.”).
2 Furthermore, Petitioner’s claim is without merit. “Relevant factors to consider in evaluating a
3 claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and
4 character of the error, and (3) the gravity of the crime charged.” Mulder v. State, 116 Nev. 1,
5 17, 992 P.2d 845, 855 (2000). A defendant “is not entitled to a perfect trial, but only a fair
6 trial.” Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

7 Further, the Court finds the factors articulated in Mulder do not warrant a finding of
8 cumulative error. The issue of guilt in the instant case was not close. As the Nevada Supreme
9 Court noted when it affirmed Petitioner’s judgment of conviction, there was “overwhelming
10 evidence that supported the jury’s verdict.” Order of Affirmance, at 3. In addition, the gravity
11 of the crime charged was severe, as Petitioner was charged with multiple counts in connection
12 with a first-degree kidnapping. Finally, there was no individual error in the underlying
13 proceedings, and as such, there is no error to cumulate. Therefore, this claim is denied.

14 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

16 1. The judge or justice, upon review of the return, answer and all
17 supporting documents which are filed, shall determine whether an
18 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.

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

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

23 The Nevada Supreme Court has held that if a petition can be resolved without
24 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
25 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
26 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
27 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
28 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100

1 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
2 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
3 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
4 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
5 improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
6 Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court
7 considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as
8 complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

19 Here, Petitioner has offered no factual allegations that, even if true, would entitle him
20 to relief. All of Petitioner’s claims amount to either bare and naked allegations or arguments
21 that counsel had the duty to file frivolous motions.² Further, Petitioner is unable to overcome
22 the fact that he cannot show he prejudiced by counsel’s conduct on any of these grounds
23 because the evidence of guilt admitted against him was overwhelming. See Order of
24 Affirmance, at 3. As such, there is no need to expand the record, and Petitioner’s request for
25 an evidentiary hearing is denied.

26 //

27
28 ² The Court notes that it previously granted Petitioner the opportunity to file a Supplemental Petition to expand upon his claims on August 18, 2020.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Post-Conviction Petition for Writ of Habeas Corpus shall be and is DENIED.

Dated this 19th day of January, 2021

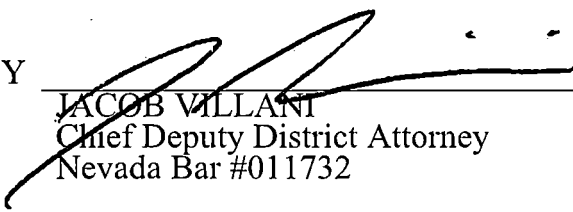
DATED this ____ day of January, 2021.


DISTRICT JUDGE

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

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

BY


JACOB VILLANT
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

1 CSERV

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA
4

5
6 Calvin Elam, Plaintiff(s)

CASE NO: A-20-815585-W

7 vs.

DEPT. NO. Department 15

8 Bean, Warden, 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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CERTIFICATE OF SERVICE BY MAILING


I, Calvin Thomas Elam #1187304, hereby certify, pursuant to NRCP 5(b), that on this 19th
day of February, 2021, I mailed a true and correct copy of the foregoing, "Notice of Appeal"
by depositing it in the High Desert State Prison, Legal Library, First-Class Postage, fully prepaid,
addressed as follows:

Clark County District Attorney's Office
200 Lewis Ave.
Las Vegas, NV 89155

Nevada Attorney General's Office
555 East Washington Ave., #3900
Las Vegas, NV 89101

Clerk of Courts
Regional Justice Center
200 Lewis Ave.
Las Vegas, N.V. 89155

DATED: this 19th day of February, 2021.


Calvin Thomas Elam # 1187304
/In Propria Persona
Post Office box 650 [HDSP]
Indian Springs, Nevada 89018

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

Notice of Appeal
(Title of Document)

filed in District Court Case number _____

☒ 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.


Signature

02/19/2021
Date

Calvin Thomas Elam
Print Name

Appellant
Title

Calvin Thomas Elam # 1187304
High Desert State Prison
P.O. Box 650
Indian Springs, Nevada 89070-0650

Nevada Supreme Court of Appeals
408 East Clark Ave.
Las Vegas, Nevada 89101

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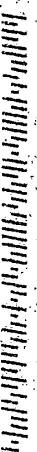
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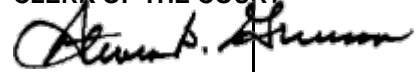


ZIP 89101
011E12660516



SC/O J. Alcock ~~2020~~ 2/21/21

C/O TRH



1 ASTA

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6 **IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE**
7 **STATE OF NEVADA IN AND FOR**
8 **THE COUNTY OF CLARK**

9 STATE OF NEVADA,

10 Plaintiff(s),

11 vs.

12 CALVIN THOMAS ELAM,

13 Defendant(s),

Case No: C-15-305499-1

Dept No: XV

14
15
16 **CASE APPEAL STATEMENT**

17
18 1. Appellant(s): Calvin Thomas Elam

19 2. Judge: Joe Hardy

20 3. Appellant(s): Calvin Thomas Elam

21 Counsel:

22 Calvin Thomas Elam #1187304
23 P.O. Box 650
24 Indian Springs, NV 89070

25 4. Respondent: The State of Nevada

26 Counsel:

27 Steven B. Wolfson, District Attorney
28 200 Lewis Ave.
Las Vegas, NV 89101

(702) 671-2700

5. Appellant(s)'s Attorney Licensed in Nevada: N/A
Permission Granted: N/A

Respondent(s)'s Attorney Licensed in Nevada: Yes
Permission Granted: N/A

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: Yes

7. Appellant Represented by Appointed Counsel On Appeal: N/A

8. Appellant Granted Leave to Proceed in Forma Pauperis: N/A

9. Date Commenced in District Court: April 17, 2015

10. Brief Description of the Nature of the Action: Criminal

Type of Judgment or Order Being Appealed: Writ of Habeas Corpus

11. Previous Appeal: Yes

Supreme Court Docket Number(s): 74581

12. Child Custody or Visitation: N/A

Dated This 17 day of March 2021.

Steven D. Grierson, Clerk of the Court

/s/ Heather Ungermann

Heather Ungermann, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Calvin Thomas Elam

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY**CASE NO. C-15-305949-1**

State of Nevada
vs
Calvin Elam

§
§
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§
§
§
§
§

Location: **Department 15**
Judicial Officer: **Hardy, Joe**
Filed on: **04/17/2015**
Case Number History:
Cross-Reference Case Number: **C305949**
Defendant's Scope ID #: **2502165**
Grand Jury Case Number: **14BGJ062**
ITAG Case ID: **1684346**
Supreme Court No.: **74581**

CASE INFORMATION

Offense	Statute	Deg	Date	Case Type:	Felony/Gross Misdemeanor
1. CONSPIRACY TO COMMIT KIDNAPPING	200.310.1	F	03/10/2015	Case Status:	12/12/2017 Closed
2. FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON	200.310.1	F	03/10/2015		
3. ASSAULT WITH A DEADLY WEAPON	200.471.2b	F	03/10/2015		
4. UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE	202.357.5a	F	03/10/2015		
5. BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT	200.400.4b	F	03/10/2015		
6. SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON	200.366.2b	F	03/10/2015		
7. ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON	200.366.2b	F	03/10/2015		
8. OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON	202.360.1	F	03/10/2015		

Related Cases

A-20-815585-W (Writ Related Case)

Statistical Closures

12/12/2017 Jury Trial - Conviction - Criminal

Warrants

Indictment Warrant - Elam, Calvin Thomas (Judicial Officer: Togliatti, Jennifer)

04/28/2015 3:54 PM Quashed

04/17/2015 11:45 AM Active

Fine: \$0

Bond: \$500,000.00

Cash or Surety**DATE****CASE ASSIGNMENT****Current Case Assignment**

Case Number C-15-305949-1
Court Department 15
Date Assigned 01/04/2021
Judicial Officer Hardy, Joe


















PARTY INFORMATION

		<i>Lead Attorneys</i>
Defendant	Elam, Calvin Thomas	Pro Se
Plaintiff	State of Nevada	Wolfson, Steven B 702-671-2700(W)

DATE**EVENTS & ORDERS OF THE COURT****INDEX**

CASE SUMMARY
CASE NO. C-15-305949-1

EVENTS

04/17/2015	 Indictment <i>Indictment</i>
04/17/2015	 Warrant <i>Indictment Warrant</i>
04/20/2015	 Indictment Warrant Return
04/22/2015	 Media Request and Order <i>Media Request And Order Allowing Camera Access To Court Proceedings</i>
04/28/2015	Warrant Quashed
04/29/2015	 Transcript of Proceedings <i>Reporter's Transcript of Proceedings, Volume 2, April 16, 2015</i>
04/29/2015	 Transcript of Proceedings <i>Reporter's Transcript of Proceedings, Volume 1, April 9, 2015</i>
06/01/2015	 Notice of Witnesses and/or Expert Witnesses <i>Notice of Witnesses and/or Expert Witnesses [NRS 174.234]</i>
07/15/2015	 Motion <i>Notice of Motion and Motion for Brady, Kyles, Giglio, and Related Discovery Materials</i>
07/15/2015	 Motion <i>Defendant's Notice of Motion and Motion to Set Reasonable Bail</i>
07/17/2015	 Opposition <i>State's Opposition to Defendant's Motion to Set Reasonable Bail</i>
08/13/2015	 Opposition <i>State's Opposition to Defendant's Motion for Brady, Kyles, Giglio, and Related Discovery Materials</i>
05/11/2016	 Notice of Change of Address <i>Notice Of Change Of Address</i>
06/12/2017	 List of Witnesses Filed By: Defendant Elam, Calvin Thomas <i>Defendant's List of Witnesses</i>
06/20/2017	 Jury List
06/26/2017	 Amended Jury List
06/27/2017	 Instructions to the Jury
06/27/2017	 Verdict

CASE SUMMARY

CASE NO. C-15-305949-1

06/30/2017	 Declaration <i>Witness Declaration For Preliminary-Hearing Testimony Through The Use Of Audiovisual Technology</i>
08/11/2017	 PSI
09/28/2017	 PSI - Supplemental PSI
10/31/2017	 Judgment of Conviction <i>JUDGMENT OF CONVICTION (JURY TRIAL)</i>
11/13/2017	 Notice of Appeal (criminal) Party: Defendant Elam, Calvin Thomas <i>Notice of Appeal</i>
11/13/2017	 Case Appeal Statement Filed By: Defendant Elam, Calvin Thomas <i>Case Appeal Statement</i>
11/13/2017	 Request Filed by: Defendant Elam, Calvin Thomas <i>Request for Rough Draft Transcript</i>
11/22/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript Re: Sentencing</i>
12/12/2017	 Criminal Order to Statistically Close Case <i>Criminal Order to Statistically Close Case</i>
12/20/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript Re: Calendar Call</i>
12/20/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing Defendant's Motion for Brady, Kyles, Giglio, and Related Discovery Materials. Heard August 18, 2015</i>
12/20/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing Sentencing</i>
12/20/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing Status Check: FI Cards. Heard September 7, 2017</i>
12/20/2017	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing Status Check: FI Cards. Heard September 14, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 1. Heard June 19, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 2. Heard June 20, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trail - Day 3</i>

CASE SUMMARY

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02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 4. Heard June 22, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 5. Heard June 23, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 6. Heard June 26, 2017</i>
02/13/2018	 Recorders Transcript of Hearing <i>Transcript of Proceedings Jury Trial - Day 7. Heard June 27, 2017</i>
03/09/2018	 Recorders Transcript of Hearing <i>Recorder's Transcript of Hearing Calendar Call heard June 15, 2017.</i>
05/13/2019	 NV Supreme Court Clerks Certificate/Judgment - Affirmed <i>Nevada Supreme Court Clerk's Certificate/Remittitur Judgment - Affirmed</i>
05/15/2019	 Motion Filed By: Defendant Elam, Calvin Thomas <i>Motion to Withdraw as Counsel</i>
05/15/2019	 Clerk's Notice of Hearing <i>Notice of Hearing</i>
05/28/2019	 Order Filed By: Defendant Elam, Calvin Thomas <i>Order To Withdraw As Counsel</i>
01/04/2021	Case Reassigned to Department 15 <i>Judicial Reassignment to Judge Joe Hardy</i>
01/19/2021	 Findings of Fact, Conclusions of Law and Order
01/22/2021	 Notice of Entry Filed By: Plaintiff State of Nevada <i>Notice of Entry of Findings of Fact, Conclusions of Law and Order</i>
02/26/2021	 Notice of Appeal (criminal) <i>Notice of Appeal</i>
03/17/2021	 Case Appeal Statement Filed By: Defendant Elam, Calvin Thomas <i>Case Appeal Statement</i>

DISPOSITIONS

04/28/2015	Plea (Judicial Officer: Adair, Valerie) 1. CONSPIRACY TO COMMIT KIDNAPPING Not Guilty PCN: Sequence: 2. FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON Not Guilty
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CASE SUMMARY
CASE NO. C-15-305949-1

PCN: Sequence:

3. ASSAULT WITH A DEADLY WEAPON

Not Guilty

PCN: Sequence:

4. UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE

Not Guilty

PCN: Sequence:

5. BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT

Not Guilty

PCN: Sequence:

6. SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

Not Guilty

PCN: Sequence:

7. ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

Not Guilty

PCN: Sequence:

05/19/2017 **Disposition** (Judicial Officer: Adair, Valerie)

4. UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE

Dismissed

PCN: Sequence:

6. SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

Dismissed

PCN: Sequence:

7. ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON

Dismissed

PCN: Sequence:

06/27/2017 **Disposition** (Judicial Officer: Adair, Valerie)

1. CONSPIRACY TO COMMIT KIDNAPPING

Guilty

PCN: Sequence:

2. FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON

Guilty

PCN: Sequence:

3. ASSAULT WITH A DEADLY WEAPON

Guilty

PCN: Sequence:

5. BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT

Guilty

PCN: Sequence:

10/19/2017 **Adult Adjudication** (Judicial Officer: Adair, Valerie)

1. CONSPIRACY TO COMMIT KIDNAPPING

03/10/2015 (F) 200.310.1 (DC50087)

PCN: Sequence:


Sentenced to Nevada Dept. of Corrections

Term: Minimum:24 Months, Maximum:72 Months

CASE SUMMARY
CASE NO. C-15-305949-1






10/19/2017	<p>Adult Adjudication (Judicial Officer: Adair, Valerie) 2. FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON 03/10/2015 (F) 200.310.1 (DC50055) PCN: Sequence:</p> <hr/> <p>Sentenced to Nevada Dept. of Corrections Term: Life with the possibility of parole after:5 Years Consecutive Enhancement:Use of Deadly Weapon, Minimum:60 Months, Maximum:180 Months Concurrent: Charge 1</p>										
10/19/2017	<p>Adult Adjudication (Judicial Officer: Adair, Valerie) 3. ASSAULT WITH A DEADLY WEAPON 03/10/2015 (F) 200.471.2b (DC50201) PCN: Sequence:</p> <hr/> <p>Sentenced to Nevada Dept. of Corrections Term: Minimum:12 Months, Maximum:72 Months Consecutive: Charge 2</p>										
10/19/2017	<p>Adult Adjudication (Judicial Officer: Adair, Valerie) 5. BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT 03/10/2015 (F) 200.400.4b (DC50157) PCN: Sequence:</p> <hr/> <p>Sentenced to Nevada Dept. of Corrections Term: Life with the possibility of parole after:2 Years Consecutive: Charge 3 Credit for Time Served: 928 Days Condition 1. Register As A Sex Offender 2. Lifetime Supervision Fee Totals: <table> <tr> <td>Administrative Assessment Fee</td> <td>25.00</td> </tr> <tr> <td>\$25 DNA Analysis Fee</td> <td>150.00</td> </tr> <tr> <td>\$150 Genetic Marker Analysis AA Fee</td> <td>3.00</td> </tr> <tr> <td>\$3</td> <td></td> </tr> <tr> <td>Fee Totals \$</td> <td>178.00</td> </tr> </table> </p>	Administrative Assessment Fee	25.00	\$25 DNA Analysis Fee	150.00	\$150 Genetic Marker Analysis AA Fee	3.00	\$3		Fee Totals \$	178.00
Administrative Assessment Fee	25.00										
\$25 DNA Analysis Fee	150.00										
\$150 Genetic Marker Analysis AA Fee	3.00										
\$3											
Fee Totals \$	178.00										

HEARINGS

04/17/2015	<p> Grand Jury Indictment (11:45 AM) (Judicial Officer: Togliatti, Jennifer)</p> <p>MINUTES Warrant 04/17/2015 Inactive Indictment Warrant Matter Heard; Journal Entry Details: <i>Edmond James, Grand Jury Foreperson, stated to the Court that at least twelve members had concurred in the return of the true bill during deliberation, but had been excused for presentation to the Court. State presented Grand Jury Case Number 14BGJ062X to the Court. COURT ORDERED, the Indictment may be filed and is assigned Case Number C305949-1, Department 21. State requested warrant and argued bail. COURT ORDERED, WARRANT ISSUED, bail SET in the TOTAL AMOUNT of \$500,000.00 and matter SET for initial arraignment. FURTHER ORDERED, Las Vegas Justice Court Case 15F03797X DISMISSED and exhibit(s) 1-37 lodged with Clerk of District Court. I.W. (CUSTODY) 4/28/15 9:30 AM INITIAL ARRAIGNMENT (DEPT. 21) ;</i></p> <p>SCHEDULED HEARINGS Initial Arraignment (04/28/2015 at 9:30 AM) (Judicial Officer: Adair, Valerie)</p>
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CASE SUMMARY


CASE NO. C-15-305949-1

04/28/2015	Initial Arraignment (9:30 AM) (Judicial Officer: Adair, Valerie) Matter Heard;
04/28/2015	Indictment Warrant Return (9:30 AM) (Judicial Officer: Adair, Valerie) Matter Heard;
04/28/2015	 All Pending Motions (9:30 AM) (Judicial Officer: Adair, Valerie) Under Advisement; Journal Entry Details: <i>INITIAL ARRAIGNMENT...INDICTMENT WARRANT RETURN DEFENDANT ELAM ARRAIGNED, PLED GUILTY and INVOKED THE SIXTY (60) DAY RULE. COURT ORDERED, matter SET for trial. Defense has 21 days from the date of filing of the preliminary hearing transcript to file a writ. CUSTODY 6/18/15 9:30 AM CALENDAR CALL 6/22/15 9:30 AM JURY TRIAL. ;</i>
06/18/2015	 Calendar Call (9:30 AM) (Judicial Officer: Adair, Valerie) Trial Date Set; Journal Entry Details: <i>Deft. present in custody. Mr. Gaffney stated the parties have talked and agree to move the trial date; additionally, Deft. will waive his right to a speedy trial; therefore, requested a trial setting in January or February. Upon Court's inquiry as to the reason for a continuance, Ms. Jimenez advised it was the defense request to continue; however, she was not opposing the continuance; noting the DNA forensic testing and the fingerprinting are still be outstanding. Upon Court's inquiry as to whether the Deft. waived his right to a speedy trial, Deft. stated he was not waiving his right and requested to speak to his counselor. COURT SO NOTED. Matter TRAILED for Deft. to talk to his attorney. Matter RECALLED. Same parties present as before. Upon Court's inquiry, Deft. waived his right to a speedy trial. COURT ORDERED, Jury Trial VACATED and RESET. CUSTODY 1/21/15 9:30 AM - CALENDAR CALL 1/25/15 9:30 AM - JURY TRIAL ;</i>
06/22/2015	CANCELED Jury Trial (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Vacated - per Judge</i>
07/21/2015	 Motion to Set Bail (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Defendant's Motion to Set Reasonable Bail</i> Denied; Journal Entry Details: <i>Following arguments by counsel, COURT ORDERED, bail as set is reasonable, therefore motion is DENIED WITHOUT PREJUDICE. FURTHER, motion calendared on 7/28/15 is RESET to 8/18/15 9:30 AM CUSTODY ;</i>
08/18/2015	 Motion for Discovery (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Defendant's Notice of Motion and Motion for Brady, Kyles, Giglio, and Related Discovery Materials</i> Granted in Part; Journal Entry Details: <i>Mr. Ericsson stated he received the opposition and additional discovery, but has not reviewed it. He did request that be Brady motion be addressed. COURT ORDERED, Brady Motion is GRANTED. Mr. Ericsson to discuss the other issues with the State; if there are any other issues, counsel may place the matter back on calendar. CUSTODY ;</i>
01/21/2016	 Calendar Call (9:30 AM) (Judicial Officer: Adair, Valerie) Set Status Check; Journal Entry Details: <i>Ms. Luzaich stated that parties are trying to resolve this matter and requested a continuance. Mr. Ericsson stated that he spoke with the defendant and he understands that more time is needed. COURT ORDERED, matter SET for a status check. CUSTODY 2/23/16 9:30 AM SC: NEGOTIATIONS/RESET TRIAL;</i>
01/25/2016	CANCELED Jury Trial (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Vacated - per Attorney or Pro Per</i>
02/23/2016	 Status Check (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Negotiations/Reset Trial</i> Trial Date Set; Journal Entry Details:

CASE SUMMARY

CASE NO. C-15-305949-1

Ms. Luzaich advised that the matter was not negotiated and requested a trial setting. COURT ORDERED, trial date SET. CUSTODY 8/11/16 9:30 AM CALENDAR CALL 8/15/16 9:30 AM JURY TRIAL;

08/11/2016  **Calendar Call** (9:30 AM) (Judicial Officer: Adair, Valerie)


MINUTES

Set Status Check;

Journal Entry Details:

Colloquy regarding trial dates. Counsel stated they are still attempting to negotiate and requested a continuance. COURT ORDERED trial date VACATED and SET for status check. CUSTODY 9/8/16 9:30 AM STATUS CHECK: NEGOTIATIONS/TRIAL SETTING;

SCHEDULED HEARINGS

 **Status Check: Negotiations/Trial Setting** (09/08/2016 at 9:30 AM) (Judicial Officer: Adair, Valerie)
09/08/2016, 10/06/2016, 10/20/2016

08/15/2016 **CANCELED Jury Trial** (9:30 AM) (Judicial Officer: Adair, Valerie)
Vacated - per Judge

09/08/2016  **Status Check: Negotiations/Trial Setting** (9:30 AM) (Judicial Officer: Adair, Valerie)
09/08/2016, 10/06/2016, 10/20/2016

MINUTES

Matter Continued;

Matter Continued;

Matter Heard;

Journal Entry Details:

Mr. Gafney stated that the matter was not resolved and requested a continuance. Court SET trial date. CUSTODY 3/23/17 9:30 AM CALENDAR CALL 3/27/17 9:30 AM JURY TRIAL;

Matter Continued;

Matter Continued;

Matter Heard;

Journal Entry Details:

Mr. Gafney stated the matter was mis-calendared and requested matter be continued. COURT SO ORDERED. CUSTODY CONTINUED TO: 10/20/16 9:30 AM;

Matter Continued;


Matter Continued;


Matter Heard;

Journal Entry Details:

Mr. Ericsson stated parties were very close to a resolution and requested additional time. COURT SO ORDERED. CUSTODY CONTINUED TO: 10/6/16 9:30 AM;

SCHEDULED HEARINGS

 **Calendar Call** (03/23/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)
CANCELED Jury Trial (03/27/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)
Vacated

03/23/2017  **Calendar Call** (9:30 AM) (Judicial Officer: Adair, Valerie)


MINUTES

Set Status Check;

Journal Entry Details:

Ms. Luzaich requested matter be continued for further negotiation. COURT SO ORDERED. CUSTODY 4/11/17 9:30 AM STATUS CHECK: NEGOTIATIONS/TRIAL SETTING;






SCHEDULED HEARINGS

 **Status Check: Negotiations/Trial Setting** (04/11/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)

03/27/2017 **CANCELED Jury Trial** (9:30 AM) (Judicial Officer: Adair, Valerie)
Vacated

CASE SUMMARY

CASE NO. C-15-305949-1

04/11/2017	 Status Check: Negotiations/Trial Setting (9:30 AM) (Judicial Officer: Adair, Valerie) Matter Heard; Journal Entry Details: <i>Counsel indicated they did not settle the case and to set it for trial. COURT ORDERED, trial dates SET. CUSTODY 6/1/17 9:30AM CC 6/5/17 9:30AM JT;</i>
06/01/2017	 Calendar Call (9:30 AM) (Judicial Officer: Adair, Valerie) MINUTES Matter Heard; Journal Entry Details: <i>Mr. Ericsson announced ready for trial. Ms. Luzaich stated an essential witness was in the hospital and requested a continuance. Mr. Ericsson made no objection. Court GRANTED a brief continuance. Counsel stated they would need 6-7 days for trial. CUSTODY 6/15/17 9:30 AM CALENDAR CALL 6/19/17 9:30 AM JURY TRIAL;</i> SCHEDULED HEARINGS  Calendar Call (06/15/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie) CANCELED Jury Trial (06/19/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie) <i>Vacated</i>
06/05/2017	CANCELED Jury Trial (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Vacated</i>
06/15/2017	 Calendar Call (9:30 AM) (Judicial Officer: Adair, Valerie) Trial Date Set; Journal Entry Details: <i>Counsel announced ready for trial adding that 6-7 days would be needed and there would be approximately 14 witnesses. Court SET trial date and time. CUSTODY 6/19/17 9:00 AM JURY TRIAL;</i>
06/19/2017	 Jury Trial (9:00 AM) (Judicial Officer: Adair, Valerie) 06/19/2017-06/23/2017 Trial Continues; Trial Continues; Trial Continues; Trial Continues; Trial Continues; Journal Entry Details: <i>INSIDE THE PRESENCE OF THE JURY Testimony and exhibits presented. (See worksheets) Court admonished and excused the Jury for the weekend recess. CONTINUED TO: 6/26/17 9:00 AM;</i> Trial Continues; Trial Continues; Trial Continues; Trial Continues; Trial Continues; Journal Entry Details: <i>INSIDE THE PRESENCE OF THE JURY Testimony and exhibits presented. (See worksheets) Court admonished and excused the Jury for the evening recess. CONTINUED TO: 6/23/17 10:00 AM;</i> Trial Continues; Trial Continues; Trial Continues; Trial Continues; Trial Continues; Journal Entry Details: <i>OUTSIDE THE PRESENCE OF THE JURY Counsel put Juror challenges on the record. INSIDE THE PRESENCE OF THE JURY Testimony and exhibits presented. (See worksheets) Court admonished and excused the Jury for evening recess. OUTSIDE THE PRESENCE OF THE JURY Mr. Ericsson moved to prevent the Deft's statement from being played to the Jury. Ms. Luzaich argued the Supreme Court's ruling against suppression of the statement. Court DENIED Mr. Ericsson's request. CONTINUED TO: 6/22/17 12:30 AM;</i> Trial Continues; Trial Continues; Trial Continues;

CASE SUMMARY

CASE NO. C-15-305949-1

Trial Continues;

Trial Continues;

Journal Entry Details:

INSIDE THE PRESENCE OF THE PROSPECTIVE JURY Jury selection continued. Prospective Jurors excused for lunch recess. *OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY* Colloquy as to which Prospective Jurors to release. *INSIDE THE PRESENCE OF THE PROSPECTIVE JURY* Jury selection continued. Jury panel of 14 members selected and SWORN. Remaining panel thanked and excused. Introductions by Court. Indictment read. Openings by counsel. Jury admonished and excused for evening recess. CONTINUED TO: 6/21/17 10:30 AM;

Trial Continues;

Trial Continues;

Trial Continues;

Trial Continues;

Trial Continues;

Journal Entry Details:

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY Mr. Ericsson put the offer on the record and stated the Deft. rejected the offer. *INSIDE THE PRESENCE OF THE PROSPECTIVE JURY* Introduction by the Court and by counsel. VIOR DIRE OATH given. Jury selection began. Court admonished and excused the prospective jurors for evening recess. *OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY* Colloquy as to which Prospective Jurors to release. Evening recess. CONTINUED TO: 6/20/17 10:30 AM;

06/19/2017 **CANCELED Jury Trial** (9:30 AM) (Judicial Officer: Adair, Valerie)
Vacated

06/26/2017  **Jury Trial** (9:00 AM) (Judicial Officer: Adair, Valerie)

06/26/2017-06/27/2017

Jury Deliberating;

Verdict;

Journal Entry Details:

At the time of 12:11 PM the Jury returned with the following verdict: COUNT 1 - CONSPIRACY TO COMMIT KIDNAPPING - GUILTY; COUNT 2 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON - GUILTY; COUNT 3 - ASSAULT WITH A DEADLY WEAPON - GUILTY; COUNT 4 - UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE - NOT GUILTY; COUNT 5 - BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT - GUILTY; COUNT 6 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON - NOT GUILTY; COUNT 7 - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON - NOT GUILTY. Jury polled at the request of Mr. Ericsson. Court thanked and excused the Jury. At the request of Ms. Luzaich, Deft. REMANDED into custody without bail. Court referred the matter to Parole and Probation for a Presentence Investigation Report and ORDERED, SET for sentencing. Upon inquiry of the Court, Ms. Luzaich elected not to proceed with the Ex-Felon in Possession of Firearm but would revive if the conviction is overturned. Ms. Luzaich requested the Court conditionally dismiss the charge so the State can revive it if necessary. COURT SO ORDERED. CUSTODY 8/29/17 9:30 AM SENTENCING;

Jury Deliberating;

Verdict;

Journal Entry Details:

INSIDE THE PRESENCE OF THE JURY: Testimony and exhibits presented. (See worksheets). Parties RESTED. *OUTSIDE THE PRESENCE OF THE JURY:* Defendant advised of his right not to testify. Instructions settled. *INSIDE THE PRESENCE OF THE JURY:* Court instructed the jury. Closing arguments by counsel. Marshal SWORN to take charge of the Jury; Court thanked and excused the alternate jurors. At the hour of 3:25 p.m., the jury retired to deliberate. At approximately 4:30 p.m., the Court released the jury and ordered them to return the following day at 9:00 a.m., to resume deliberations. CUSTODY 6/27/17 9:00 AM JURY TRIAL ;

08/29/2017  **Sentencing** (9:30 AM) (Judicial Officer: Adair, Valerie)


MINUTES

Set Status Check;

Journal Entry Details:

Court noted an email was received regarding the gang affiliation listed in the Presentence Investigation report (PSI) and ORDERED Ms. Pieper to obtain the FI cards. Mr. Ericsson stated there was also an issue with the race listed for the Deft. adding it should be Moorish-American. The Court advised it was immaterial to the Court but should be accurate. Mr. Ericsson stated he would contact Parole and Probation to go over the options. Court SET status check. CUSTODY 9/7/17 9:30 AM STATUS CHECK: FI CARDS ;

SCHEDULED HEARINGS

 **Status Check** (09/07/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)

CASE SUMMARY

CASE NO. C-15-305949-1

09/07/2017, 09/14/2017

FI Cards

09/07/2017



Status Check (9:30 AM) (Judicial Officer: Adair, Valerie)

09/07/2017, 09/14/2017

FI Cards

MINUTES

Matter Continued;

Matter Heard;

Journal Entry Details:

Mr. Ericsson stated the FI cards were received and was made aware by Ms. Pieper that the State did not object to remove the gang affiliation reference from the Presentence Investigation Report (PSI). Ms. Pieper confirmed there was no objection. Mr. Ericsson requested the matter be continued to have a supplemental PSI prepared. COURT SO ORDERED. CUSTODY CONTINUED TO: 9/26/17 9:30 AM;

Matter Continued;

Matter Heard;

Journal Entry Details:

Mr. Ericsson stated that Ms. Luzaich was in another department and requested the matter be continued. He further stated he received information from the State that said the last contact the Deft. had with law enforcement was in 2017 but the Deft. was in custody at that time. Court ORDERED, MATTER CONTINUED. CUSTODY CONTINUED TO: 9/14/17 9:30 AM;

SCHEDULED HEARINGS



Sentencing (09/26/2017 at 9:30 AM) (Judicial Officer: Adair, Valerie)

09/26/2017, 10/10/2017, 10/19/2017

09/26/2017



Sentencing (9:30 AM) (Judicial Officer: Adair, Valerie)

09/26/2017, 10/10/2017, 10/19/2017

Matter Continued;

See 10/2/17 Correspondence from counsel requesting sentencing be moved to a later date

Matter Continued;

Defendant Sentenced;

Journal Entry Details:

Court noted that there was notice of a victim speaker. Ms. Luzaich stated the speaker would not be able to make it. Argument by counsel. Statement by Deft. By virtue of the Jury's verdict and this Court's order, DEFT ELAM ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT KIDNAPPING (F), COUNT 2 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON, COUNT 3 - ASSAULT WITH A DEADLY WEAPON (F) and COUNT 5 - BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (F). COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, a \$150.00 DNA Analysis fee including testing to determine genetic markers, and \$3.00 DNA Collection fee, Deft. SENTENCED AS FOLLOWS: COUNT 1 - to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC); COUNT 2 - to LIFE with the eligibility for parole after FIVE (5) YEARS with a CONSECUTIVE term of a MINIMUM of SIXTY (60) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon in the Nevada Department of Corrections (NDC) to run CONCURRENT with COUNT 1; COUNT 3 - to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC) to run CONSECUTIVE to COUNT 2; COUNT 5 - to LIFE with the eligibility for parole after TWO (2) YEARS to run CONSECUTIVE to COUNT 3 in the Nevada Department of Corrections (NDC), with NINE HUNDRED TWENTY-EIGHT (928) DAYS credit for time served. The Deft's AGGREGATE TOTAL SENTENCE is LIFE with the eligibility for parole after THIRTEEN (13) YEARS. COURT ORDERED, COUNTS 4, 6 and 7 DISMISSED. COURT FURTHER ORDERED, COUNT 8 DISMISSED WITHOUT PREJUDICE. COURT ORDERED, a special SENTENCE OF LIFETIME SUPERVISION is imposed to commence upon release from any term of probation, parole or imprisonment. Register as a sex offender in accordance with NRS 179D.460 within 48 hours after Deft's release. BOND, if any, EXONERATED. NDC;

Matter Continued;

See 10/2/17 Correspondence from counsel requesting sentencing be moved to a later date

Matter Continued;

Defendant Sentenced;

Journal Entry Details:


Ms. Einhorn stated Ms. Luzaich asked her to request the matter be continued for her to be present. COURT ORDERED, MATTER CONTINUED and directed Ms. Einhorn to notify the victim speaker of the new date. CUSTODY CONTINUED TO: 10/19/17 9:30 AM;

Matter Continued;

EIGHTH JUDICIAL DISTRICT COURT

CASE SUMMARY

CASE NO. C-15-305949-1

05/28/2019	<p>See 10/2/17 Correspondence from counsel requesting sentencing be moved to a later date Matter Continued; Defendant Sentenced; Journal Entry Details: <i>Mr. Ericsson stated there was no Presentence Investigation Report (PSI) filed and requested the matter be continued.</i> <i>Court ORDERED, MATTER CONTINUED. CUSTODY CONTINUED TO: 10/3/17 9:30 AM;</i></p> <p> Motion to Withdraw as Counsel (9:30 AM) (Judicial Officer: Adair, Valerie) <i>Thomas A. Ericsson's, Esq., Motion to Withdraw as Counsel</i> Granted; Journal Entry Details: <i>Defendant not present. COURT ORDERED, motion GRANTED. CUSTODY;</i></p>	
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DATE

FINANCIAL INFORMATION

<p>Defendant Elam, Calvin Thomas Total Charges Total Payments and Credits Balance Due as of 3/17/2021</p>	<p>178.00 0.00 178.00</p>
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\\CLARKCOUNTYDA.NET\CRM\CASES\2010\1517034\201517634\HITO-TV\AMC\GALVIN-12-01-2020-001.DOCX

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On April 17, 2015, Calvin Elam (hereinafter “Petitioner”) was indicted by way of grand
4 jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B
5 Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE
6 KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310,
7 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON
8 (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF
9 AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one
10 (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A
11 Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE
12 OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC
13 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY
14 WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121);
15 and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
16 PERSON (Category B Felony – NRS 202.360 – NOC 51460).

17 Petitioner’s jury trial started on June 19, 2017, and ended on June 27, 2017. The jury
18 found Defendant guilty of Count 1—CONSPIRACY TO COMMIT KIDNAPPING (Category
19 B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST
20 DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
21 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY
22 WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY
23 WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 –
24 NOC 50157).

25 The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN
26 ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count
27 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
28 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

1 WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366,
2 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally
3 dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
4 PERSON (Category B Felony - NRS 202.360 - NOC 51460).

5 On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to
6 Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months
7 in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole
8 after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum
9 of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department
10 of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12)
11 months and a maximum of seventy-two (72) months in the Nevada Department of Corrections
12 to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2)
13 years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner
14 received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were
15 dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special
16 sentence of lifetime supervision to commence upon release from any term of probation, parole,
17 or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance
18 with NRS 199D.460 within 48 hours after release.

19 Petitioner's Judgment of Conviction was filed on October 31, 2017.

20 On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the
21 Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on
22 May 7, 2019.

23 On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May
24 27, 2020, Petitioner filed a Motion to Withdraw Judgment on Petition for Writ of habeas
25 Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response.
26 On August 18, 2020, the Court granted Petitioner's Motion to Withdraw Judgment on Petition
27 for Writ of Habeas Corpus, and allowed Petitioner to file a Supplemental Petition by October
28 20, 2020. Also on August 18, 2020, the Court denied Petitioner's Motion for Appointment of

1 Counsel without prejudice, and articulated that if issues were unduly complex counsel
2 appointment would be considered. Petitioner never filed a Supplemental Petition. On
3 December 1, 2020, the Court denied Petitioner's Petition. The Court's written Order follows.

4 **STATEMENT OF THE FACTS**

5 On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile
6 (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and
7 neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to
8 visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog
9 to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and
10 Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing.
11 Webster saw Petitioner and he said, "what's up" and motioned for her to come over. He was
12 downstairs in front of his apartment when Webster saw him.

13 Webster did not know Petitioner's name was Calvin because she called him "cuz"
14 because he was in a dating relationship with Webster's cousin, Joanique, by marriage. She
15 knew Petitioner only for a few months before the incident took place. When he motioned for
16 her to come over, Webster went because she wanted to explain the situation that occurred with
17 his pit bull puppies that went missing.

18 Previously, while Webster was visiting her friend Edward Brown, who lived in the
19 building next to Petitioner, she discovered Petitioner's girlfriend looking for the puppies.
20 When Webster saw Petitioner's girlfriend looking for the puppies she decided to help her look
21 for them, but they could not find them and everyone went their separate ways. Webster
22 understood that Petitioner was upset and believed someone had taken his puppies so when he
23 motioned for her to come over she wanted to explain that she had nothing to do with the
24 missing puppies.

25 Webster left her dog Payton with Gentile and Yancy and went and talked with
26 Petitioner. As she walked up to the apartment, he was already in the apartment, so they started
27 talking in the kitchen. She began to explain that she heard what had happened to the puppies
28 and told Petitioner she did not have anything to do with it. Petitioner insisted that she did have

1 something to do with it and Webster explained again that she did not. Webster testified that
2 Petitioner's voice changed in the tone. Petitioner began to get aggressive, loud, and scary. He
3 told her if she did not have anything to do with it, to not worry about it, but told her to turn
4 around and get on her knees. She asked him if he was serious, but could tell by his voice that
5 he was serious so she turned around and got on her knees.

6 Petitioner then tied her up with electrical cords and tape, stuffed her mouth with fabric,
7 covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her
8 back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her
9 mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game."
10 Petitioner beat her with a belt multiple times, pulled her pants down, and took the broom and
11 angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had
12 something to do with the missing dogs. 3 He then made a phone call, and within minutes there
13 were three women and another male that came to the door. During the call Webster heard him
14 saying, "I have one of them here. Come over." The individuals that came in starting videoing
15 what was taking place. Webster started to hear laughter, and then Petitioner pulled out a taser
16 and came extremely close to her face with the taser and then tased her. There was two or three
17 black males and one black female.

18 Webster described Petitioner as a tall and lighter skinned man with a medium build.
19 Webster believed Petitioner was going to stick the broomstick in her anus, she was so
20 distraught that she blacked out. The beating took place over a couple of hours. Petitioner
21 touched Webster with the broomstick on her buttocks area. While Petitioner was doing this,
22 Webster had her chest on the floor because she had fallen from her knees. She repeatedly told
23 Petitioner she had nothing to do with the missing dogs. The broomstick touched her behind in
24 several places and Webster testified "at one point I just braced myself for him to just do it, and
25 then I just blanked out." She believed Petitioner was going to stick the broomstick in her anus.
26 If he did do it, she did not remember because she passed out.

27 //

28 //

1 Petitioner pulled Webster's shorts and underwear down and started beating her with a
2 leather belt. Webster heard Petitioner and the other man say things along the lines of "[w]e're
3 going to put the bitch in the trunk and—and it's not just going to happen to you. We're going
4 to go over there and get everybody else because the puppies are going to come up." At one
5 point during the beating, Webster played dead so they would stop beating and tasing her and
6 she heard them say, "is that bitch dead?" She then heard them say "wake her up, tase her
7 again."

8 Petitioner made a phone call about picking kids up from school. She realized the
9 individuals were gone because they did not respond when she said something. Webster was
10 then able to roll and scoot herself to the door and somehow got to her knees. She was able to
11 unlock the door and threw herself outside and onto the pavement. Gentile was still on her deck,
12 saw Webster, and ran down to help her.

13 Gentile and two men helped untie her and take the stuffing out of her mouth. One of
14 the individuals had to use a knife to untie Webster. Webster was so afraid that she told the
15 individuals to help her faster because she wanted to get out of there. After she was untied,
16 within seconds, Petitioner returned in a vehicle, noticed Webster and rolled right past her.
17 Petitioner went to Tony's house. Shortly thereafter, Webster saw Petitioner walking towards
18 his house. Petitioner looked directly at Webster, throwing up signs and looked like Snoop
19 Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte
20 Patterson. She explained to him what just happened and he immediately called the police.
21 When officers arrived Webster explained what happened. Webster had a bruise on her lip and
22 injuries on her legs.

23 The next day or soon thereafter the incident Webster went to the UMC. Webster told
24 the Sexual Assault Nurse Examiner that Petitioner put the broom between her butt cheeks. She
25 told Detective Ryland, a female detective, that her rectum felt sore. She also told Detective
26 Ryland and another female detective that the broomstick went between the two butt cheeks,
27 but she was not sure if it went into her anus. She told them she was touched anally, that is why
28 she scooted repeatedly over and over again. She also told them she was so scared during the

1 beating that she urinated herself.

2 Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat
3 Fox's four-year-old daughter while Fox worked. On March 10, 2015, Fox dropped her
4 daughter off with Yancy in the early afternoon. After she dropped the baby off, Fox went
5 downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling
6 for help. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were
7 tied, and she had something wrapped around her mouth. Fox began to help her. Webster said,
8 "please help me," and "please call the cops," in a panicked and scared voice.

9 Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived
10 near Gentile and Yancy. He also knew Petitioner and Webster. On March 10, 2015, he saw
11 Webster hopping, jumping, trying to get away and rolling. She was rolling away from
12 Petitioner's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth
13 was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile
14 began cutting the wires and plastic off to free Webster.

15 Before he saw Webster come out of the apartment, he saw a black male, who was about
16 5'11" to 6', with dark skin, weighing about 250 pounds. He also saw three women come out
17 of the apartment. He had seen the black male before with Petitioner. Id. However, he had never
18 seen the females before. The four people left in a burgundy car with dark tinted windows. Then
19 he saw Petitioner come out of the apartment after the four people had left. Id. Petitioner left in
20 a car. He testified that he had previously seen Petitioner drive in a small white four-door car.
21 Petitioner later in the day came back to the apartment complex in the white car. Petitioner
22 cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and
23 Petitioner threw it in the dumpster near his apartment.

24 Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las
25 Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed
26 Joanique in his vehicle at 1108 North Jones, near Petitioner's apartment. Cardenas called a
27 phone number for Petitioner that he obtained. Petitioner answered the phone and Cardenas
28 asked him if he knew Webster. Petitioner acknowledged knowing her. Cardenas asked him to

1 come back to the crime scene and Petitioner decided not to. Cardenas then participated in
2 serving a search warrant on Petitioner's apartment.

3 Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took
4 photos of Webster when he arrived on the scene. One of the photos depicted bruising on
5 Webster's inner and lower lips. She had abrasions on her knees and shins. He testified that she
6 complained of pain in her wrists and forearms and that there may be have some redness on her
7 wrists.

8 He then went to 900 North Jones. He collected what he described as a fitted bed sheet
9 and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the
10 parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black
11 twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The
12 dumpster was in front of Petitioner's apartment approximately 20-30 feet away. Inside the
13 apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also
14 found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with
15 Petitioner's name on it. He also found Petitioner's ID in the east dresser in the northwest
16 bedroom.

17 Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he
18 located a Nissan Sentra. He recovered a blue LA hat on a shelf in the southeast bedroom. He
19 also recovered an ID with Petitioner's name on it. Grover swabbed the barrel of the shotgun
20 and the end of the broomstick to later be tested for DNA.

21 Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner,
22 performed a sexual assault evaluation on Webster. Webster chose to have the fourth
23 examination which was the full forensic sexual assault exam, including requests for the
24 criminal investigation of a sexual assault and the medical component. She testified that
25 Webster told her she was a victim of a sexual assault, that she had been blindfolded and
26 hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her
27 rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her
28 body. When asked if she passed out or lost consciousness during the assault, Webster stated

1 she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the
2 injury was similar to other injuries she had observed where guns had been put into people's
3 mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified
4 that was not abnormal considering it had been 50 hours since the incident. When shown
5 pictures of Webster's legs that were taken right after the attack, she described there were
6 abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have
7 been interested in looking at had those injuries been apparent when Webster came in.

8 Dermanelian classified the injuries she was shown in court as superficial, meaning they
9 would not last long. During the vaginal examination she did not find signs of blunt force
10 trauma. She explained that because she had seen Webster two days after the assault, it was
11 likely that any injuries had healed such that she could not observe them. During the rectal
12 exam there were no injuries of blunt force trauma. She also testified that based on her past
13 experience it did not appear that Webster was under the influence of a controlled substance.

14 Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD
15 lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun,
16 for DNA along with three reference standards. She was asked to run the three reference
17 standards for Webster, Gentile, and Petitioner. The swab that came from the end of the shotgun
18 barrel was consistent with Webster.

19 ANALYSIS

20 **I. GROUND TWO IS PROCEDURALLY BARRED**

21 **A. Any Substantive Claims Were Waived**

22 NRS 34.810(1) reads:

23 The court shall dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or guilty
25 but mentally ill and the petition is not based upon an allegation that
26 the plea was involuntarily or unknowingly or that the plea was
entered without effective assistance of counsel.

27 (b) The petitioner's conviction was the result of a trial and the
28 grounds for the petition could have been:

...

1 (2) Raised in a direct appeal or a prior petition for a writ of habeas
2 corpus or postconviction relief.

3 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
4 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
5 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
6 pursued on direct appeal, or they will be considered waived in subsequent proceedings.”
7 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
8 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
9 court must dismiss a habeas petition if it presents claims that either were or could have been
10 presented in an earlier proceeding, unless the court finds both cause for failing to present the
11 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
12 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

13 Further, substantive claims are beyond the scope of habeas and waived. NRS
14 34.724(2)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v.
15 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas
16 v. State, 115 Nev. 148, 979 P.2d 222 (1999). A defendant may only escape these procedural
17 bars if they meet the burden of establishing good cause and prejudice:

18 3. Pursuant to subsections 1 and 2, the petitioner has the burden of
19 pleading and proving specific facts that demonstrate:

20 (a) Good cause for the petitioner's failure to present the claim or for
21 presenting the claim again; and

22 (b) Actual prejudice to the petitioner.

23 NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of
24 error upon direct appeal, the district court is not obliged to consider them in post-conviction
25 proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

26 Petitioner brings substantive claims that should have been raised on direct appeal. In
27 Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at
28 7-7A. The Court finds that such a substantive claim is waived for not bringing it on appeal.
Further, to the extent Ground Three is construed as a claim of prosecutorial misconduct, such

1 a claim is substantive and should have been raised on direct appeal. Therefore, the Court finds
2 that unless Petitioner can demonstrate good cause and prejudice, these claims were waived
3 pursuant to NRS 34.810.

4 **B. Petitioner Has Not Demonstrated Good Cause Sufficient to Overcome the**
5 **Procedural Bar**

6 A showing of good cause and prejudice may overcome procedural bars. “To establish
7 good cause, appellants must show that an impediment external to the defense prevented their
8 compliance with the applicable procedural rule. A qualifying impediment might be shown
9 where the factual or legal basis for a claim was not reasonably available at the time of default.”
10 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court
11 continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526.
12 In order to establish prejudice, the defendant must show “not merely that the errors of [the
13 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
14 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
15 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
16 Fraday, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a
17 “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252,
18 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
19 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner.
20 NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural default rules must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d
23 at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that
25 a claim reasonably available to the petitioner during the statutory time period did not constitute
26 good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot
27 constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077
28 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Here, the Court finds Petitioner has not even alleged, must less shown, good cause to
2 overcome the procedural bar.¹ All the relevant facts and law necessary to present this claim
3 were known to petitioner at the time he raised his direct appeal. As such, there is no good cause
4 sufficient to over the procedural bar, and this ground is denied.

5 II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

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

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

¹ Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).

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

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

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

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

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1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89,
7 694, 104 S. Ct. at 2064-65, 2068).

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

18 **A. Counsel Was Not Ineffective for Not Moving to Dismiss the Complaint**

19 In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to
20 dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. Counsel
21 cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State,
22 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The remedy for a finding of insufficient
23 evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State,
24 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence
25 to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a
26 judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be
27 that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

28 //

1 “In reviewing a claim of insufficient evidence, the relevant inquiry is ‘whether, after
2 reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact
3 could have found the essential elements of the crime beyond a reasonable doubt.’” Origel-
4 Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100
5 Nev. 245, 250, 681 P.2d 44, 47 (1984)). “Clearly, this standard does not allow the district court
6 to act as a “thirteenth juror” and reevaluate the evidence and the credibility of the witnesses.”
7 Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

8 The Court finds that a Motion for Acquittal due to insufficiency of the evidence would
9 have been futile in the instant case. As the Nevada Supreme Court noted when affirming
10 Petitioner’s sentence, there was “overwhelming evidence that supported the jury’s verdict,
11 which included eyewitness and independent witness testimony, DNA evidence, physical
12 injuries on the victim, and recovery of items used to bind and gag the victim.” Order of
13 Affirmance, at 3. Therefore, such a motion would have been futile. Under Ennis, counsel has
14 no obligation to raise futile motions.

15 The Court further finds that even if counsel’s decision not to raise this motion had been
16 unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when
17 affirming Petitioner’s conviction, there was such overwhelming evidence of Petitioner’s guilt
18 introduced at trial that it was not plain error for the Court to allow alleged prior bad act
19 evidence to be admitted. Given that the standard for prejudice under ineffective assistance of
20 counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate
21 that he was prejudiced by his counsel’s actions. See Gordon v. United States, 518 F.3d 1291,
22 1300 (11th Cir. 2008). As such, Petitioner’s counsel cannot be found ineffective and this claim
23 is denied.

24 Likewise, the Court finds that Petitioner’s related claim under Ground Two that his
25 conviction is invalid because of insufficient evidence is similarly without merit. Petitioner’s
26 chief complaint seems to be that there was no evidence admitted as to his intent sufficient to
27 warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined
28 as “a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals,

1 kidnaps, or carries away a person ... for the purpose of committing sexual assault... or for the
2 purpose of killing the person or inflicting substantial bodily harm.” NRS 200.310. The State
3 admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her
4 mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further
5 angled a broomstick towards the victim’s anal opening, as if to stick the broom handle in the
6 victim’s anal opening. Id. As such, and consistent with the Supreme Court of Nevada’s
7 holding, there is no doubt that sufficient evidence was introduced against Petitioner to support
8 his conviction of first-degree kidnapping.

9 As such, this claim is without merit. Since this claim is without merit, Petitioner would
10 not be prejudiced by its denial. Since Petitioner would not be prejudiced by this claims denial,
11 nor has he shown good cause sufficient to overcome the procedural bars (see Section I(B)),
12 this claim is denied under NRS 34.810.

13 **B. Petitioner’s Counsel Was Not Ineffective for Not Objecting to the Prosecutor’s**
14 **Comments**

15 Petitioner next argues that his counsel was ineffective for failing to object to various
16 instances of alleged prosecutorial misconduct. Pet at 8- 8D. However, the Court finds that none
17 of the instances mentioned by Petitioner amount to prosecutorial misconduct, and there was
18 therefore nothing for counsel to object to.

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

24 In resolving claims of prosecutorial misconduct, the Court undertakes a two-step
25 analysis: determining whether the comments were improper; and deciding whether the
26 comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172,
27 1188. The Court views the statements in context, and will not lightly overturn a jury’s verdict
28 based upon a prosecutor’s statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the

1 defendant must show that an error was prejudicial in order to establish that it affected
2 substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

3 With respect to the second step, this Court will not reverse if the misconduct was
4 harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless error review
5 depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-
6 89. Misconduct may be constitutional if a prosecutor comments on the exercise of a
7 constitutional right, or the misconduct “so infected the trial with unfairness as to make the
8 resulting conviction a denial of due process.” Id. 124 Nev. at 1189 (quoting Darden v.
9 Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension,
10 this Court will reverse unless the State demonstrates that the error did not contribute to the
11 verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, this
12 Court “will reverse only if the error substantially affects the jury’s verdict.” Id.

13 The State is permitted to offer commentary on the evidence that is supported by the
14 record. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). In Rose, the prosecutor
15 called the appellant a predator for using his daughter as a lure to reach other victims, but the
16 Nevada Supreme Court accepted it as appropriate commentary supported by the evidence and
17 as insufficiently prejudicial to warrant relief. Rose, 123 Nev. at 209–10, 163 P.3d at 418–19.

18 Further, the State may respond to defense theories and arguments. Williams v. State,
19 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant’s failure to
20 substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116
21 Nev. 752, 762 (2000), citing State v. Green, 81 Nev. 173, 176 (1965) (“The prosecutor had a
22 right to comment upon the testimony and to ask the jury to draw inferences from the evidence,
23 and has the right to state fully his views as to what the evidence shows.”). Further, if the
24 defendant presents a theory of defense, but fails to present evidence thereon, the State may
25 comment upon the failure to support the supposed theory. Evans v. State, 117 Nev. 609, 630-
26 631 (2001); see McNelton v. State, 115 Nev. 396, 408–09 (1999).

27 //

28 //

1 Petitioner objects to four different statements as alleged prosecutorial misconduct that
2 his counsel should have objected to. Petitioner first takes issue with the State claiming during
3 closing argument that: “The purpose was to either inflict substantial bodily harm or kill her --
4 so first – first degree kidnapping was met.” Pet. at 8; Jury Trial Day 6: June 26, 2017, at 118,
5 filed February 13, 2018. In context, the State’s statement was as follows:

6 All of this demonstrates the fact that she was hogtied, kidnapped. So
7 for what purpose? Was it to inflict substantial bodily harm? To kill
8 her? To sexually assault? You heard the defendant was angry she said.
9 When he brought her into the apartment, everything was fine, and then
10 all of a sudden his body language changed. His demeanor changed.
11 He got loud. He got mean, and ultimately she was beat. She was beat
with a belt. She was beat with a broom. She was beat with a – or she
was stunned. She had the shotgun in her mouth. What do you think
the purpose was? The purpose was to either inflict substantial bodily
harm or kill her, and then you heard about the broomstick. So first --
first-degree kidnapping was met.

12 Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The State’s argument was
13 clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner’s
14 intent could be deduced from the actions he undertook while he had the victim hogtied. The
15 Court finds that such a commentary is proper during closing arguments, and is not
16 prosecutorial misconduct.

17 Petitioner next takes issue with the State allegedly offering an incorrect definition of
18 Battery with Intent to Commit Sexual Assault. Petitioner references page 125 and 128 of Jury
19 Trial Day 6: June 26, 2017 and claims that the State defined Battery With Intent to Commit
20 Sexual Assault as

21 The fact that she is physically restrained substantially increased her
22 risk of potentially death or substantial bodily harm because she can’t
get out.

23 ...
24 So the putting her down, whacking her with the broomstick and the
putting the broomstick up at her butt, Battery With the Intent to
Commit a Sexual Assault.

25 Pet. at 8-A; Jury Trial Day 6: June 26, 2017 at 124-25, 128 respectively.

26 In regards to the first statement, the Court notes that the State was not discussing the
27 crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner
28 could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim

1 is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial
2 Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the
3 case, the jury could find that Petitioner had committed kidnapping in the first degree by
4 substantially increasing the risk of substantially bodily harm, and also find that Petitioner had
5 committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere
6 in the excerpt does the State define any of these offenses. In fact, the State made regular
7 mention to the jury instructions that properly defined these offenses. Id. As such, the Court
8 finds that Petitioner's notion that the State incorrectly defined Battery with Intent to Commit
9 Sexual Assault is belied by the record.

10 In regards to the second statement, the State was not defining Battery With Intent to
11 Commit Sexual Assault. In fact, the Court notes that the State specifically referenced the jury
12 to Jury Instruction 17 for a statement of the law regarding this crime. Id. at 128. The State was
13 arguing that these were the actions that constituted Battery with Intent to Commit Sexual
14 Assault. Given that proof of these actions had been admitted at trial, the State was entitled to
15 argue that the evidence satisfied the elements of the crime charged.

16 Petitioner further takes issue with the State claiming "the fact that she is physically
17 restrained substantially increases her risk of potentially death or substantial bodily harm." Pet.
18 at 8-B; Jury Trial Day 6: June 26, 2017 at 124-25. Such a statement was clearly a commentary
19 on the evidence. Pursuant to Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), such
20 a statement does not establish prosecutorial misconduct.

21 Given that trial counsel has the ultimate responsibility of deciding what objections to
22 make, and that none of the statements Petitioner here complains of constituted prosecutorial
23 misconduct, the Court finds that it was not unreasonable for Petitioner's counsel to not object
24 to these statements.

25 Further, even if counsel's decision had been unreasonable, the Court finds that
26 Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's
27 conviction, there was such overwhelming evidence of Petitioner's guilt introduced at trial that
28 it was not plain error for the Court to allow alleged prior bad act evidence to be admitted.

1 Given that the standard for prejudice under ineffective assistance of counsel is the same as the
2 standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by
3 his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As
4 such, Petitioner's counsel cannot be found ineffective and this claim is denied.

5 **C. Counsel Was Not Ineffective for Not Requesting a Jury Instruction**

6 Petitioner argues in Ground Three that his counsel was ineffective for not requesting a
7 jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C.
8 Petitioner alleges that it was unreasonable for his counsel not to request an instruction
9 reflecting this standard because the State had charged him with Battery with Intent to Commit
10 Sexual Assault, which the State could not prove without showing that the crime resulted in
11 substantial bodily harm. Id.

12 Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an
13 individual may be convicted of Battery with Intent to Commit Sexual Assault even when no
14 substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only
15 charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit
16 Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence
17 for this crime (life with the eligibility to parole after two (2) years) also reflects that he was
18 only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to
19 Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4);
20 Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason
21 for Petitioner's counsel to request the jury instruction in question. Therefore, the Court finds
22 that this decision was not an unreasonable one.

23 Further, even if counsel's decision had been unreasonable, Petitioner was not
24 prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there
25 was such overwhelming evidence of Petitioner's guilt introduced at trial that it was not plain
26 error for the Court to allow alleged prior bad act evidence to be admitted. Given that the
27 standard for prejudice under ineffective assistance of counsel is the same as the standard for
28 plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's

actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim is denied.

D. Counsel Did Not Fail to Subject the Case to a Meaningful Adversary Process

Petitioner next argues that counsel was ineffective for failing to (1) do any pretrial investigation; (2) failing to file the following motions: Motion to Strike Aggravators, Motion to Exclude Argument Constituting Prosecutorial Misconduct; Motion to Suppress Evidence; Motion in Limine to Preclude Admission of Prejudicial Evidence; Motion to Dismiss For Insufficient Information Charging Petitioner; (3) failure to object to damaging and prejudicial statements during closing arguments; and (4) failure to call any witnesses on Petitioner's behalf.

The Court finds that each of these allegations is a bare and naked claim suitable only for summary dismissal. In regard to the failure to investigate claim, Petitioner does not even allege, much less show, what a better investigation would have turned up. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable).

Regarding the various motions Petitioner alleges his counsel should have filed, Petitioner has neither alleged nor shown that any of these motions would have been successful. For some of these motions, Petitioner has only offered bare and naked assertions that counsel not filing them constitutes ineffective assistance of counsel. For example, Petitioner claims that his counsel should have filed a motion to suppress evidence. But he does not even articulate what evidence he claims should have been suppressed. On other motions, there was clearly no legal grounds to bring the motion (such as the motion to exclude argument constituting prosecutorial misconduct as more fully articulated in Section II(C)). Given that Petitioner has not alleged any grounds claiming why these Motions would have been successful, the Court finds that counsel's decision not to file them cannot constitute ineffective assistance of counsel.

1 Regarding counsel's alleged failure to object to prejudicial statements, Petitioner has
2 not identified what statements he now complains of. To the extent he is referring to the
3 statements he alleged constituted prosecutorial conduct under Ground Three, the Court has
4 already articulated why counsel cannot be found ineffective for not objecting to these
5 statements. As such, the Court finds that this claim is either meritless for the reasons articulated
6 in Section II(C), or this claim is a bare and naked allegation suitable only for summary
7 dismissal under Hargrove. 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

8 Similarly, the Court finds that Petitioner claim that counsel was ineffective for failing
9 to call any witnesses on his behalf is a bare and naked allegation suitable only for summary
10 dismissal. Petitioner does not articulate what witnesses were available to be called, why they
11 should have been called, or how they would have assisted his case.

12 Further, even if Petitioner had alleged enough facts for this Court to consider whether
13 it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be
14 unable to establish that any of these decisions would have prejudiced him at trial. As the
15 Nevada Supreme Court held when affirming Petitioner's conviction, there was such
16 overwhelming evidence of Petitioner's guilt introduced at trial that it was not plain error for the
17 Court to allow alleged prior bad act evidence to be admitted. Given that the standard for
18 prejudice under ineffective assistance of counsel is the same as the standard for plain error
19 review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions.
20 See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). Therefore, counsel cannot
21 be found ineffective for any of the reasons articulated in this section, and these claims are
22 denied.

23 **III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW**

24 Petitioner asserts a claim of cumulative error in the context of ineffective assistance of
25 counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of
26 counsel can be cumulated. However, even if they could be, it would be of no moment as there
27 was no single instance of ineffective assistance in Petitioner's case. See United States v.
28 Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate

1 only the effect of matters determined to be error, not the cumulative effect of non-errors.”).
2 Furthermore, Petitioner’s claim is without merit. “Relevant factors to consider in evaluating a
3 claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and
4 character of the error, and (3) the gravity of the crime charged.” Mulder v. State, 116 Nev. 1,
5 17, 992 P.2d 845, 855 (2000). A defendant “is not entitled to a perfect trial, but only a fair
6 trial.” Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

7 Further, the Court finds the factors articulated in Mulder do not warrant a finding of
8 cumulative error. The issue of guilt in the instant case was not close. As the Nevada Supreme
9 Court noted when it affirmed Petitioner’s judgment of conviction, there was “overwhelming
10 evidence that supported the jury’s verdict.” Order of Affirmance, at 3. In addition, the gravity
11 of the crime charged was severe, as Petitioner was charged with multiple counts in connection
12 with a first-degree kidnapping. Finally, there was no individual error in the underlying
13 proceedings, and as such, there is no error to cumulate. Therefore, this claim is denied.

14 **IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING**

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

- 16 1. The judge or justice, upon review of the return, answer and all
17 supporting documents which are filed, shall determine whether an
18 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.
- 19 2. If the judge or justice determines that the petitioner is not entitled
20 to relief and an evidentiary hearing is not required, he shall dismiss
the petition without a hearing.
- 21 3. If the judge or justice determines that an evidentiary hearing is
22 required, he shall grant the writ and shall set a date for the hearing.

23 The Nevada Supreme Court has held that if a petition can be resolved without
24 expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev.
25 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A
26 defendant is entitled to an evidentiary hearing if his petition is supported by specific factual
27 allegations, which, if true, would entitle him to relief unless the factual allegations are repelled
28 by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100

1 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
2 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
3 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
4 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
5 improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
6 Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court
7 considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as
8 complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

19 Here, Petitioner has offered no factual allegations that, even if true, would entitle him
20 to relief. All of Petitioner’s claims amount to either bare and naked allegations or arguments
21 that counsel had the duty to file frivolous motions.² Further, Petitioner is unable to overcome
22 the fact that he cannot show he prejudiced by counsel’s conduct on any of these grounds
23 because the evidence of guilt admitted against him was overwhelming. See Order of
24 Affirmance, at 3. As such, there is no need to expand the record, and Petitioner’s request for
25 an evidentiary hearing is denied.

26 //

27
28 ² The Court notes that it previously granted Petitioner the opportunity to file a Supplemental Petition to expand upon his claims on August 18, 2020.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Post-Conviction Petition for Writ of Habeas Corpus shall be and is DENIED.

Dated this 19th day of January, 2021

DATED this ____ day of January, 2021.

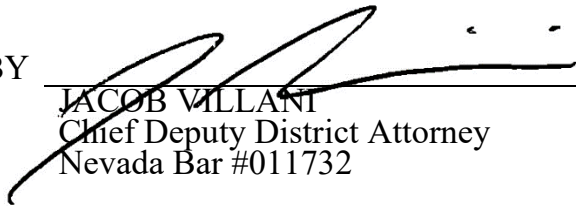


DISTRICT JUDGE

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

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

BY



JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Calvin Elam, Plaintiff(s)

CASE NO: A-20-815585-W

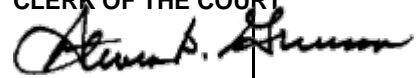
7 vs.

DEPT. NO. Department 15

8 Bean, Warden, 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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NEO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

CALVIN ELAM,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent,

Case No: C-15-305949-1

Dept No: XV

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

PLEASE TAKE NOTICE that on January 19, 2021, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on January 22, 2021.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 22 day of January 2021, I served a copy of this Notice of Entry on the following:

☒ By e-mail:

Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☒ The United States mail addressed as follows:

Calvin Elam # 1187304
P.O. Box 650
Indian Springs, NV 89070

/s/ Amanda Hampton

Amanda Hampton, Deputy Clerk

Statistically closed: USUR - CV Summary Judgment (DSSUJ)

1 **FINDINGS OF FACT, CONCLUSIONS OF LAW**

2 **PROCEDURAL HISTORY**

3 On April 17, 2015, Calvin Elam (hereinafter “Petitioner”) was indicted by way of grand
4 jury as follows: one (1) count of CONSPIRACY TO COMMIT KIDNAPPING (Category B
5 Felony – NRS 200.310, 199.480 – NOC 50087); one (1) count of FIRST DEGREE
6 KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony – NRS 200.310,
7 200.320, 193.165 – NOC 50055); one (1) count of ASSAULT WITH A DEADLY WEAPON
8 (Category B Felony – NRS 200.471 – NOC 50201); one (1) count of UNLAWFUL USE OF
9 AN ELECTRONIC STUN DEVICE (Category B Felony – NRS 202.357 – NOC 51508); one
10 (1) count of BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A
11 Felony – NRS 200.400.4 – NOC 50157); one (1) count of SEXUAL ASSAULT WITH USE
12 OF A DEADLY WEAPON (Category A Felony – NRS 200.364, 200.366, 193.165 – NOC
13 50097); one (1) count of ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY
14 WEAPON (Category B Felony – NRS 200.364, 200.366, 193.330, 193.165 – NOC 50121);
15 and one (1) count of OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
16 PERSON (Category B Felony – NRS 202.360 – NOC 51460).

17 Petitioner’s jury trial started on June 19, 2017, and ended on June 27, 2017. The jury
18 found Defendant guilty of Count 1—CONSPIRACY TO COMMIT KIDNAPPING (Category
19 B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087), guilty of Count 2—FIRST
20 DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
21 200.310, 200.320, 193.165 - NOC 50055), Count 3—ASSAULT WITH A DEADLY
22 WEAPON (Category B Felony - NRS 200.471 - NOC 50201), and Count 5— BATTERY
23 WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 –
24 NOC 50157).

25 The jury found Petitioner not guilty of Count 4—UNLAWFUL USE OF AN
26 ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508), Count
27 6— SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS
28 200.364, 200.366, 193.165 - NOC 50097), and Count 7— ATTEMPT SEXUAL ASSAULT

1 WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366,
2 193.330, 193.165 - NOC 50121). The State requested that the District Court conditionally
3 dismiss Count 8— OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED
4 PERSON (Category B Felony - NRS 202.360 - NOC 51460).

5 On October 19, 2017, Petitioner was adjudged guilty and sentenced as follows: as to
6 Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months
7 in the Nevada Department of Corrections; as to Count 2—life with the eligibility for parole
8 after five (5) years with a consecutive term of a minimum of sixty (60) months and a maximum
9 of one hundred eighty (180) months for the use of a deadly weapon in the Nevada Department
10 of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12)
11 months and a maximum of seventy-two (72) months in the Nevada Department of Corrections
12 to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2)
13 years to run consecutive to Count 3 in the Nevada Department of Corrections. Petitioner
14 received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were
15 dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special
16 sentence of lifetime supervision to commence upon release from any term of probation, parole,
17 or imprisonment. Further, Petitioner was ordered to register as a sex offender in accordance
18 with NRS 199D.460 within 48 hours after release.

19 Petitioner's Judgment of Conviction was filed on October 31, 2017.

20 On November 13, 2017, Petitioner filed a Notice of Appeal. On April 12, 2019, the
21 Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on
22 May 7, 2019.

23 On May 27, 2020, Petitioner filed a Petition for Writ of Habeas Corpus. Also on May
24 27, 2020, Petitioner filed a Motion to Withdraw Judgment on Petition for Writ of habeas
25 Corpus and Motion for Appointment of Attorney. On July 6, 2020, the State filed its Response.
26 On August 18, 2020, the Court granted Petitioner's Motion to Withdraw Judgment on Petition
27 for Writ of Habeas Corpus, and allowed Petitioner to file a Supplemental Petition by October
28 20, 2020. Also on August 18, 2020, the Court denied Petitioner's Motion for Appointment of

1 Counsel without prejudice, and articulated that if issues were unduly complex counsel
2 appointment would be considered. Petitioner never filed a Supplemental Petition. On
3 December 1, 2020, the Court denied Petitioner's Petition. The Court's written Order follows.

4 **STATEMENT OF THE FACTS**

5 On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile
6 (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and
7 neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to
8 visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog
9 to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and
10 Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing.
11 Webster saw Petitioner and he said, "what's up" and motioned for her to come over. He was
12 downstairs in front of his apartment when Webster saw him.

13 Webster did not know Petitioner's name was Calvin because she called him "cuz"
14 because he was in a dating relationship with Webster's cousin, Joanique, by marriage. She
15 knew Petitioner only for a few months before the incident took place. When he motioned for
16 her to come over, Webster went because she wanted to explain the situation that occurred with
17 his pit bull puppies that went missing.

18 Previously, while Webster was visiting her friend Edward Brown, who lived in the
19 building next to Petitioner, she discovered Petitioner's girlfriend looking for the puppies.
20 When Webster saw Petitioner's girlfriend looking for the puppies she decided to help her look
21 for them, but they could not find them and everyone went their separate ways. Webster
22 understood that Petitioner was upset and believed someone had taken his puppies so when he
23 motioned for her to come over she wanted to explain that she had nothing to do with the
24 missing puppies.

25 Webster left her dog Payton with Gentile and Yancy and went and talked with
26 Petitioner. As she walked up to the apartment, he was already in the apartment, so they started
27 talking in the kitchen. She began to explain that she heard what had happened to the puppies
28 and told Petitioner she did not have anything to do with it. Petitioner insisted that she did have

1 something to do with it and Webster explained again that she did not. Webster testified that
2 Petitioner's voice changed in the tone. Petitioner began to get aggressive, loud, and scary. He
3 told her if she did not have anything to do with it, to not worry about it, but told her to turn
4 around and get on her knees. She asked him if he was serious, but could tell by his voice that
5 he was serious so she turned around and got on her knees.

6 Petitioner then tied her up with electrical cords and tape, stuffed her mouth with fabric,
7 covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her
8 back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her
9 mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game."
10 Petitioner beat her with a belt multiple times, pulled her pants down, and took the broom and
11 angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had
12 something to do with the missing dogs. 3 He then made a phone call, and within minutes there
13 were three women and another male that came to the door. During the call Webster heard him
14 saying, "I have one of them here. Come over." The individuals that came in starting videoing
15 what was taking place. Webster started to hear laughter, and then Petitioner pulled out a taser
16 and came extremely close to her face with the taser and then tased her. There was two or three
17 black males and one black female.

18 Webster described Petitioner as a tall and lighter skinned man with a medium build.
19 Webster believed Petitioner was going to stick the broomstick in her anus, she was so
20 distraught that she blacked out. The beating took place over a couple of hours. Petitioner
21 touched Webster with the broomstick on her buttocks area. While Petitioner was doing this,
22 Webster had her chest on the floor because she had fallen from her knees. She repeatedly told
23 Petitioner she had nothing to do with the missing dogs. The broomstick touched her behind in
24 several places and Webster testified "at one point I just braced myself for him to just do it, and
25 then I just blanked out." She believed Petitioner was going to stick the broomstick in her anus.
26 If he did do it, she did not remember because she passed out.

27 //

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1 Petitioner pulled Webster's shorts and underwear down and started beating her with a
2 leather belt. Webster heard Petitioner and the other man say things along the lines of "[w]e're
3 going to put the bitch in the trunk and—and it's not just going to happen to you. We're going
4 to go over there and get everybody else because the puppies are going to come up." At one
5 point during the beating, Webster played dead so they would stop beating and tasing her and
6 she heard them say, "is that bitch dead?" She then heard them say "wake her up, tase her
7 again."

8 Petitioner made a phone call about picking kids up from school. She realized the
9 individuals were gone because they did not respond when she said something. Webster was
10 then able to roll and scoot herself to the door and somehow got to her knees. She was able to
11 unlock the door and threw herself outside and onto the pavement. Gentile was still on her deck,
12 saw Webster, and ran down to help her.

13 Gentile and two men helped untie her and take the stuffing out of her mouth. One of
14 the individuals had to use a knife to untie Webster. Webster was so afraid that she told the
15 individuals to help her faster because she wanted to get out of there. After she was untied,
16 within seconds, Petitioner returned in a vehicle, noticed Webster and rolled right past her.
17 Petitioner went to Tony's house. Shortly thereafter, Webster saw Petitioner walking towards
18 his house. Petitioner looked directly at Webster, throwing up signs and looked like Snoop
19 Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte
20 Patterson. She explained to him what just happened and he immediately called the police.
21 When officers arrived Webster explained what happened. Webster had a bruise on her lip and
22 injuries on her legs.

23 The next day or soon thereafter the incident Webster went to the UMC. Webster told
24 the Sexual Assault Nurse Examiner that Petitioner put the broom between her butt cheeks. She
25 told Detective Ryland, a female detective, that her rectum felt sore. She also told Detective
26 Ryland and another female detective that the broomstick went between the two butt cheeks,
27 but she was not sure if it went into her anus. She told them she was touched anally, that is why
28 she scooted repeatedly over and over again. She also told them she was so scared during the

1 beating that she urinated herself.

2 Debra Fox (hereinafter "Fox") testified that Yancy, who lived with Gentile babysat
3 Fox's four-year-old daughter while Fox worked. On March 10, 2015, Fox dropped her
4 daughter off with Yancy in the early afternoon. After she dropped the baby off, Fox went
5 downstairs and saw a tied-up lady, later identified as Webster, come running up to her yelling
6 for help. Fox saw that Webster's arms were tied, her pants were pulled down, her legs were
7 tied, and she had something wrapped around her mouth. Fox began to help her. Webster said,
8 "please help me," and "please call the cops," in a panicked and scared voice.

9 Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived
10 near Gentile and Yancy. He also knew Petitioner and Webster. On March 10, 2015, he saw
11 Webster hopping, jumping, trying to get away and rolling. She was rolling away from
12 Petitioner's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth
13 was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile
14 began cutting the wires and plastic off to free Webster.

15 Before he saw Webster come out of the apartment, he saw a black male, who was about
16 5'11" to 6', with dark skin, weighing about 250 pounds. He also saw three women come out
17 of the apartment. He had seen the black male before with Petitioner. Id. However, he had never
18 seen the females before. The four people left in a burgundy car with dark tinted windows. Then
19 he saw Petitioner come out of the apartment after the four people had left. Id. Petitioner left in
20 a car. He testified that he had previously seen Petitioner drive in a small white four-door car.
21 Petitioner later in the day came back to the apartment complex in the white car. Petitioner
22 cleaned up the wire and the stuff that Taylor and Gentile had taken off of Webster, and
23 Petitioner threw it in the dumpster near his apartment.

24 Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las
25 Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed
26 Joanique in his vehicle at 1108 North Jones, near Petitioner's apartment. Cardenas called a
27 phone number for Petitioner that he obtained. Petitioner answered the phone and Cardenas
28 asked him if he knew Webster. Petitioner acknowledged knowing her. Cardenas asked him to

1 come back to the crime scene and Petitioner decided not to. Cardenas then participated in
2 serving a search warrant on Petitioner's apartment.

3 Bradley Grover, a senior crime scene analyst testified that on March 10, 2015, he took
4 photos of Webster when he arrived on the scene. One of the photos depicted bruising on
5 Webster's inner and lower lips. She had abrasions on her knees and shins. He testified that she
6 complained of pain in her wrists and forearms and that there may be have some redness on her
7 wrists.

8 He then went to 900 North Jones. He collected what he described as a fitted bed sheet
9 and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the
10 parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black
11 twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The
12 dumpster was in front of Petitioner's apartment approximately 20-30 feet away. Inside the
13 apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also
14 found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with
15 Petitioner's name on it. He also found Petitioner's ID in the east dresser in the northwest
16 bedroom.

17 Grover then went to 6300 West Lake Mead, Building 16 at apartment 1011 where he
18 located a Nissan Sentra. He recovered a blue LA hat on a shelf in the southeast bedroom. He
19 also recovered an ID with Petitioner's name on it. Grover swabbed the barrel of the shotgun
20 and the end of the broomstick to later be tested for DNA.

21 Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner,
22 performed a sexual assault evaluation on Webster. Webster chose to have the fourth
23 examination which was the full forensic sexual assault exam, including requests for the
24 criminal investigation of a sexual assault and the medical component. She testified that
25 Webster told her she was a victim of a sexual assault, that she had been blindfolded and
26 hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her
27 rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her
28 body. When asked if she passed out or lost consciousness during the assault, Webster stated

1 she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the
2 injury was similar to other injuries she had observed where guns had been put into people's
3 mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified
4 that was not abnormal considering it had been 50 hours since the incident. When shown
5 pictures of Webster's legs that were taken right after the attack, she described there were
6 abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have
7 been interested in looking at had those injuries been apparent when Webster came in.

8 Dermanelian classified the injuries she was shown in court as superficial, meaning they
9 would not last long. During the vaginal examination she did not find signs of blunt force
10 trauma. She explained that because she had seen Webster two days after the assault, it was
11 likely that any injuries had healed such that she could not observe them. During the rectal
12 exam there were no injuries of blunt force trauma. She also testified that based on her past
13 experience it did not appear that Webster was under the influence of a controlled substance.

14 Cassandra Robertson, a forensic scientist in the DNA biology section at the LVMPD
15 lab, testified that she was asked to examine a swab from the end of a barrel of an H&R shotgun,
16 for DNA along with three reference standards. She was asked to run the three reference
17 standards for Webster, Gentile, and Petitioner. The swab that came from the end of the shotgun
18 barrel was consistent with Webster.

19 ANALYSIS

20 **I. GROUND TWO IS PROCEDURALLY BARRED**

21 **A. Any Substantive Claims Were Waived**

22 NRS 34.810(1) reads:

23 The court shall dismiss a petition if the court determines that:

24 (a) The petitioner's conviction was upon a plea of guilty or guilty
25 but mentally ill and the petition is not based upon an allegation that
26 the plea was involuntarily or unknowingly or that the plea was
entered without effective assistance of counsel.

27 (b) The petitioner's conviction was the result of a trial and the
28 grounds for the petition could have been:

...

1 (2) Raised in a direct appeal or a prior petition for a writ of habeas
2 corpus or postconviction relief.

3 The Nevada Supreme Court has held that “challenges to the validity of a guilty plea and
4 claims of ineffective assistance of trial and appellate counsel must first be pursued in post-
5 conviction proceedings.... [A]ll other claims that are appropriate for a direct appeal must be
6 pursued on direct appeal, or they will be considered waived in subsequent proceedings.”
7 Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added)
8 (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). “A
9 court must dismiss a habeas petition if it presents claims that either were or could have been
10 presented in an earlier proceeding, unless the court finds both cause for failing to present the
11 claims earlier or for raising them again and actual prejudice to the petitioner.” Evans v. State,
12 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

13 Further, substantive claims are beyond the scope of habeas and waived. NRS
14 34.724(2)(a); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v.
15 State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas
16 v. State, 115 Nev. 148, 979 P.2d 222 (1999). A defendant may only escape these procedural
17 bars if they meet the burden of establishing good cause and prejudice:

18 3. Pursuant to subsections 1 and 2, the petitioner has the burden of
19 pleading and proving specific facts that demonstrate:

20 (a) Good cause for the petitioner's failure to present the claim or for
presenting the claim again; and

21 (b) Actual prejudice to the petitioner.

22 NRS 34.810(3). Where a defendant does not show good cause for failure to raise claims of
23 error upon direct appeal, the district court is not obliged to consider them in post-conviction
24 proceedings. Jones v. State, 91 Nev. 416, 536 P.2d 1025 (1975).

25 Petitioner brings substantive claims that should have been raised on direct appeal. In
26 Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at
27 7-7A. The Court finds that such a substantive claim is waived for not bringing it on appeal.
28 Further, to the extent Ground Three is construed as a claim of prosecutorial misconduct, such

1 a claim is substantive and should have been raised on direct appeal. Therefore, the Court finds
2 that unless Petitioner can demonstrate good cause and prejudice, these claims were waived
3 pursuant to NRS 34.810.

4 **B. Petitioner Has Not Demonstrated Good Cause Sufficient to Overcome the**
5 **Procedural Bar**

6 A showing of good cause and prejudice may overcome procedural bars. “To establish
7 good cause, appellants must show that an impediment external to the defense prevented their
8 compliance with the applicable procedural rule. A qualifying impediment might be shown
9 where the factual or legal basis for a claim was not reasonably available at the time of default.”
10 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court
11 continued, “appellants cannot attempt to manufacture good cause[.]” Id. at 621, 81 P.3d at 526.
12 In order to establish prejudice, the defendant must show “not merely that the errors of [the
13 proceedings] created possibility of prejudice, but that they worked to his actual and substantial
14 disadvantage, in affecting the state proceedings with error of constitutional dimensions.”
15 Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v.
16 Fraday, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a
17 “substantial reason; one that affords a legal excuse.” Hathaway v. State, 119 Nev. 248, 252,
18 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230
19 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner.
20 NRS 34.726(1)(a).

21 A petitioner raising good cause to excuse procedural default rules must do so within a
22 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34 P.3d
23 at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see
24 generally Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506-07 (2003) (stating that
25 a claim reasonably available to the petitioner during the statutory time period did not constitute
26 good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot
27 constitute good cause. State v. District Court (Riker), 121 Nev. 225, 235, 112 P.3d 1070, 1077
28 (2005). See also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

1 Here, the Court finds Petitioner has not even alleged, must less shown, good cause to
2 overcome the procedural bar.¹ All the relevant facts and law necessary to present this claim
3 were known to petitioner at the time he raised his direct appeal. As such, there is no good cause
4 sufficient to over the procedural bar, and this ground is denied.

5 II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

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

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

¹ Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).

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

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

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

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

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1 Even if a defendant can demonstrate that his counsel's representation fell below an
2 objective standard of reasonableness, he must still demonstrate prejudice and show a
3 reasonable probability that, but for counsel's errors, the result of the trial would have been
4 different. McNelson v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing
5 Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability
6 sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89,
7 694, 104 S. Ct. at 2064-65, 2068).

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

18 **A. Counsel Was Not Ineffective for Not Moving to Dismiss the Complaint**

19 In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to
20 dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. Counsel
21 cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State,
22 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). The remedy for a finding of insufficient
23 evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State,
24 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence
25 to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a
26 judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be
27 that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

28 //

1 “In reviewing a claim of insufficient evidence, the relevant inquiry is ‘whether, after
2 reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact
3 could have found the essential elements of the crime beyond a reasonable doubt.’” Origel-
4 Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998), (quoting Koza v. State, 100
5 Nev. 245, 250, 681 P.2d 44, 47 (1984)). “Clearly, this standard does not allow the district court
6 to act as a “thirteenth juror” and reevaluate the evidence and the credibility of the witnesses.”
7 Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996).

8 The Court finds that a Motion for Acquittal due to insufficiency of the evidence would
9 have been futile in the instant case. As the Nevada Supreme Court noted when affirming
10 Petitioner’s sentence, there was “overwhelming evidence that supported the jury’s verdict,
11 which included eyewitness and independent witness testimony, DNA evidence, physical
12 injuries on the victim, and recovery of items used to bind and gag the victim.” Order of
13 Affirmance, at 3. Therefore, such a motion would have been futile. Under Ennis, counsel has
14 no obligation to raise futile motions.

15 The Court further finds that even if counsel’s decision not to raise this motion had been
16 unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when
17 affirming Petitioner’s conviction, there was such overwhelming evidence of Petitioner’s guilt
18 introduced at trial that it was not plain error for the Court to allow alleged prior bad act
19 evidence to be admitted. Given that the standard for prejudice under ineffective assistance of
20 counsel is the same as the standard for plain error review, Petitioner cannot then demonstrate
21 that he was prejudiced by his counsel’s actions. See Gordon v. United States, 518 F.3d 1291,
22 1300 (11th Cir. 2008). As such, Petitioner’s counsel cannot be found ineffective and this claim
23 is denied.

24 Likewise, the Court finds that Petitioner’s related claim under Ground Two that his
25 conviction is invalid because of insufficient evidence is similarly without merit. Petitioner’s
26 chief complaint seems to be that there was no evidence admitted as to his intent sufficient to
27 warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined
28 as “a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals,

1 kidnaps, or carries away a person ... for the purpose of committing sexual assault... or for the
2 purpose of killing the person or inflicting substantial bodily harm.” NRS 200.310. The State
3 admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her
4 mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further
5 angled a broomstick towards the victim’s anal opening, as if to stick the broom handle in the
6 victim’s anal opening. Id. As such, and consistent with the Supreme Court of Nevada’s
7 holding, there is no doubt that sufficient evidence was introduced against Petitioner to support
8 his conviction of first-degree kidnapping.

9 As such, this claim is without merit. Since this claim is without merit, Petitioner would
10 not be prejudiced by its denial. Since Petitioner would not be prejudiced by this claims denial,
11 nor has he shown good cause sufficient to overcome the procedural bars (see Section I(B)),
12 this claim is denied under NRS 34.810.

13 **B. Petitioner’s Counsel Was Not Ineffective for Not Objecting to the Prosecutor’s**
14 **Comments**

15 Petitioner next argues that his counsel was ineffective for failing to object to various
16 instances of alleged prosecutorial misconduct. Pet at 8- 8D. However, the Court finds that none
17 of the instances mentioned by Petitioner amount to prosecutorial misconduct, and there was
18 therefore nothing for counsel to object to.

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

24 In resolving claims of prosecutorial misconduct, the Court undertakes a two-step
25 analysis: determining whether the comments were improper; and deciding whether the
26 comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172,
27 1188. The Court views the statements in context, and will not lightly overturn a jury’s verdict
28 based upon a prosecutor’s statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the

1 defendant must show that an error was prejudicial in order to establish that it affected
2 substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

3 With respect to the second step, this Court will not reverse if the misconduct was
4 harmless error. Valdez, 124 Nev. at 1188. The proper standard of harmless error review
5 depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188-
6 89. Misconduct may be constitutional if a prosecutor comments on the exercise of a
7 constitutional right, or the misconduct “so infected the trial with unfairness as to make the
8 resulting conviction a denial of due process.” Id. 124 Nev. at 1189 (quoting Darden v.
9 Wainright, 477 U.S. 168, 181 (1986)). When the misconduct is of constitutional dimension,
10 this Court will reverse unless the State demonstrates that the error did not contribute to the
11 verdict. Id. 124 Nev. at 1189. When the misconduct is not of constitutional dimension, this
12 Court “will reverse only if the error substantially affects the jury’s verdict.” Id.

13 The State is permitted to offer commentary on the evidence that is supported by the
14 record. Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007). In Rose, the prosecutor
15 called the appellant a predator for using his daughter as a lure to reach other victims, but the
16 Nevada Supreme Court accepted it as appropriate commentary supported by the evidence and
17 as insufficiently prejudicial to warrant relief. Rose, 123 Nev. at 209–10, 163 P.3d at 418–19.

18 Further, the State may respond to defense theories and arguments. Williams v. State,
19 113 Nev. 1008, 1018-19 (1997). This includes commenting on a defendant’s failure to
20 substantiate his theory. Colley v. State, 98 Nev. 14, 16 (1982); See also Bridges v. State, 116
21 Nev. 752, 762 (2000), citing State v. Green, 81 Nev. 173, 176 (1965) (“The prosecutor had a
22 right to comment upon the testimony and to ask the jury to draw inferences from the evidence,
23 and has the right to state fully his views as to what the evidence shows.”). Further, if the
24 defendant presents a theory of defense, but fails to present evidence thereon, the State may
25 comment upon the failure to support the supposed theory. Evans v. State, 117 Nev. 609, 630-
26 631 (2001); see McNelton v. State, 115 Nev. 396, 408–09 (1999).

27 //

28 //

1 Petitioner objects to four different statements as alleged prosecutorial misconduct that
2 his counsel should have objected to. Petitioner first takes issue with the State claiming during
3 closing argument that: “The purpose was to either inflict substantial bodily harm or kill her --
4 so first – first degree kidnapping was met.” Pet. at 8; Jury Trial Day 6: June 26, 2017, at 118,
5 filed February 13, 2018. In context, the State’s statement was as follows:

6 All of this demonstrates the fact that she was hogtied, kidnapped. So
7 for what purpose? Was it to inflict substantial bodily harm? To kill
8 her? To sexually assault? You heard the defendant was angry she said.
9 When he brought her into the apartment, everything was fine, and then
10 all of a sudden his body language changed. His demeanor changed.
11 He got loud. He got mean, and ultimately she was beat. She was beat
with a belt. She was beat with a broom. She was beat with a – or she
was stunned. She had the shotgun in her mouth. What do you think
the purpose was? The purpose was to either inflict substantial bodily
harm or kill her, and then you heard about the broomstick. So first --
first-degree kidnapping was met.

12 Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The State’s argument was
13 clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner’s
14 intent could be deduced from the actions he undertook while he had the victim hogtied. The
15 Court finds that such a commentary is proper during closing arguments, and is not
16 prosecutorial misconduct.

17 Petitioner next takes issue with the State allegedly offering an incorrect definition of
18 Battery with Intent to Commit Sexual Assault. Petitioner references page 125 and 128 of Jury
19 Trial Day 6: June 26, 2017 and claims that the State defined Battery With Intent to Commit
20 Sexual Assault as

21 The fact that she is physically restrained substantially increased her
22 risk of potentially death or substantial bodily harm because she can’t
get out.

23 ...
24 So the putting her down, whacking her with the broomstick and the
putting the broomstick up at her butt, Battery With the Intent to
Commit a Sexual Assault.

25 Pet. at 8-A; Jury Trial Day 6: June 26, 2017 at 124-25, 128 respectively.

26 In regards to the first statement, the Court notes that the State was not discussing the
27 crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner
28 could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim

1 is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial
2 Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the
3 case, the jury could find that Petitioner had committed kidnapping in the first degree by
4 substantially increasing the risk of substantially bodily harm, and also find that Petitioner had
5 committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere
6 in the excerpt does the State define any of these offenses. In fact, the State made regular
7 mention to the jury instructions that properly defined these offenses. Id. As such, the Court
8 finds that Petitioner's notion that the State incorrectly defined Battery with Intent to Commit
9 Sexual Assault is belied by the record.

10 In regards to the second statement, the State was not defining Battery With Intent to
11 Commit Sexual Assault. In fact, the Court notes that the State specifically referenced the jury
12 to Jury Instruction 17 for a statement of the law regarding this crime. Id. at 128. The State was
13 arguing that these were the actions that constituted Battery with Intent to Commit Sexual
14 Assault. Given that proof of these actions had been admitted at trial, the State was entitled to
15 argue that the evidence satisfied the elements of the crime charged.

16 Petitioner further takes issue with the State claiming "the fact that she is physically
17 restrained substantially increases her risk of potentially death or substantial bodily harm." Pet.
18 at 8-B; Jury Trial Day 6: June 26, 2017 at 124-25. Such a statement was clearly a commentary
19 on the evidence. Pursuant to Rose v. State, 123 Nev. 194, 209, 163 P.3d 408, 418 (2007), such
20 a statement does not establish prosecutorial misconduct.

21 Given that trial counsel has the ultimate responsibility of deciding what objections to
22 make, and that none of the statements Petitioner here complains of constituted prosecutorial
23 misconduct, the Court finds that it was not unreasonable for Petitioner's counsel to not object
24 to these statements.

25 Further, even if counsel's decision had been unreasonable, the Court finds that
26 Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's
27 conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that
28 it was not plain error for the Court to allow alleged prior bad act evidence to be admitted.

1 Given that the standard for prejudice under ineffective assistance of counsel is the same as the
2 standard for plain error review, Petitioner cannot then demonstrate that he was prejudiced by
3 his counsel's actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As
4 such, Petitioner's counsel cannot be found ineffective and this claim is denied.

5 **C. Counsel Was Not Ineffective for Not Requesting a Jury Instruction**

6 Petitioner argues in Ground Three that his counsel was ineffective for not requesting a
7 jury instruction defining the necessary elements of substantial bodily harm. Pet at 8-C.
8 Petitioner alleges that it was unreasonable for his counsel not to request an instruction
9 reflecting this standard because the State had charged him with Battery with Intent to Commit
10 Sexual Assault, which the State could not prove without showing that the crime resulted in
11 substantial bodily harm. Id.

12 Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an
13 individual may be convicted of Battery with Intent to Commit Sexual Assault even when no
14 substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only
15 charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit
16 Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence
17 for this crime (life with the eligibility to parole after two (2) years) also reflects that he was
18 only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to
19 Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4);
20 Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason
21 for Petitioner's counsel to request the jury instruction in question. Therefore, the Court finds
22 that this decision was not an unreasonable one.

23 Further, even if counsel's decision had been unreasonable, Petitioner was not
24 prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there
25 was such overwhelming evidence of Petitioner's guilt introduced at trial that it was not plain
26 error for the Court to allow alleged prior bad act evidence to be admitted. Given that the
27 standard for prejudice under ineffective assistance of counsel is the same as the standard for
28 plain error review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's

actions. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). As such, Petitioner's counsel cannot be found ineffective and this claim is denied.

D. Counsel Did Not Fail to Subject the Case to a Meaningful Adversary Process

Petitioner next argues that counsel was ineffective for failing to (1) do any pretrial investigation; (2) failing to file the following motions: Motion to Strike Aggravators, Motion to Exclude Argument Constituting Prosecutorial Misconduct; Motion to Suppress Evidence; Motion in Limine to Preclude Admission of Prejudicial Evidence; Motion to Dismiss For Insufficient Information Charging Petitioner; (3) failure to object to damaging and prejudicial statements during closing arguments; and (4) failure to call any witnesses on Petitioner's behalf.

The Court finds that each of these allegations is a bare and naked claim suitable only for summary dismissal. In regard to the failure to investigate claim, Petitioner does not even allege, much less show, what a better investigation would have turned up. Pursuant to Molina v. State, such a claim cannot support post-conviction relief. 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) (stating that a defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome probable).

Regarding the various motions Petitioner alleges his counsel should have filed, Petitioner has neither alleged nor shown that any of these motions would have been successful. For some of these motions, Petitioner has only offered bare and naked assertions that counsel not filing them constitutes ineffective assistance of counsel. For example, Petitioner claims that his counsel should have filed a motion to suppress evidence. But he does not even articulate what evidence he claims should have been suppressed. On other motions, there was clearly no legal grounds to bring the motion (such as the motion to exclude argument constituting prosecutorial misconduct as more fully articulated in Section II(C)). Given that Petitioner has not alleged any grounds claiming why these Motions would have been successful, the Court finds that counsel's decision not to file them cannot constitute ineffective assistance of counsel.

1 Regarding counsel's alleged failure to object to prejudicial statements, Petitioner has
2 not identified what statements he now complains of. To the extent he is referring to the
3 statements he alleged constituted prosecutorial conduct under Ground Three, the Court has
4 already articulated why counsel cannot be found ineffective for not objecting to these
5 statements. As such, the Court finds that this claim is either meritless for the reasons articulated
6 in Section II(C), or this claim is a bare and naked allegation suitable only for summary
7 dismissal under Hargrove. 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

8 Similarly, the Court finds that Petitioner claim that counsel was ineffective for failing
9 to call any witnesses on his behalf is a bare and naked allegation suitable only for summary
10 dismissal. Petitioner does not articulate what witnesses were available to be called, why they
11 should have been called, or how they would have assisted his case.

12 Further, even if Petitioner had alleged enough facts for this Court to consider whether
13 it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be
14 unable to establish that any of these decisions would have prejudiced him at trial. As the
15 Nevada Supreme Court held when affirming Petitioner's conviction, there was such
16 overwhelming evidence of Petitioner's guilt introduced at trial that it was not plain error for the
17 Court to allow alleged prior bad act evidence to be admitted. Given that the standard for
18 prejudice under ineffective assistance of counsel is the same as the standard for plain error
19 review, Petitioner cannot then demonstrate that he was prejudiced by his counsel's actions.
20 See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008). Therefore, counsel cannot
21 be found ineffective for any of the reasons articulated in this section, and these claims are
22 denied.

23 **III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW**

24 Petitioner asserts a claim of cumulative error in the context of ineffective assistance of
25 counsel. The Nevada Supreme Court has never held that instances of ineffective assistance of
26 counsel can be cumulated. However, even if they could be, it would be of no moment as there
27 was no single instance of ineffective assistance in Petitioner's case. See United States v.
28 Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate

only the effect of matters determined to be error, not the cumulative effect of non-errors.”). Furthermore, Petitioner’s claim is without merit. “Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). A defendant “is not entitled to a perfect trial, but only a fair trial.” Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Further, the Court finds the factors articulated in Mulder do not warrant a finding of cumulative error. The issue of guilt in the instant case was not close. As the Nevada Supreme Court noted when it affirmed Petitioner’s judgment of conviction, there was “overwhelming evidence that supported the jury’s verdict.” Order of Affirmance, at 3. In addition, the gravity of the crime charged was severe, as Petitioner was charged with multiple counts in connection with a first-degree kidnapping. Finally, there was no individual error in the underlying proceedings, and as such, there is no error to cumulate. Therefore, this claim is denied.

IV. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.
2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.
3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100

1 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that “[a] defendant seeking post-conviction
2 relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the
3 record”). “A claim is ‘belied’ when it is contradicted or proven to be false by the record as it
4 existed at the time the claim was made.” Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is
5 improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth
6 Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) (“The district court
7 considered itself the ‘equivalent of . . . the trial judge’ and consequently wanted ‘to make as
8 complete a record as possible.’ This is an incorrect basis for an evidentiary hearing.”).

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

19 Here, Petitioner has offered no factual allegations that, even if true, would entitle him
20 to relief. All of Petitioner’s claims amount to either bare and naked allegations or arguments
21 that counsel had the duty to file frivolous motions.² Further, Petitioner is unable to overcome
22 the fact that he cannot show he prejudiced by counsel’s conduct on any of these grounds
23 because the evidence of guilt admitted against him was overwhelming. See Order of
24 Affirmance, at 3. As such, there is no need to expand the record, and Petitioner’s request for
25 an evidentiary hearing is denied.

26 //

27
28 ² The Court notes that it previously granted Petitioner the opportunity to file a Supplemental Petition to expand upon his claims on August 18, 2020.

ORDER

THEREFORE, **IT IS HEREBY ORDERED** that the Post-Conviction Petition for Writ of Habeas Corpus shall be and is DENIED.

Dated this 19th day of January, 2021

DATED this ____ day of January, 2021.

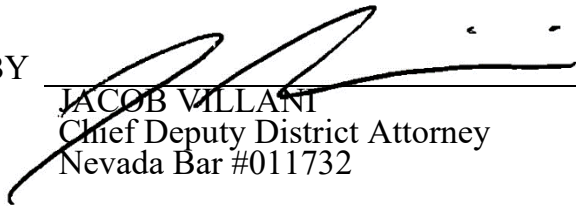


DISTRICT JUDGE

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

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

BY



JACOB VILLANT
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 Calvin Elam, Plaintiff(s)

CASE NO: A-20-815585-W

7 vs.

DEPT. NO. Department 15

8 Bean, Warden, 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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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 17, 2015

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

April 17, 2015 11:45 AM Grand Jury Indictment

HEARD BY: Togliatti, Jennifer

COURTROOM: RJC Courtroom 10C

COURT CLERK: April Watkins

RECORDER: Yvette G. Sison

REPORTER:

PARTIES

PRESENT: Jimenez, Sonia V. Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Edmond James, Grand Jury Foreperson, stated to the Court that at least twelve members had concurred in the return of the true bill during deliberation, but had been excused for presentation to the Court. State presented Grand Jury Case Number 14BGJ062X to the Court. COURT ORDERED, the Indictment may be filed and is assigned Case Number C305949-1, Department 21. State requested warrant and argued bail. COURT ORDERED, WARRANT ISSUED, bail SET in the TOTAL AMOUNT of \$500,000.00 and matter SET for initial arraignment. FURTHER ORDERED, Las Vegas Justice Court Case 15F03797X DISMISSED and exhibit(s) 1-37 lodged with Clerk of District Court.

I.W. (CUSTODY)

4/28/15 9:30 AM INITIAL ARRAIGNMENT (DEPT. 21)

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 28, 2015

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

April 28, 2015

9:30 AM

All Pending Motions

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Denise Husted

RECORDER: Janie Olsen

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	State of Nevada	Plaintiff
	Thomson, Megan	Attorney

JOURNAL ENTRIES

- INITIAL ARRAIGNMENT...INDICTMENT WARRANT RETURN

DEFENDANT ELAM ARRAIGNED, PLED GUILTY and INVOKED THE SIXTY (60) DAY RULE. COURT ORDERED, matter SET for trial. Defense has 21 days from the date of filing of the preliminary hearing transcript to file a writ.

CUSTODY

6/18/15 9:30 AM CALENDAR CALL

6/22/15 9:30 AM JURY TRIAL.

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 18, 2015

C-15-305949-1 State of Nevada
vs
Calvin Elam

June 18, 2015 9:30 AM Calendar Call

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Andrea Natali

RECORDER: Janie Olsen

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Gaffney, Lucas	Attorney
	Jimenez, Sonia V.	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Deft. present in custody. Mr. Gaffney stated the parties have talked and agree to move the trial date; additionally, Deft. will waive his right to a speedy trial; therefore, requested a trial setting in January or February. Upon Court's inquiry as to the reason for a continuance, Ms. Jimenez advised it was the defense request to continue; however, she was not opposing the continuance; noting the DNA forensic testing and the fingerprinting are still be outstanding. Upon Court's inquiry as to whether the Deft. waived his right to a speedy trial, Deft. stated he was not waiving his right and requested to speak to his counselor. COURT SO NOTED. Matter TRAILED for Deft. to talk to his attorney.

Matter RECALLED. Same parties present as before. Upon Court's inquiry, Deft. waived his right to a speedy trial. COURT ORDERED, Jury Trial VACATED and RESET.

CUSTODY

1/21/15 9:30 AM - CALENDAR CALL

1/25/15 9:30 AM - JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

July 21, 2015

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

July 21, 2015 9:30 AM Motion to Set Bail

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

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 Jimenez, Sonia V. Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, bail as set is reasonable, therefore motion is DENIED WITHOUT PREJUDICE. FURTHER, motion calendared on 7/28/15 is RESET to 8/18/15 9:30 AM

CUSTODY

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

August 18, 2015

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

August 18, 2015 9:30 AM Motion for Discovery

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

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	State of Nevada	Plaintiff
	Thomson, Megan	Attorney

JOURNAL ENTRIES

- Mr. Ericsson stated he received the opposition and additional discovery, but has not reviewed it. He did request that be Brady motion be addressed.

COURT ORDERED, Brady Motion is GRANTED. Mr. Ericsson to discuss the other issues with the State; if there are any other issues, counsel may place the matter back on calendar.

CUSTODY

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

January 21, 2016

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

January 21, 2016 9:30 AM Calendar Call

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

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 Luzaich, Elissa Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Ms. Luzaich stated that parties are trying to resolve this matter and requested a continuance. Mr. Ericsson stated that he spoke with the defendant and he understands that more time is needed.
COURT ORDERED, matter SET for a status check.

CUSTODY

2/23/16 9:30 AM SC: NEGOTIATIONS/RESET TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

February 23, 2016

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

February 23, 2016 9:30 AM Status Check

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

COURT CLERK: Denise Husted

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Ericsson, Thomas A. Attorney
 Luzaich, Elissa Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Ms. Luzaich advised that the matter was not negotiated and requested a trial setting. COURT ORDERED, trial date SET.

CUSTODY

8/11/16 9:30 AM CALENDAR CALL

8/15/16 9:30 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

August 11, 2016

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

August 11, 2016 9:30 AM Calendar Call

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 Luzaich, Elissa Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Colloquy regarding trial dates. Counsel stated they are still attempting to negotiate and requested a continuance. COURT ORDERED trial date VACATED and SET for status check.

CUSTODY

9/8/16 9:30 AM STATUS CHECK: NEGOTIATIONS/TRIAL SETTING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 08, 2016

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

September 08, 2016 9:30 AM

**Status Check:
Negotiations/Trial Setting**

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Craggs, Genevieve C.	Attorney
	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Ericsson stated parties were very close to a resolution and requested additional time. COURT SO ORDERED.

CUSTODY

CONTINUED TO: 10/6/16 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 06, 2016

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

October 06, 2016 9:30 AM

**Status Check:
Negotiations/Trial Setting**

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Gaffney, Lucas	Attorney
	Mishler, Karen	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Gafney stated the matter was mis-calendared and requested matter be continued. COURT SO ORDERED.

CUSTODY

CONTINUED TO: 10/20/16 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 20, 2016

C-15-305949-1 State of Nevada
vs
Calvin Elam

October 20, 2016 9:30 AM Status Check:
Negotiations/Trial Setting

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Gaffney, Lucas	Attorney
	Pandukht, Taleen R	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Gafney stated that the matter was not resolved and requested a continuance. Court SET trial date.

CUSTODY

3/23/17 9:30 AM CALENDAR CALL

3/27/17 9:30 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

March 23, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

March 23, 2017 9:30 AM Calendar Call

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 Luzaich, Elissa Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Ms. Luziach requested matter be continued for further negotiation. COURT SO ORDERED.

CUSTODY

4/11/17 9:30 AM STATUS CHECK: NEGOTIATIONS/TRIAL SETTING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

April 11, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

April 11, 2017

9:30 AM

**Status Check:
Negotiations/Trial Setting**

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Alice Jacobson

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Counsel indicated they did not settle the case and to set it for trial. COURT ORDERED, trial dates SET.

CUSTODY

6/1/17 9:30AM CC

6/5/17 9:30AM JT

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 01, 2017

C-15-305949-1 State of Nevada
vs
Calvin Elam

June 01, 2017 9:30 AM Calendar Call

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Ericsson announced ready for trial. Ms. Luzaich stated an essential witness was in the hospital and requested a continuance. Mr. Ericsson made no objection. Court GRANTED a brief continuance. Counsel stated they would need 6-7 days for trial.

CUSTODY

6/15/17 9:30 AM CALENDAR CALL

6/19/17 9:30 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 15, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 15, 2017 9:30 AM Calendar Call

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Counsel announced ready for trial adding that 6-7 days would be needed and there would be approximately 14 witnesses. Court SET trial date and time.

CUSTODY

6/19/17 9:00 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 19, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 19, 2017

9:00 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Mr. Ericsson put the offer on the record and stated the Deft. rejected the offer.

INSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Introduction by the Court and by counsel. VIOR DIRE OATH given. Jury selection began. Court admonished and excused the prospective jurors for evening recess.

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Colloquy as to which Prospective Jurors to release. Evening recess.

CONTINUED TO: 6/20/17 10:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 20, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 20, 2017

10:30 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzach, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- INSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Jury selection continued. Prospective Jurors excused for lunch recess.

OUTSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Colloquy as to which Prospective Jurors to release.

INSIDE THE PRESENCE OF THE PROSPECTIVE JURY

Jury selection continued. Jury panel of 14 members selected and SWORN. Remaining panel thanked and excused. Introductions by Court. Indictment read. Openings by counsel.

Jury admonished and excused for evening recess.

CONTINUED TO: 6/21/17 10:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 21, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 21, 2017

10:30 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- OUTSIDE THE PRESENCE OF THE JURY

Counsel put Juror challenges on the record.

INSIDE THE PRESENCE OF THE JURY

Testimony and exhibits presented. (See worksheets) Court admonished and excused the Jury for evening recess.

OUTSIDE THE PRESENCE OF THE JURY

Mr. Ericsson moved to prevent the Deft's statement from being played to the Jury. Ms. Luzaich argued the Supreme Court's ruling against suppression of the statement. Court DENIED Mr. Ericsson's request.

CONTINUED TO: 6/22/17 12:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 22, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 22, 2017

12:30 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Patti Slattery

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- INSIDE THE PRESENCE OF THE JURY

Testimony and exhibits presented. (See worksheets)

Court admonished and excused the Jury for the evening recess.

CONTINUED TO: 6/23/17 10:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 23, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 23, 2017

10:30 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- INSIDE THE PRESENCE OF THE JURY

Testimony and exhibits presented. (See worksheets)

Court admonished and excused the Jury for the weekend recess.

CONTINUED TO: 6/26/17 9:00 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 26, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 26, 2017

9:00 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Louisa Garcia

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- INSIDE THE PRESENCE OF THE JURY: Testimony and exhibits presented. (See worksheets).
Parties RESTED.

OUTSIDE THE PRESENCE OF THE JURY: Defendant advised of his right not to testify. Instructions settled.

INSIDE THE PRESENCE OF THE JURY: Court instructed the jury. Closing arguments by counsel. Marshal SWORN to take charge of the Jury; Court thanked and excused the alternate jurors. At the hour of 3:25 p.m., the jury retired to deliberate. At approximately 4:30 p.m., the Court released the jury and ordered them to return the following day at 9:00 a.m., to resume deliberations.

CUSTODY

6/27/17 9:00 AM JURY TRIAL

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

June 27, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

June 27, 2017

9:00 AM

Jury Trial

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:

Elam, Calvin

Defendant

Ericsson, Thomas A.

Attorney

Luzaich, Elissa

Attorney

State of Nevada

Plaintiff

JOURNAL ENTRIES

- At the time of 12:11 PM the Jury returned with the following verdict:

COUNT 1 - CONSPIRACY TO COMMIT KIDNAPPING - GUILTY;

COUNT 2 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON - GUILTY;

COUNT 3 - ASSAULT WITH A DEADLY WEAPON - GUILTY;

COUNT 4 - UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE - NOT GUILTY;

COUNT 5 - BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT - GUILTY;

COUNT 6 - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON - NOT GUILTY;

COUNT 7 - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON - NOT GUILTY.

Jury polled at the request of Mr. Ericsson. Court thanked and excused the Jury.

At the request of Ms. Luzaich, Deft. REMANDED into custody without bail. Court referred the matter to Parole and Probation for a Presentence Investigation Report and ORDERED, SET for sentencing.

Upon inquiry of the Court, Ms. Luzaich elected not to proceed with the Ex-Felon in Possession of Firearm but would revive if the conviction is overturned. Ms. Luzaich requested the Court conditionally dismiss the charge so the State can revive it if necessary. COURT SO ORDERED.

CUSTODY

8/29/17 9:30 AM SENTENCING

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

August 29, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

August 29, 2017 9:30 AM Sentencing

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 Pieper, Danielle K. Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Court noted an email was received regarding the gang affiliation listed in the Presentence Investigation report (PSI) and ORDERED Ms. Pieper to obtain the FI cards. Mr. Ericsson stated there was also an issue with the race listed for the Deft. adding it should be Moorish-American. The Court advised it was immaterial to the Court but should be accurate. Mr. Ericsson stated he would contact Parole and Probation to go over the options. Court SET status check.

CUSTODY

9/7/17 9:30 AM STATUS CHECK: FI CARDS

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 07, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

September 07, 2017 9:30 AM Status Check

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Einhorn, Kelsey R.	Attorney
	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Ericsson stated that Ms. Luzaich was in another department and requested the matter be continued. He further stated he received information from the State that said the last contact the Deft. had with law enforcement was in 2017 but the Deft. was in custody at that time. Court ORDERED, MATTER CONTINUED.

CUSTODY

CONTINUED TO: 9/14/17 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 14, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

September 14, 2017 9:30 AM Status Check

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Pieper, Danielle K.	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Ericsson stated the FI cards were received and was made aware by Ms. Pieper that the State did not object to remove the gang affiliation reference from the Presentence Investigation Report (PSI). Ms. Pieper confirmed there was no objection. Mr. Ericsson requested the matter be continued to have a supplemental PSI prepared. COURT SO ORDERED.

CUSTODY

CONTINUED TO: 9/26/17 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

September 26, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

September 26, 2017 9:30 AM Sentencing

HEARD BY: Adair, Valerie

COURTROOM: RJC Courtroom 11C

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Overly, Sarah	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Mr. Ericsson stated there was no Presentence Investigation Report (PSI) filed and requested the matter be continued. Court ORDERED, MATTER CONTINUED.

CUSTODY

CONTINUED TO: 10/3/17 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

October 10, 2017

C-15-305949-1 State of Nevada
 vs
 Calvin Elam

October 10, 2017 9:30 AM Sentencing

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT: Einhorn, Kelsey R. Attorney
 Elam, Calvin Defendant
 Ericsson, Thomas A. Attorney
 State of Nevada Plaintiff

JOURNAL ENTRIES

- Ms. Einhorn stated Ms. Luzaich asked her to request the matter be continued for her to be present.
COURT ORDERED, MATTER CONTINUED and directed Ms. Einhorn to notify the victim speaker of
the new date.

CUSTODY

CONTINUED TO: 10/19/17 9:30 AM

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor**COURT MINUTES****October 19, 2017**

C-15-305949-1 State of Nevada
vs
Calvin Elam

October 19, 2017 9:30 AM Sentencing

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

COURT CLERK: Jill Chambers

RECORDER: Susan Schofield

REPORTER:

PARTIES

PRESENT:	Elam, Calvin	Defendant
	Ericsson, Thomas A.	Attorney
	Luzaich, Elissa	Attorney
	State of Nevada	Plaintiff

JOURNAL ENTRIES

- Court noted that there was notice of a victim speaker. Ms. Luzaich stated the speaker would not be able to make it. Argument by counsel. Statement by Deft. By virtue of the Jury's verdict and this Court's order, DEFT ELAM ADJUDGED GUILTY of COUNT 1 - CONSPIRACY TO COMMIT KIDNAPPING (F), COUNT 2 - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON, COUNT 3 - ASSAULT WITH A DEADLY WEAPON (F) and COUNT 5 - BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (F). COURT ORDERED, in addition to the \$25.00 Administrative Assessment fee, a \$150.00 DNA Analysis fee including testing to determine genetic markers, and \$3.00 DNA Collection fee, Deft. SENTENCED AS FOLLOWS:

COUNT 1 - to a MINIMUM of TWENTY-FOUR (24) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC);
COUNT 2 - to LIFE with the eligibility for parole after FIVE (5) YEARS with a CONSECUTIVE term of a MINIMUM of SIXTY (60) MONTHS and a MAXIMUM of ONE HUNDRED EIGHTY (180) MONTHS for use of a deadly weapon in the Nevada Department of Corrections (NDC) to run CONCURRENT with COUNT 1;

COUNT 3 - to a MINIMUM of TWELVE (12) MONTHS and a MAXIMUM of SEVENTY-TWO (72) MONTHS in the Nevada Department of Corrections (NDC) to run CONSECUTIVE to COUNT 2; COUNT 5 - to LIFE with the eligibility for parole after TWO (2) YEARS to run CONSECUTIVE to COUNT 3 in the Nevada Department of Corrections (NDC), with NINE HUNDRED TWENTY-EIGHT (928) DAYS credit for time served.

The Deft's AGGREGATE TOTAL SENTENCE is LIFE with the eligibility for parole after THIRTEEN (13) YEARS. COURT ORDERED, COUNTS 4, 6 and 7 DISMISSED. COURT FURTHER ORDERED, COUNT 8 DISMISSED WITHOUT PREJUDICE.

COURT ORDERED, a special SENTENCE OF LIFETIME SUPERVISION is imposed to commence upon release from any term of probation, parole or imprisonment. Register as a sex offender in accordance with NRS 179D.460 within 48 hours after Deft's release.

BOND, if any, EXONERATED.

NDC

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Felony/Gross Misdemeanor

COURT MINUTES

May 28, 2019

C-15-305949-1 State of Nevada
vs
Calvin Elam

May 28, 2019	9:30 AM	Motion to Withdraw as Counsel
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HEARD BY: Adair, Valerie **COURTROOM:** RJC Courtroom 11C

COURT CLERK: Athena Trujillo

RECORDER: Robin Page

REPORTER:

PARTIES

PRESENT: Ericsson, Thomas A. Attorney
Flinn, William W. Attorney
State of Nevada Plaintiff

JOURNAL ENTRIES

- Defendant not present.

COURT ORDERED, motion GRANTED.

CUSTODY

55
CASE NO. C-15-305949-1
DEPT. NO. XXI
DDA SONIA JIMENEZ

Defendant(s): CALVIN THOMAS ELAM #2502165

Case No(s): 14BGJ062X (Random tracks between DC Depts. V & XXI)

Charge(s): (1) CT - CONSPIRACY TO COMMIT KIDNAPPING (Category B Felony - NRS 200.310, 200.320, 199.480 - NOC 50087);
(1) CT - FIRST DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.310, 200.320, 193.165 - NOC 50055);
(1) CT - ASSAULT WITH A DEADLY WEAPON (Category B Felony - NRS 200.471 - NOC 50201);
(1) CT - UNLAWFUL USE OF AN ELECTRONIC STUN DEVICE (Category B Felony - NRS 202.357 - NOC 51508);
(1) CT - BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT (Category A Felony - NRS 200.400.4 - NOC 50157);
(1) CT - SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category A Felony - NRS 200.364, 200.366, 193.165 - NOC 50097);
(1) CT - ATTEMPT SEXUAL ASSAULT WITH USE OF A DEADLY WEAPON (Category B Felony - NRS 200.364, 200.366, 193.330, 193.165 - NOC 50121); and
(1) CT - OWNERSHIP OR POSSESSION OF FIREARM BY PROHIBITED PERSON (Category B Felony - NRS 202.360 - NOC 51460)

Def. Counsel(s): THOMAS ERICSSON, ESQ.

WARRANT (ONE WEEK)
DEF IN-CUSTODY AT CCD, THESE CHARGES (15F03797X, P/H 4-30, JC 12)
-

LVJC CASE TO BE DISMISSED: 15F03797X, P/H 4-30, JC 12

CONTINUED...

C - 15 - 305949 - 1
LSF
Left Side Filing
4449531



- Exhibits:**
- 1. Proposed Indictment**
 - 2. Instructions**
 - 3. CD**
 - 4. Photo**
 - 5. Photo**
 - 6. Photo**
 - 7. Photo**
 - 8. Photo**
 - 9. Photo**
 - 10. Photo**
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 - 30. Photo**
 - 31. Photo**
 - 32. Photo**
 - 33. Photo**
 - 34. Photo**
 - 35. Photo**
 - 36. Judgment of Conviction**
 - 37. Transcript**

Exhibits 1-37, to be lodged with the Clerk of the Court.

EXHIBIT(S) LIST

Case No.: C305949

Hearing / Trial Date: 6/19/17

Dept. No.: XXI

Judge: Valerie Adair

Court Clerk: Jill Chambers

Plaintiff: State of Nevada

Recorder: Susie Schofield

Counsel for Plaintiff: Elissa Luzaich

vs.

Defendant: Calvin Elam

Counsel for Defendant: Thomas Ericsson

TRIAL BEFORE THE COURT

State's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	Photo – Smith's storefront	JUN 20 2017	N	JUN 20 2017
2	Photo – Black female, red t-shirt	JUN 20 2017	N	JUN 20 2017
3	Photo – Black female, face close up	JUN 21 2017	N	JUN 21 2017
4	Photo – Black female, inside of bottom lip	JUN 21 2017	N	JUN 21 2017
5	Photo – Black female, legs	JUN 21 2017	N	JUN 21 2017
6	Photo – Black female, legs, close up on right leg	JUN 21 2017	N	JUN 21 2017
7	Photo – Black female, legs, close up on left leg	JUN 21 2017	N	JUN 21 2017
8	Photo – Black female, legs, knees to feet	JUN 21 2017	N	JUN 21 2017
9	Photo – Black female, back of legs	JUN 21 2017	N	JUN 21 2017
10	Photo – Black female, forearms, under	JUN 21 2017	N	JUN 21 2017
11	Photo – Black female, forearms, top	JUN 21 2017	N	JUN 21 2017
12	Photo – 2 apartment buildings	JUN 21 2017	N	JUN 21 2017
13	Photo – Streetview apartments on left	JUN 21 2017	N	JUN 21 2017
14	Photo – 900 house number	JUN 21 2017	N	JUN 21 2017
15	Photo – Stairs up to apartment	JUN 21 2017	N	JUN 21 2017
16	Photo – Door with D on it	JUN 21 2017	N	JUN 21 2017
17	Photo – Stairs, scooter, grill	JUN 21 2017	N	JUN 21 2017

EXHIBIT(S) LIST

Case No: **C305949**

State of Nevada

VS.

Calvin Elam

State's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
18	Photo – Close up grill, plant	JUN 2 1 2017	N	JUN 2 1 2017
19	Photo – Item under grill	JUN 2 1 2017	N	JUN 2 1 2017
20	Photo – Grill by wall	JUN 2 1 2017	N	JUN 2 1 2017
21	Photo - Sheet balled up with tape	JUN 2 1 2017	N	JUN 2 1 2017
22	Photo – Power box 1112	JUN 2 1 2017	N	JUN 2 1 2017
23	Photo – Outside of apartment, dumpster, red stairs	JUN 2 1 2017	N	JUN 2 1 2017
24	Photo – Parking spot 1112, shoe	JUN 2 1 2017	N	JUN 2 1 2017
25	Photo – Shoe close-up	JUN 2 1 2017	N	JUN 2 1 2017
26	Photo – 2 dumpsters	JUN 2 1 2017	N	JUN 2 1 2017
27	Photo – Stair way, 110	JUN 2 1 2017	N	JUN 2 1 2017
28	Photo – Dumpster, side view	JUN 2 1 2017	N	JUN 2 1 2017
29	Photo – Inside of dumpster	JUN 2 1 2017	N	JUN 2 1 2017
30	Photo – Cord inside of dumpster	JUN 2 1 2017	N	JUN 2 1 2017
31	Photo – Black twine	JUN 2 1 2017	N	JUN 2 1 2017
32	Photo – 1108 address marker	JUN 2 3 2017	N	JUN 2 3 2017
33	Photo – White door, red trim	JUN 2 1 2017	N	JUN 2 1 2017
34	Photo – Kitchen, oven on right	JUN 2 1 2017	N	JUN 2 1 2017
35	Photo – Kitchen, sink on right	JUN 2 1 2017	N	JUN 2 1 2017
36	Photo – Broom, water bottle	JUN 2 1 2017	N	JUN 2 1 2017
37	Photo – Sink, broom	JUN 2 1 2017	N	JUN 2 1 2017
38	Photo – Mop bucket w/ mop	JUN 2 1 2017	N	JUN 2 1 2017
39	Photo – Oven, mac and cheese	JUN 2 1 2017	N	JUN 2 1 2017
40	Photo – Oven, packing tape	JUN 2 1 2017	N	JUN 2 1 2017
41	Photo – Sink, broom handle	JUN 2 1 2017	N	JUN 2 1 2017
42	Photo – Belt close up	JUN 2 1 2017	N	JUN 2 1 2017

EXHIBIT(S) LIST

Case No: **C305949**

State of Nevada

VS.

Calvin Elam

State's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
43	Photo – Long box	JUN 2 1 2017	N	JUN 2 1 2017
44	Photo – Black rifle in box	JUN 2 1 2017	N	JUN 2 1 2017
45	Photo – Living room, couch on right	JUN 2 1 2017	N	JUN 2 1 2017
46	Photo – Living room, bed, office chair	JUN 2 1 2017	N	JUN 2 1 2017
47	Photo – Doorway of room	JUN 2 1 2017	N	JUN 2 1 2017
48	Photo – High table, framed pics on wall	JUN 2 1 2017	N	JUN 2 1 2017
49	Photo – TV with Huggies boxes	JUN 2 1 2017	N	JUN 2 1 2017
50	Photo – Cabinet open on right	JUN 2 1 2017	N	JUN 2 1 2017
51	Photo – 2 dressers, crates	JUN 2 1 2017	N	JUN 2 1 2017
52	Photo – Hang up clothes	JUN 2 1 2017	N	JUN 2 1 2017
53	Photo – 2 trashcans	JUN 2 1 2017	N	JUN 2 1 2017
54	Photo – Shower, toilet	JUN 2 1 2017	N	JUN 2 1 2017
55	Photo – Pill bottle	JUN 2 1 2017	N	JUN 2 1 2017
56	Photo – Pill bottle close up	JUN 2 1 2017	N	JUN 2 1 2017
57	Photo – Black dresser	JUN 2 1 2017	N	JUN 2 1 2017
58	Photo – ID on black dresser	JUN 2 1 2017	N	JUN 2 1 2017
59	Photo – ID close up	JUN 2 1 2017	N	JUN 2 1 2017
60	Photo – Shotgun on box	JUN 2 1 2017	N	JUN 2 1 2017
61	Photo – Shotgun on box, trigger on top	JUN 2 1 2017	N	JUN 2 1 2017
62	Photo – Kitchen countertop, tissue	JUN 2 1 2017	N	JUN 2 1 2017
63	Photo – Map of Culley E.S. close up	JUN 2 0 2017	N	JUN 2 0 2017
64	Photo – Map Jones addresses	JUN 2 0 2017	N	JUN 2 0 2017
65	Photo – White Sentra	JUN 2 1 2017	N	JUN 2 1 2017
66	Photo – Mug Shot	JUN 2 1 2017	N	JUN 2 1 2017
67	Photo – DMV form	JUN 2 1 2017	N	JUN 2 1 2017

EXHIBIT(S) LIST

Case No: C305949

State of Nevada

VS.

Calvin Elam

State's

EXHIBITS

[illegible]

DEFENDANT'S EXHIBITS

CASE NO. C305949

[illegible]

EXHIBIT(S) LIST

Case No.: C305949

Hearing / Trial Date: 6/19/17

Dept. No.: XXI

Judge: Valerie Adair

Court Clerk: Jill Chambers

Plaintiff: State of Nevada

Recorder: Susie Schofield

Counsel for Plaintiff: Elissa Luzaich

vs.

Defendant: Calvin Elam

Counsel for Defendant: Thomas Ericsson

TRIAL BEFORE THE COURT

Court's EXHIBITS

Exhibit Number	Exhibit Description	Date Offered	Objection	Date Admitted
1	Juror Question #8 Asked	JUN 2 1 2017		JUN 2 1 2017
2	" #7 "	JUN 2 1 2017		JUN 2 1 2017
3	" #13 "	JUN 2 1 2017		JUN 2 1 2017
4	" #11 "	JUN 2 1 2017		JUN 2 1 2017
5	" #8 1 of 3 Asked	JUN 2 1 2017		JUN 2 1 2017
6	" #8 Not Asked	JUN 2 1 2017		JUN 2 1 2017
7	" #11 Asked	JUN 2 2 2017		JUN 2 2 2017
8	" #5 "	JUN 2 2 2017		JUN 2 2 2017
9	Voluntary Statement - Calvin Elam	JUN 2 6 2017		JUN 2 6 2017

Certification of Copy

State of Nevada }
County of Clark } SS:

I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, does hereby certify that the foregoing is a true, full and correct copy of the hereinafter stated original document(s):

NOTICE OF APPEAL; CASE APPEAL STATEMENT; DISTRICT COURT
DOCKET ENTRIES; FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; NOTICE OF
ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER; DISTRICT COURT
MINUTES; EXHIBITS LIST

STATE OF NEVADA,

Plaintiff(s),

vs.

CALVIN THOMAS ELAM,

Defendant(s).

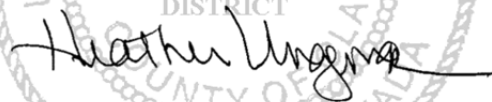
Case No: C-15-305949-1

Dept No: XV

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto
Set my hand and Affixed the seal of the
Court at my office, Las Vegas, Nevada
This 17 day of March 2021.

Steven D. Grierson, Clerk of the Court



Heather Ungermann, Deputy Clerk