IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Apr 12 2021 11:17 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

CALVIN THOMAS ELAM,
Appellant(s),

vs.

THE STATE OF NEVADA,
Respondent(s),

Case No: A-20-815585-W
Related Case C-15-305949-1
Docket No: 82637

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
CALVIN THOMAS #1187304,
PROPER PERSON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

ATTORNEY FOR RESPONDENT
STEVEN B. WOLFSON,
DISTRICT ATTORNEY
200 LEWIS AVE.
LAS VEGAS, NV 89155-2212

A-20-815585-W **Calvin Elam, Plaintiff(s)**
vs.
Bean, Warden, Defendant(s)

I N D E X

FILED

MAY 27 2020

CLERK OF COURT

Case No. C-305949
Dept. No.....

IN THE 8TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK

CALVIN ELAM
Petitioner,

v.

BEAN (warden)
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

A-20-815585-W
Dept. 21

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you are not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: High Desert State Prison, Clark County.

2. Name and location of court which entered the judgment of conviction under attack: 8th Judicial District Court, Clark County, NV.

3. Date of judgment of conviction: On or About 4-12-2019

4. Case number: C-305949

5. (a) Length of sentence: Count I - 24 to 72 months Count II - (Continued)

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5 (a) Length of Sentence: (continued)

5 Years to Life in Prison, Plus a Consecutive Term of 60 to 180 months For use of a Deadly weapon, count 2 Runs Concurrent with count 1; count III - 12 to 72 months, count 3 Runs consecutive to count 2; count IV - 2 years to Life in Prison, count 5 Runs Consecutive to count 3.

(b) If sentence is death, state any date upon which execution is scheduled:....

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion?

Yes ..... No ..X...

If "yes," list crime, case number and sentence being served at this time: .....

.....

.....

7. Nature of offense involved in conviction being challenged: First Degree Kidnapping with use of a Deadly weapon and Battery with intent to commit Sexual assault.

8. What was your plea? (check one)

(a) Not guilty ..X....

(b) Guilty .....

(c) Guilty but mentally ill .....

(d) Nolo contendere .....

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details: ..... N/A .....

.....

10. If you were found guilty or guilty but mentally ill after a plea of not guilty, was the finding made by: (check one)

(a) Jury ..X...

(b) Judge without a jury .....

11. Did you testify at the trial? Yes .....No ..X..

12. Did you appeal from the judgment of conviction? Yes ..X.. No .....

13. If you did appeal, answer the following:

(a) Name of court: NEVADA SUPREME COURT

(b) Case number or citation: #74581

(c) Result: AFFirmed

(d) Date of result: April 12, 2019

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ..... No X

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: .....

(2) Nature of proceeding: .....

(3) Grounds raised: .....

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ..... No .....

(5) Result: .....

(6) Date of result: .....

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(2) Second petition, application or motion? Yes ..... No .....

Citation or date of decision: .....

(3) Third or subsequent petitions, applications or motions? Yes ..... No .....

Citation or date of decision: .....

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.).....

.....

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: N/A

.....

(b) The proceedings in which these grounds were raised: .....

.....

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) .....

.....

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Ground one, insufficient evidence; Ground Two, Insufficient Evidence; Ground Three, Prosecutorial

Misconduct; Ground Four, Failure to test state case; Ground Five, Cumulative Error.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 1/2 by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) ..... NO .....

.....

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ..... No ..X..

If yes, state what court and the case number: .....

.....

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: ..... Thomas A. Ericsson (Trial and Direct appeal) .....

.....

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ..... No ..X.....

If yes, specify where and when it is to be served, if you know: .....

.....

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground ONE: Trial Counsel Failed to move For a Dismissal of the Compliant On the Basis of Insufficient Evidence Presented At Trial To Support A Finding, Beyond A Reasonable Doubt, of A Factual Basis For the Necessary Element of criminal Agency For culpability for the offense (continued)

Supporting FACTS (Tell your story briefly without citing cases or law.): In order to Be Found Guilty of "Battery with Intent To Commit Sexual Assault", Pursuant To NRS 200.400(4)(a), "The crime must Result in Substantial Bodily Harm To the Victim."

Pursuant To NRS 0.060(1)(2), in order to commit Substantial Bodily Harm There must Be a Substantial Risk of Death, or Prolonged Physical Pain. Therefore, Since The Victim was never in any Danger of Death, we address the "Prolonged Physical Pain Definition. Collins V. State, 125 Nev. 60, 203 P.3d 90 (Nev. 2009), is The controlling Nevada Authority on the issue of Prolonged Physical Pain. Collins will show that the Element of Substantial Bodily Harm was never met.

Further, A "conviction of Battery with intent To commit Sexual Assault causing Substantial Bodily Harm Requires Proof of intent to commit sexual assault." Pursuant To Colley V. Sumner, 784 F.2d 984 (9th cir. 1986). To Prove The element of Sexual Assault, The State must Prove that There was Penetration or Substantial Bodily Harm to the Victim. Pursuant To The Trial Records and Collins V. State, NEITHER was Proven.

(a) GROUND ONE: (CONTINUED)

OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, A VIOLATION OF PETITIONERS 5TH, 6TH, AND 14TH AMENDMENT RIGHT TO THE U. S. CONSTITUTION.

(b) Ground TWO: Petitioner's Conviction on Count 2 of The Information is invalid under The constitutional Guarantees of Due Process and a Fair Trial, as articulated By The 5th, 6th, and 14th Amendment To The U.S. Constitution, Due To The absence of (continued)

Supporting FACTS (Tell your story briefly without citing cases or law.): For order To Found Guilty of Kidnapping in The First Degree, PURSUANT TO NRS 200.310, 200.320, The crime MUST Be Committed "with The intent To Hold or Detain, or who Holds or Detains, The Person For Ransom, or Reward, or For the purpose of committing Sexual Assault, Extortion or Robbery upon or From The Person or For The purpose of Killing The Person or inflicting Substantial Bodily Harm upon The Person, or To exact From Relatives, Friends, or any other Person any money or Valuable Things For The Return or Disposition of The Kidnapped Person." In This case, First, During The Trial, or anywhere else in The Record will you Find any mention of The Victim Being Detained For The Purpose of Ransom or Reward. Second, The Record makes it clear That The Victim was never Detained For the Purpose of committing Sexual Assault. Third, again The Record makes it clear That Extortion or Robbery was never The Purpose. Fourth, The Purpose was never To Kill The Victim or inflict Substantial Bodily Harm. Lastly, The Record is clear As To The Purpose of This crime, which was To Find out The location of The missing Puppies. The Record will show That everything else That Happened in This case, was AMENABLE, Recklessly misguided as it was, To locate The missing Puppies. Therefore, The Evidence Presented At Trial was insufficient To support A Finding of First Degree Kidnapping.

-7-

(B) Ground Two (continued)

Evidence sufficient to support a finding of first degree kidnapping.

(c) Ground THREE: Petitioner was Denied His Right to Effective Assistance of Counsel under the 6th and 14th Amendment of the U.S. Constitution, where counsel Failed to object to the Prosecutions improper Vouching and Commentary at closing Argument.

Supporting FACTS (Tell your story briefly without citing cases or law.): In Weygandt V. Duchaarme, 774 F2d 1491 (9th Cir 1985), The Circuit Court Held, "That Counsel's Failure to object to improper closing Remarks Amounted to Performance Below the objective standard of Reasonableness." Id. In this case, Defense Counsel Failed to object to the Following:

1. The Prosecutor improperly Expressed Her Personal opinion That the necessary Elements of First Degree Kidnapping were met, when she stated,

"The Purpose was to either inflict substantial Bodily Harm or Kill Her -, So First -- First Degree Kidnapping was met." See, T.T., Closing Argument P# 118, Line# 21-23 (Emphasis added).

The Prosecutor improperly expressed His Personal opinion that Petitioner's Purpose was to inflict substantial Bodily Harm or Kill Her. Opposed to the testimony of the Victim, and all other Pertinent witnesses, on numerous occassions the Victim, and other witnesses, expressed their understanding that the Purpose For this whole incident was to locate the missing Puppies, See, T.T., DAY# 3, P# 28, P# 31-32, P# 35, P# 36, Thereby Depriving Petitioner His 14th Amendment Right to A Fair Trial and Due Process of Law, And His 6th Amendment Right to confront The witness against him, and to an impartial Jury.

(Continued)

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

2. PETITIONER IS IN CUSTODY IN VIOLATION OF HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL AS GUARANTEED BY THE 5TH AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION DUE TO INSTANCES OF PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR MAKES REFERENCES TO INCORRECT DEFINITION OF "BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT."

THE PROSECUTOR INCORRECTLY DEFINED BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WHEN SHE STATED,

"THE FACT THAT SHE IS PHYSICALLY RESTRAINED SUBSTANTIALLY INCREASED HER **RISK** OF POTENTIALLY DEATH OR SUBSTANTIAL BODILY HARM BECAUSE SHE CAN'T GET OUT." SEE T.T., CLOSING ARGUMENT, P.#126, LINES# 1-3.

THE PROSECUTOR FURTHER STATED,

"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." SEE, T.T., CLOSING ARGUMENT, P.#128, LINES# 14-16.

IN MAKING THE ABOVE STATEMENT, THE PROSECUTOR GAVE THE JURY THE NECESSARY ELEMENTS NEEDED TO PROVE BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT, WITHOUT EVER ACTUALLY PROVING THE ELEMENTS NECESSARY TO SUPPORT A CONVICTION OF BATTERY WITH INTENT TO COMMIT SEXUAL ASSAULT.

(c) Ground Three: (continued)

SUPPORTING FACTS:

What was most Damaging, and Fundamentally unfair was, The Prosecutor Laced Her Definition of Battery with intent to commit sexual assault, with the Risk of meeting the elements of Battery with the intent to commit Sexual Assault in order to Give the Jury the Illusion of Battery with intent to commit sexual assault, Proven. The Problem is, You cant Have "the intent to Commit Sexual Assault", accidentally or Potentially. Meaning, in order to Be convicted of "Battery with intent to commit Sexual Assault," You must Have the Specific intent to commit Sexual Assault.

Further, The Crime must Result in Substantial Bodily Harm to the Victim. However, The Prosecutor Said, "The Fact that she is Physically Restrained substantially increased Her Risk of Potentially Death or Substantial Bodily Harm" This statement is clearly The opinion of The Prosecutor, Something we should Have never Been made aware of, Therefore, all The above called for Defense Counsel to object to The Prosecutor incorrectly Defining Battery with intent to commit Sexual Assault, and Substantial Bodily Harm, and the Prosecutor Giving Her opinion of Guilt.

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

3. COUNSEL WAS INEFFECTIVE FOR FAILING TO EITHER, REQUEST AN INSTRUCTION FOR SUBSTANTIAL BODILY HARM OR FOR FAILING TO OBJECT TO THE DENIAL OF AN INSTRUCTION FOR SUBSTANTIAL BODILY HARM, DUE TO LACK OF KNOWLEDGE OF APPLICABLE LAW.

Counsel's Failure To Request an instruction Defining The necessary elements of Substantial Bodily Harm, was undeniably Prejudicial in light of the fact that The Prosecutor used it as a Hook Line in His closing argument, while intentionally leaving it out of The Proffered instructions.

The Prejudicial effect is astronomical as the instructional error "had a substantial and injurious effect [and] influence in Determining the Jury's Verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993), Because the Jury cannot find a Defendant Guilty of Battery with intent to commit Sexual Assault, without Finding That the crime Resulted in "Substantial Bodily Harm." However, the Jury was never instructed on what constitutes "Substantial Bodily Harm."

Therefore, this Court is Left with Serious Doubt, and cannot say with Fair assurance that the Jury, if Properly instructed, would Have Found Beyond a Reasonable

(c) GROUND THREE: (CONTINUED)

SUPPORTING FACTS:

Doubt That Petitioner Committed The Crime of Battery With Intent To Commit Sexual Assault, Resulting in Substantial Bodily Harm To The Victim.

Because the State clearly Relied on the Fact That There was no instruction, Defining, Substantial Bodily Harm, coupled with the Fact the State new that the wording, Substantial Bodily Harm to the Victim, would Be seen By the Jury when They Read the "Battery Instruction". The State Did not want the Jurors To Feel Trepidation or ask Revealing questions about the Definition of Substantial Bodily Harm, So the State, IN it's Closing Argument, incorrectly Defined it For Them.

Therefore, Defense Counsel should Have insisted on a Substantial Bodily Harm instruction.

(d) Ground FOUR: Defense Counsel's Failure to subject the Prosecutors case to a meaningful Adversary Testing Process, Denied Petitioner of His 6th and 14th Amendments Right To The U.S. Constitution.

Supporting FACTS (Tell your story briefly without citing cases or law.): In U.S. v. CRONIC, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984), The Supreme Court Found, TRIAL Counsel's Failure TO Subject The Prosecution's case To A meaningful Adversary Testing Process may constitute A Denial of Due Process And Establish A Pro Se Violation of Defendants Right to effective Assistance of Counsel.

In This case, Defense Counsel Failed To Do any Pretrial investigation. Outside of what The State Provided, There was no Pretrial investigation Performed By The Defense To Support The Theory of The case. IT is Virtually impossible For A Defense Attorney To Defend A client without Doing Some Kind of Pretrial investigation. Even if That client is completely Guilty! Trial Counsel's willingness to Accept The Governments Version of Facts, and Failed To File any Pretrial motions Because He Relied on The Governments Version of Facts and not His own Reasonable investigation.

Further, Defense Counsel Failed To File any of The Following Pretrial motions:

1) motion To STRIKE [redacted] Aggravators.

2) motion To exclude Argument Constituting Prosecutorial misconduct

3) motion To Suppress Evidence. (CONTINUED)

(d) GROUND FOUR: (CONTINUED)

SUPPORTING FACTS:

4) MOTION IN LIMINE TO Preclude admission of Prejudicial evidence. Specifically, BUT NOT Limited TO: (Rape nurse Testifying That the victim TOLD HER THAT she was PENETRATED with a Penis, Fingee, and Tongue, while the victim Denies ever SAying any of That).

5) MOTION TO DISMISS FOR INSUFFICIENT INFORMATION Charging PETITIONER with BATTERY with INTENT TO commit SEXUAL ASSAULT, and FIRST Degree Kidnapping. AS well AS Sexual ASSAULT, which ELAM WAS ULTIMATELY FOUND NOT GUILTY of.

DeFense Counsel ReFused to Locate and subpoena The Two Female Eye WITNESS without ANY ATTEMPTS TO INVESTIGATE AS TO WHAT They might KNOW ABOUT The Case or their Reliability.

DeFense counsel Failed to object to Damaging And Prejudicial STATEMENTS DURING Closing Argument.

DeFense counsel Failed TO Request the Proper Jury instruction, (i.e. DeFining the Elements of Substantial Bodily Harm), and when the

(d) GROUND FOUR: (CONTINUED)

SUPPORTING FACTS:

Defense Presented it's case, shockingly, no Testimony or evidence was ever offered on Behalf of the Defense.

For a charge of First Degree Kidnapping, and Battery with intent to commit Sexual Assault, Defense counsel's Performance was Disrespectful to the entire Justice system, and Denied Elam of His Right to Due Process and Effective Assistance of Counsel.

Defense Counsel's Performance was unreasonable and Resulted in an outcome that is completely unreliable.

(a) Ground FIVE: CUMULATIVE ERRORS A DENIAL OF The 14th Amendment of The U.S. CONSTITUTION.

Supporting FACTS (Tell your story briefly without citing cases or law.): In STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984), The Supreme Court Found That it must examine each error individually and then must also consider their cumulative effect in light of the totality of circumstances. STRICKLAND, 104 S.Ct. AT 2069.

On one Hand, This means that an Attorney's individual errors may not, Looking at the trial as a whole, cast Doubt on the Reliability of the Result, and Therefore, would not merit Reversal. On the other Hand, Even if individual acts or omissions are not so grievous as To merit a Finding of Incompetence or of Prejudice From Incompetence, These cumulative effect may Be Substantial Enough To meet the STRICKLAND Test.

In this case, in Grounds I THRU IV, The cumulative Errors and omissions By Elam's counsel are numerous.

Please Refer To Grounds I THRU IV, Respectively, For A complete and individual Explination of each error and/or omissions.

Taken alone each ERROR might not establish Deficient Representation. However, The cumulative EFFect of each ERROR underscores A Fundamental lack of Formulation and Direction To Present A COHERENT DEFENSE.

(continued)

(E) GROUND FIVE: (CONTINUED)

SUPPORTING FACTS:

Although the evidence of Guilt was SUFFICIENT, it was not overwhelming. Therefore, Counsel's ineffectiveness contributed to Elam's conviction, and Deprived Elam of His Right to Due Process and a Fair Trial.

WHEREFORE, petitioner prays that the court grant petitioner relief to which petitioner may be entitled in this proceeding.

EXECUTED at **High Desert State Prison** on the 12 day of the month of April, 2020.

* Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

VERIFICATION

Under penalty of perjury, the undersigned declares that the undersigned is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of the undersigned's own knowledge, except as to those matters stated on information and belief, and as to such matters the undersigned believes them to be true.

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

AFFIRMATION (Pursuant to NRS 239B.030)

The undersigned does hereby affirm that the preceeding PETITION FOR WRIT OF HABEAS CORPUS filed in District Court Case Number C-305949 Does not contain the social security number of any person.

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

CERTIFICATE OF SERVICE BY MAIL

I, Calvin Elam, hereby certify pursuant to N.R.C.P. 5(b), that on this 12 day of the month of April, 2020, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

Warden High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070

Attorney General of Nevada
100 North Carson Street
Carson City, Nevada 89701

Clark County District Attorney's Office
200 Lewis Avenue
Las Vegas, Nevada 89155

*Calvin Elam #1187304
High Desert State Prison
Post Office Box 650
Indian Springs, Nevada 89070
Petitioner in Proper Person

* Print your name and NDOC back number and sign

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

Hasler
04/15/2020
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3782

Clerk of the Court
200 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89155-1160

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

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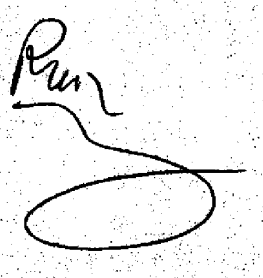

CALVIN ELAM ID NO. 1187304

HIGH DESERT STATE PRISON
22010 COLD CREEK ROAD
P.O. BOX 650
INDIAN SPRINGS, NEVADA 89018

FILED
MAY 27 2020
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

A-20-815585-W
Dept. 21

CALVIN ELAM
PETITIONER

v.

BEAN (WARDEN)
RESPONDENT

CASE NO.: C-305949

DEPT. NO.:

DOCKET:

MOTION TO WITHHOLD Judgment ON PETITION FOR WRIT OF HABEA CORPUS.

NOTICE OF SUPPLEMENTAL MEMORANDUM IN SUPPORT OF WRIT OF HABEAS CORPUS TO Follow DUE TO CORONAVIRUS.

COMES NOW, Petitioner CALVIN ELAM, herein above respectfully moves this Honorable Court for an ORDER WITHHOLDING Judgment ON THE ATTACHED PETITION FOR WRIT OF HABEAS CORPUS

This Motion is made and based upon the accompanying Memorandum of Points and Authorities.

DATED: this 12 day of April, 2020

BY: _____

CALVIN ELAM #1187304
Defendant/In Proper Personam

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APR 20 2020
CLERK OF THE COURT

CALVIN ELAM, ASK This Honorable Court To Withhold Judgment on The Attached Petition For Writ of Habeas Corpus (Post-Conviction).

The Reason For This Request is; we are currently on Quarantine and unable to Go To the Law Library. Therefore, Petitioner ASK this Court To withhold Judgment until I am able to Complete and mail in my Supplemental Memorandum in support of Writ of Habeas Corpus.

Dated This 12 Day of April 2020

Respectfully Submitted

CALVIN ELAM #1187304
P.O. Box 650
Indian Springs, NV, 89070

Page __

Page __

CERTIFICATE OF SERVICE

I, CALVIN ELAM, hereby certify that I am the petitioner in this matter and I am representing myself in propria persona.

On this 12 day of April, 2020, I served copies of the MOTION TO WITHHOLD JUDGMENT ON WRIT OF Habeas Corpus.,

in case number: C-305949 and placed said motion(s) in U.S. First Class Mail, postage pre-paid:

Address: 200 Lewis Avenue, 3RD Floor
Las Vegas, Nevada 89155-1160
Sent to: Clerk of the Court

DECLARATION UNDER PENALTY OF PERJURY

The undersigned declares under penalty of perjury that he is/the petitioner in the above-entitled action, and he, the defendant has read the above CERTIFICATE OF SERVICE and that the information contained therein is true and correct. 28 U.S.C. §1746, 18 U.S.C. §1621.

Executed at High Desert State Prison on this 12 day of April, 2020.

1187304
CALVIN ELAM DOP#

PETITIONER -- In Proper Person

Case No. C-305949

Dept. No. _____

FILED
MAY 27 2020
CLERK OF COURT

IN THE 8TH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK.

A-20-815585-W
Dept. 21

CALVIN ELAM,
Petitioner,

-vs-

BEAN (warden),
Respondents.

MOTION FOR THE APPOINTMENT OF COUNSEL

REQUEST FOR EVIDENTIARY HEARING

COMES NOW, the Petitioner, CALVIN ELAM, proceeding pro se, within the above entitled cause of action and respectfully requests this Court to consider the appointment of counsel for Petitioner for the prosecution of this action.

This motion is made and based upon the matters set forth here, N.R.S. 34.750(1)(2), affidavit of Petitioner, the attached Memorandum of Points and Authorities, as well as all other pleadings and documents on file within this case.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE CASE

This action commenced by Petitioner CALVIN ELAM, in state custody, pursuant to Chapter 34, et seq., petition for Writ of Habeas Corpus (Post-Conviction).

II. STATEMENT OF THE FACTS

To support the Petitioner's need for the appointment of counsel in this action, he states the following:

1. The merits of claims for relief in this action are of Constitutional dimension, and Petitioner is likely to succeed in this case.

2. Petitioner is incarcerated at the Petitioner is unable to undertake the ability, as an attorney would or could, to investigate crucial facts involved within the Petition for Writ of Habeas Corpus.

3. The issues presented in the Petition involves a complexity that Petitioner is unable to argue effectively.

4. Petitioner does not have the current legal knowledge and abilities, as an attorney would have, to properly present the case to this Court coupled with the fact that appointed counsel would be of service to the Court, Petitioner, and the Respondents as well, by sharpening the issues in this case, shaping the examination of potential witnesses and ultimately shortening the time of the prosecution of this case.

5. Petitioner has made an effort to obtain counsel, but does not have the funds necessary or available to pay for the costs of counsel, see Declaration of Petitioner.

6. Petitioner would need to have an attorney appointed to assist in the determination of whether he should agree to sign consent for a psychological examination.

7. The prison severely limits the hours that Petitioner may have access to the Law Library, and as well, the facility has very limited legal research materials and sources.

8. While the Petitioner does have the assistance of a prison law clerk, he is not an attorney and not allowed to plead before the Courts and like Petitioner, the legal assistants have limited knowledge and expertise.

9. The Petitioner and his assisting law clerks, by reason of their imprisonment, have a severely limited ability to investigate, or take depositions, expand the record or otherwise litigate this action.

10. The ends of justice will be served in this case by the appointment of professional and competent counsel to represent Petitioner.

II. ARGUMENT

Motions for the appointment of counsel are made pursuant to N.R.S. 34.750, and are addressed to the sound discretion of the Court. Under Chapter 34.750 the Court may request an attorney to represent any

such person unable to employ counsel. On a Motion for Appointment of Counsel pursuant to N.R.S. 34.750, the District Court should consider whether appointment of counsel would be of service to the indigent petitioner, the Court, and respondents as well, by sharpening the issues in the case, shaping examination of witnesses, and ultimately shortening trial and assisting in the just determination.

In order for the appointment of counsel to be granted, the Court must consider several factors to be met in order for the appointment of counsel to be granted; (1) The merits of the claim for relief; (2) The ability to investigate crucial factors; (3) whether evidence consists of conflicting testimony effectively treated only by counsel; (4) The ability to present the case; and (5) The complexity of the legal issues raised in the petition.

III. CONCLUSION

Based upon the facts and law presented herein, Petitioner would respectfully request this Court to weigh the factors involved within this case, and appoint counsel for Petitioner to assist this Court in the just determination of this action

Dated this 12 day of April, 20 20

Petitioner.

VERIFICATION

I declare, affirm and swear under the penalty of perjury that all of the above facts, statements and assertions are true and correct of my own knowledge. As to any such matters stated upon information or belief, I swear that I believe them all to be true and correct.

Dated this 12TH day of APRIL, 20 20.

Petitioner, pro per.

CERTIFICATE OF SERVICE BY MAIL

I, CALVIN ELAM, hereby certify pursuant to N.R.C.P. 5(b), that on this 12 day of April, of the year 2020, I mailed a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis; Affidavit in Support of Motion for Leave to Proceed in Forma Pauperis; Motion fore the Appointment of Counsel; and Request for Evidentiary Hearing, addressed to:

CLERK, DISTRICT COURT		
Name	Name	Name
200 Lewis Ave		
Las Vegas, NV.		
89155-1160		
Address	Address	Address

Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

_____

(Title of Document)

filed in District Court Case No. _____

☐ 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) (Date)

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Steven D. Grierson
CLERK OF THE COURT

PPOW

DISTRICT COURT

CLARK COUNTY, NEVADA

Calvin Elam,

Petitioner,

vs.

Bean, Warden,

Respondent,

Case No: A-20-815585-W
Department 21

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on May 27, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

IT IS HEREBY ORDERED that Respondent shall, within 45 days after the date of this Order, answer or otherwise respond to the Petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 18th day of August, 2020, at the hour of 9:30 a.m. o'clock for further proceedings.

Valerie Adair

TW

District Court Judge

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7/6/2020 4:17 PM
Steven D. Grierson
CLERK OF THE COURT

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

CALVIN ELAM,
#2502165

Defendant.

CASE NO: **A-20-815585-W**
C-15-305949-1

DEPT NO: **XXI**

STATE'S RESPONSE TO DEFENDANT'S POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS, MOTION TO WITHHOLD JUDGMENT, MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR EVIDENTIARY HARING

DATE OF HEARING: **AUGUST 18, 2020**
TIME OF HEARING: **9:30 AM**

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JAMES R. SWEETIN, Chief Deputy District Attorney, and submits the following State's Response to Defendant's Post-Conviction Petition for Writ of Habeas Corpus, Motion to Withhold Judgment, Motion for Appointment of Counsel, and Request for Evidentiary Hearing.

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

//

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

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

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

On October 19, 2017, Appellant was adjudged guilty and sentenced as follows: as to Count 1 a minimum of twenty-four (24) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections; as to Count 2—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 the use of a deadly weapon in the Nevada Department of Corrections to run concurrent with count 1; as to Count 3—to a minimum of twelve (12) months and a maximum of seventy-two (72) months in the Nevada Department of Corrections to run consecutive to Count 2; as to Count 5—life with the eligibility to parole after two (2) years to run consecutive to Count 3 in the Nevada Department of Corrections.

Appellant received nine hundred twenty-eight (928) days credit for time served. Counts 4, 6, and 7 were dismissed and Count 8 was conditionally dismissed. Additionally, the Court ordered a special sentence of lifetime supervision to commence upon release from any term of probation, parole, or imprisonment. Further, Appellant was ordered to register as a sex offender in accordance with NRS 199D.460 within 48 hours after release.

Appellant's Judgment of Conviction was filed on October 31, 2017. On November 13, 2017, Appellant filed a Notice of Appeal. On April 12, 2019, the Nevada Supreme Court affirmed Petitioner's judgment of conviction. Remittitur issued on May 7, 2019.

On May 27, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus.

STATEMENT OF FACTS

On March 10, 2015, Arrie Webster (hereinafter "Webster") visited Annie Gentile (hereinafter "Gentile") and Pamela Yancy (hereinafter "Yancy") her close friends and neighbors. Webster's friendship with Gentile was closer than with Yancy. When she went to visit she brought her puppy, Payton. Gentile also had a dog and Webster would take her dog to Gentile's house so the dogs could play every other day. Gentile lived off of Jones and

Carmen upstairs. Webster and Gentile were out on the deck while the dogs were socializing. Webster saw Appellant and he said, "what's up" and motioned for her to come over. He was downstairs in front of his apartment when Webster saw him.

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

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

Webster left her dog Payton with Gentile and Yancy and went and talked with Appellant. As she walked up to the apartment, he was already in the apartment, so they started talking in the kitchen. She began to explain that she heard what had happened to the puppies and told Appellant she did not have anything to do with it. Appellant insisted that she did have something to do with it and Webster explained again that she did not. Webster testified that Appellant's voice changed in the tone. Appellant began to get aggressive, loud, and scary. He told her if she did not have anything to do with it, to not worry about it, but told her to turn around and get on her knees. She asked him if he was serious, but could tell by his voice that he was serious so she turned around and got on her knees.

Appellant then tied her up with electrical cords and tape, stuffed her mouth with fabric, covered her eyes up, and then put a pillow case over her head. Her arms were tied behind her back and to her feet. Before he put the stuffing in her mouth, he placed a black shotgun in her mouth, but she closed her mouth and he lifted her chin up saying "bitch it's not a game."

Appellant beat her with a belt multiple times, pulled her pants down, and took the broom and angled it as to stick it in her anus. The entire time he was beating her, he kept saying she had something to do with the missing dogs. 3 He then made a phone call, and within minutes there were three women and another male that came to the door. During the call Webster heard him saying, "I have one of them here. Come over." The individuals that came in starting videoing what was taking place. Webster started to hear laughter, and then Appellant pulled out a taser and came extremely close to her face with the taser and then tased her. There was two or three black males and one black female.

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

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

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

saw Webster, and ran down to help her.

Gentile and two men helped untie her and take the stuffing out of her mouth. One of the individuals had to use a knife to untie Webster. Webster was so afraid that she told the individuals to help her faster because she wanted to get out of there. After she was untied, within seconds, Appellant retuned in a vehicle, noticed Webster and rolled right past her. Appellant went to Tony's house. Shortly thereafter, Webster saw Appellant walking towards his house. Appellant looked directly at Webster, throwing up signs and looked like Snoop Dogg in one of his videos. Webster left the area and met up with her friend Kunta Kinte Patterson. She explained to him what just happened and he immediately called the police.

When officers arrived Webster explained what happened. Webster had a bruise on her lip and injuries on her legs.

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

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

Carl Taylor (hereinafter "Taylor"), who lived on 1204 North Jones, Apartment A lived near Gentile and Yancy. He also knew Appellant and Webster. On March 10, 2015, he saw Webster hopping, jumping, trying to get away and rolling. She was rolling away from

Appellant's apartment. Webster was tied up and her shorts were down to her ankles. Her mouth was wrapped with tape, with pads stuffed in her mouth and a pillowcase over her head. Gentile began cutting the wires and plastic off to free Webster.

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

Detective Elias Cardenas (hereinafter "Cardenas") was a robbery detective for the Las Vegas Metropolitan Police Department (LVMPD) on March 10, 2015. Cardenas interviewed Joanique in his vehicle at 1108 North Jones, near Appellant's apartment. Cardenas called a phone number for Appellant that he obtained. Appellant answered the phone and Cardenas asked him if he knew Webster. Appellant acknowledged knowing her. Cardenas asked him to come back to the crime scene and Appellant decided not to. Cardenas then participated in serving a search warrant on Appellant's apartment.

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

He then went to 900 North Jones. He collected what he described as a fitted bed sheet and tape. Then Grover went to 1108 North Jones. Grover noticed there was a dumpster in the parking lot between buildings 1108 and 1112 and he collected a dark gray hose and black twine from the dumpster. He also collected a shoe in the parking lot east of Building 112. The

dumpster was in front of Appellant's apartment approximately 20-30 feet away. Inside the apartment, Grover found a shotgun, tape, broom, and black and brown leather belt. He also found some wadded up tissue or toilet paper. He recovered a prescription pill bottle with Appellant's name on it. He also found Appellant's ID in the east dresser in the northwest bedroom.

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

Jeri Dermanelian (hereinafter "Dermanelian"), a sexual assault nurse examiner, performed a sexual assault evaluation on Webster. Webster chose to have the fourth examination which was the full forensic sexual assault exam, including requests for the criminal investigation of a sexual assault and the medical component. She testified that Webster told her she was a victim of a sexual assault, that she had been blindfolded and hogtied. Webster indicated that there was a possibility that a broomstick was inserted into her rectum. She explained she was blindfolded. Webster was unaware if there was sperm on her body. When asked if she passed out or lost consciousness during the assault, Webster stated she had. When shown a picture of the bruise on Webster's mouth, Dermanelian testified the injury was similar to other injuries she had observed where guns had been put into people's mouths. Webster did not have any marks on her wrists or ankles, but Dermanelian testified that was not abnormal considering it had been 50 hours since the incident. When shown pictures of Webster's legs that were taken right after the attack, she described there were abrasions on both patellas and kneecaps, and other marks on Webster's legs she would have been interested in looking at had those injuries been apparent when Webster came in.

Dermanelian classified the injuries she was shown in court as superficial, meaning they would not last long. During the vaginal examination she did not find signs of blunt force trauma. She explained that because she had seen Webster two days after the assault, it was likely that any injuries had healed such that she could not observe them. During the rectal

exam there were no injuries of blunt force trauma. She also testified that based on her past experience it did not appear that Webster was under the influence of a controlled substance.

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

ARGUMENT

I. GROUND TWO IS PROCEDURALLY BARRED

A. Any Substantive Claims Were Waived

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .
>
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

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

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

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

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

Petitioner brings substantive claims that should have been raised on direct appeal. In Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at 7-7A. Such a substantive claim is waived for not bringing it on appeal. Further, to the extent this Court would read Ground Three as a claim of prosecutorial misconduct, such a claim is substantive and should have been raised on direct appeal. Therefore, unless Petitioner can demonstrate good cause and prejudice, these claims were waived pursuant to NRS 34.810

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

A showing of good cause and prejudice may overcome procedural bars. "To establish good cause, appellants must show that an impediment external to the defense prevented their compliance with the applicable procedural rule. A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available at the time of default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to his actual and

substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

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

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

II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

[1] Petitioner also cannot show prejudice as this claim is without merit. See Section II(A).
[2] While the instant Petition was not filed until May 27, 2020 (eighteen days after the Petition became untimely), the State notes that the Clerk of the Court stamped the Petition as being received on April 20, 2020. As such, the Petition was received within the one (1) year time period required by statute.

(1993).

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

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices

between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

The Nevada Supreme Court has held "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence." Means v. State, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). Furthermore, claims of ineffective assistance of counsel asserted in a petition for post-conviction relief must be supported with specific factual allegations, which if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "Bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record. Id. NRS

34.735(6) states in relevant part, "[Petitioner] must allege specific facts supporting the claims in the petition[.] . . . Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed." (emphasis added).

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

In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. 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). The remedy for a finding of insufficient evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a judgment of acquittal."); NRS 175.381. The State interprets Petitioner's claim to therefore be that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

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

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

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Further, even if counsel's decision not to raise this motion had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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 should be denied.

Likewise, Petitioner's related claim under Ground Two that his conviction is invalid because of insufficient evidence is similarly without merit. Petitioner's chief complaint seems to be that there was no evidence admitted as to his intent sufficient to warrant a conviction for first degree kidnapping. However, first degree kidnapping is defined as "a person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away a person … for the purpose of committing sexual assault… or for the purpose of killing the person or inflicting substantial bodily harm." NRS 200.310. Further, the State admitted evidence that Petitioner hogtied the victim, beat her, and placed a shotgun in her mouth. Jury Trial Day 3: June 21, 2017, at 33-36, filed February 13, 2018. Petitioner further angled a broomstick towards the victim's anal opening, as if to stick the broom handle in the victim's anal opening. Id. As such, and consistent with the Supreme Court of Nevada's holding, there is no doubt that sufficient evidence was introduced against Petitioner to support his conviction of first-degree kidnapping.

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

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B. Petitioner's Counsel Was Not Ineffective for Not Objecting to the Prosecutor's Comments

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

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).

In resolving claims of prosecutorial misconduct, the Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188. The Court views the statements in context, and will not lightly overturn a jury's verdict based upon a prosecutor's statements. Byars v. State, 130 Nev. 848, 865 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365 (2001).

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

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

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

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

> All of this demonstrates the fact that she was hogtied, kidnapped. So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. 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.

Jury Trial Day 6: June 26, 2017, at 118, filed February 13, 2018. The state's argument was clearly a commentary on the evidence adduced at trial. The State was arguing that Petitioner's intent could be deduced from the actions he undertook while he had the victim hogtied. Such

a commentary is proper during closing arguments, and is not prosecutorial misconduct.

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

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

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

In regards to the first statement, the State was not even discussing the crime of Battery With Intent to Commit Sexual Assault. The State was arguing that Petitioner could be found guilty of both Kidnapping in the first-degree and Sexual Assault if the victim is physically restrained, and such restraint substantially increases the risk of harm. Jury Trial Day 6: June 26, 2017 at 124-25. Essentially, the State was arguing that given the facts of the case, the jury could find that Petitioner had committed kidnapping in the first degree by substantially increasing the risk of substantially bodily harm, and also find that Petitioner had committed Sexual Assault by penetrating Petitioner with a broomstick. Id. Further, nowhere in the excerpt does the State define any of these offenses. In fact, the State made regular mention to the jury instructions that properly defined these offenses. Id. As such, Petitioner's notion that the State incorrectly defined Battery with Intent to Commit Sexual Assault is belied by the record.

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

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

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

Further, even if counsel's decision had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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 should be denied.

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

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

Such a claim is not true. In fact, a review of NRS 200.400(4)(b)-(c) reveals that an individual may be convicted of Battery with Intent to Commit Sexual Assault even when no substantial bodily harm occurs. In fact, the charging document reflects that Petitioner was only charged with Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See Indictment. Petitioner's sentence

for this crime (life with the eligibility to parole after two (2) years) also reflects that he was only convicted of Battery with Intent to Commit Sexual Assault, not Battery with Intent to Commit Sexual Assault Resulting in Substantial Bodily Harm. See NRS 200.400(4); Recorder's Transcript Re: Sentencing, at 8, October 19, 2017. As such, there was no reason for Petitioner's counsel to request the jury instruction in question. Therefore, this decision was not an unreasonable one.

Further, even if counsel's decision had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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 should be denied.

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

Defendant 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.

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, counsel's decision not to file them cannot constitute ineffective assistance of counsel.

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

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

Further, even if Petitioner had alleged enough facts for this Court to consider whether it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be unable to establish that any of these decisions would have prejudiced him at trial. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for

the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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). Therefore, counsel cannot be found ineffective for any of the reasons articulated in this section, and these claims should be denied.

III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW

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

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IV. PETITIONER'S MOTION TO WITHHOLD JUDGMENT SHOULD BE DENIED

Petitioner also filed a Motion to Withhold Judgment on Petition for Writ of Habeas Corpus. Petitioner claims that this Court should withhold judgment because he has not yet been able to complete and mail in his supplemental memorandum in support of writ of habeas corpus. Petitioner claims that this is due to being unable to access the law library due to being quarantined.

Pursuant to NRS 34.740, a petition for writ of habeas corpus must be "presented promptly" and examined expeditiously by the judge or justice to whom it is assigned." Further, Petitioner has not been granted leave to supplement his Petition. Pursuant to NRS 34.750, a supplement may be filed if counsel is appointed by the Court. However, except as otherwise stated in NRS 34.750, "[n]o further pleadings may be filed except as ordered by the court." NRS 34.750(5). Therefore, Petitioner is not even entitled to file a supplement to his Petition, let alone request this Court delay its lawful obligation to decide this matter expeditiously so that he may do so. As such, this Motion should be denied.

V. PETITIONER IS NOT ENTITLED TO COUNSEL

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

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

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel at the time the court orders the filing of an answer and a return. In making its determination, the court may consider whether:
>
> (a) The issues are difficult;
>
> (b) The Defendant is unable to comprehend the proceedings; or
>
> (c) Counsel is necessary to proceed with discovery.

(emphasis added). Under NRS 34.750, it is clear that the court has discretion in determining whether to appoint counsel.

In the instant case, the factors articulated in NRS 34.750 do not merit appointing post-conviction counsel to Petitioner. First, the issues presented in this Petition are not difficult. All of Petitioner's claims are either bare and naked allegations suitable only for summary dismissal or fail as a matter of law. Second, Petitioner seems fully able to understand the current proceedings. Petitioner has filed multiple post-conviction motions illustrating that he is fully able to comprehend the current proceedings. Finally, counsel is unnecessary to proceed with discovery, as there is no need for an evidentiary hearing since all of Petitioner's claims are either bare and naked allegations or fail as a matter of law. Therefore, the factors articulated in NRS 34.750 do not weigh in favor of appointing Petitioner counsel and this motion should be denied.

VI. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

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

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

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

CONCLUSION

For the reasons set forth above, the court should deny Petitioner's Post-Conviction Petition for Writ of Habeas Corpus, Motion to Withhold Judgment, Motion for Appointment of Attorney, and Request for Evidentiary Hearing.

DATED this 6th day of July, 2020.

Respectfully submitted,

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

BY */s/ James R. Sweetin*
JAMES R. SWEETIN
Chief Deputy District Attorney
Nevada Bar #005144

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing was made this 6th day of JULY, 2020, to:

CALVIN ELAM, BAC#1187304
HIGH DESERT STATE PRISON
P.O. BOX 650
INDIAN SPRINGS, NV 89070

BY */s/ Howard Conrad*
Secretary for the District Attorney's Office
Special Victims Unit

hjc/SVU

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DISTRICT COURT
CLARK COUNTY, NEVADA

CALVIN ELAM,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-20-815585-W**
C-15-305949-1

DEPT NO: ~~XXI~~ XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **DECEMBER 1, 2020**
TIME OF HEARING: **1:45 PM**

THIS CAUSE having presented before the Honorable VALERIE ADAIR, District Judge, on the 1st day of December, 2020; Petitioner not present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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Statistically closed: USUR - CV - Summary Judgment (USSUJ)

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

beating that she urinated herself.

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. GROUND TWO IS PROCEDURALLY BARRED

A. Any Substantive Claims Were Waived

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .

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

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

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

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

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

Petitioner brings substantive claims that should have been raised on direct appeal. In Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at 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

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

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

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

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

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

II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

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

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

[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. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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

In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. 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). The remedy for a finding of insufficient evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

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

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

The Court further finds that even if counsel's decision not to raise this motion had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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.

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

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

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

B. Petitioner's Counsel Was Not Ineffective for Not Objecting to the Prosecutor's Comments

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

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).

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

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

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

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

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

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

> All of this demonstrates the fact that she was hogtied, kidnapped. So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. 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.

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

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

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

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

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

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

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

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

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

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

Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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.

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

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

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

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

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

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

Further, even if Petitioner had alleged enough facts for this Court to consider whether it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be unable to establish that any of these decisions would have prejudiced him at trial. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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). Therefore, counsel cannot be found ineffective for any of the reasons articulated in this section, and these claims are denied.

III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW

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

only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). 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

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

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

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

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[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 _____ day of January, 2021.

Dated this 19th day of January, 2021

DISTRICT JUDGE

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

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

BY
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Calvin Elam, Plaintiff(s)	CASE NO: A-20-815585-W
vs.	DEPT. NO. Department 15
Bean, Warden, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Electronically Filed
1/22/2021 1:34 PM
Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

CALVIN ELAM,

Petitioner,

vs.

BEAN, WARDEN,

Respondent,

Case No: A-20-815585-W

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

Electronically Filed
01/19/2021 12:59 PM
CLERK OF THE COURT

FFCO
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

CALVIN ELAM,

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: **A-20-815585-W**
C-15-305949-1

DEPT NO: ~~**XXI**~~ XV

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: **DECEMBER 1, 2020**
TIME OF HEARING: **1:45 PM**

THIS CAUSE having presented before the Honorable VALERIE ADAIR, District Judge, on the 1st day of December, 2020; Petitioner not present, proceeding IN PROPER PERSON; Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JACOB VILLANI, Chief Deputy District Attorney; and having considered the matter, including briefs, transcripts, and documents on file herein, the Court makes the following Findings of Fact and Conclusions of Law:

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Statistically closed: USUR - CV - Summary Judgment (USSUJ)

FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

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

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

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

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

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

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

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

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

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

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

beating that she urinated herself.

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS

I. GROUND TWO IS PROCEDURALLY BARRED

A. Any Substantive Claims Were Waived

NRS 34.810(1) reads:

> The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly or that the plea was entered without effective assistance of counsel.
>
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
>
> . . .

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

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

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

> 3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:
>
> (a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and
>
> (b) Actual prejudice to the petitioner.

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

Petitioner brings substantive claims that should have been raised on direct appeal. In Ground Two, Petitioner alleges that his conviction is based upon insufficient evidence. Pet. at 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

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

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

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

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

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

II. PETITIONER'S COUNSEL WAS NOT INEFFECTIVE

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

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

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

[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. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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

In Ground One, Petitioner alleges that Counsel was Ineffective for failing to move to dismiss the complaint on the basis of insufficient evidence produced at trial. Pet. at 6. 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). The remedy for a finding of insufficient evidence presented at trial is not a striking of the indictment, but an acquittal. Evans v. State, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996) (stating: "where there is insufficient evidence to support a conviction, the trial judge may set aside a jury verdict of guilty and enter a judgment of acquittal."); NRS 175.381. The Court interprets Petitioner's claim to therefore be that counsel was ineffective for not moving for a judgment of acquittal under NRS 175.381.

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

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

The Court further finds that even if counsel's decision not to raise this motion had been unreasonable, Petitioner was not prejudiced. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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.

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

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

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

B. Petitioner's Counsel Was Not Ineffective for Not Objecting to the Prosecutor's Comments

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

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).

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

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

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

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

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

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

> All of this demonstrates the fact that she was hogtied, kidnapped. So for what purpose? Was it to inflict substantial bodily harm? To kill her? To sexually assault? You heard the defendant was angry she said. When he brought her into the apartment, everything was fine, and then all of a sudden his body language changed. His demeanor changed. 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.

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

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

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

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

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

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

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

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

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

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

Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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.

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

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

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

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

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

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

Further, even if Petitioner had alleged enough facts for this Court to consider whether it was unreasonable for counsel to engage in these courses of conduct, Petitioner would be unable to establish that any of these decisions would have prejudiced him at trial. As the Nevada Supreme Court held when affirming Petitioner's conviction, there was such overwhelming evidence of Petitioners guilt introduced at trial that it was not plain error for the Court to allow alleged prior bad act evidence to be admitted. Given that the standard for prejudice under ineffective assistance of counsel is the same as the standard for 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). Therefore, counsel cannot be found ineffective for any of the reasons articulated in this section, and these claims are denied.

III. THERE IS NO CUMULATIVE ERROR IN HABEAS REVIEW

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

only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). 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

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

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

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

//

[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 _____ day of January, 2021.

Dated this 19th day of January, 2021

DISTRICT JUDGE

4AA C9C C9A0 71F9
Joe Hardy
District Court Judge

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

BY
JACOB VILLANI
Chief Deputy District Attorney
Nevada Bar #011732

hjc/SVU

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Calvin Elam, Plaintiff(s)	CASE NO: A-20-815585-W
vs.	DEPT. NO. Department 15
Bean, Warden, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**August 18, 2020**

A-20-815585-W Calvin Elam, Plaintiff(s)
vs.
Bean, Warden, Defendant(s)

August 18, 2020 **1:45 PM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: April Watkins
Carina Bracamontez-Munguia

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT: Lacher, Ashley A. Attorney

JOURNAL ENTRIES

- Court noted the Deft. has requested to be allowed to file a supplemental petition as he has been quarantined and no access to Law Library. No objection by the State. COURT ORDERED, the following briefing schedule set: Deft's Supplemental Petition due by October 20, 2020; State's Supplemental Opposition due by November 20, 2020. COURT FURTHER ORDERED, request to appoint counsel DENIED WITHOUT PREJUDICE. Court noted if issues were unduly complex counsel appointment would be considered.

NDC

CONTINUED TO: 12/01/2020 09:30 AM

CLERK'S NOTE: The above minute order has been distributed to: Calvin Elam #1187304, High Desert State Prison, PO Box 650, Indian Springs, NV 89070 / / cbm 08/20/2020

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**December 01, 2020**

A-20-815585-W Calvin Elam, Plaintiff(s)
vs.
Bean, Warden, Defendant(s)

December 01, 2020 **1:45 PM** **Petition for Writ of Habeas Corpus**

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

COURT CLERK: April Watkins

RECORDER: Robin Page

REPORTER:

PARTIES PRESENT: Villani, Jacob J. Attorney

JOURNAL ENTRIES

- Court noted matter was passed over for Pltf. to file supplemental which has not been done. Further, the Court has not heard from Pltf. and will rule on the original brief and opposition. Therefore, COURT ORDERED, petition DENIED consistent with the State's Response. State to prepare detailed order.

NDC

CLERK'S NOTE: The above minute order has been distributed to: Elam Calvin #1187304, HDSP, P.O. Box 650, Indian Springs, NV 89070. aw

Certification of Copy and Transmittal of Record

State of Nevada
County of Clark } **SS:**

Pursuant to the Supreme Court order dated March 31, 2021, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 117.

CALVIN ELAM,

Plaintiff(s),

vs.

BEAN (WARDEN),

Defendant(s),

Case No: A-20-815585-W
Related Case 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 12 day of April 2021.

Steven D. Grierson, Clerk of the Court

Heather Ungermann, Deputy Clerk