IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA BACHARACH,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82886

RESPONDENT'S APPENDIX

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on October 13, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA,

Plaintiff,

-vs-

JOSHUA BACHARACH,
#90607

Defendant.

CASE NO: C-14-299425-1

DEPT NO: VIII

STATE'S RESPONSE TO DEFENDANT'S PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO APPOINT COUNSEL

DATE OF HEARING: JANUARY 3, 2018
TIME OF HEARING: 8:00 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Defendant's Petition For Writ Of Habeas Corpus And Motion To Appoint Counsel.

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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

On July 16, 2014, Joshua W. Bacharach, aka, Joshua William Bacharach, ("Petitioner") was charged by way of Indictment with the following: Count 1 – Attempt Murder with Use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Counts 2, 4, 6, 8 and 10 – Discharge of Firearm from or within a Structure or Vehicle (Category B Felony – NRS 202.287); Counts 3, 5, 7, 9 and 11 – Assault with a Deadly Weapon (Category B Felony – NRS 200.471); Count 12 – Stop Required on Signal of Police Officer (Category B Felony – NRS 484B.550.3b); Count 13 – Resisting Public Officer with Use of a Firearm (Category C Felony – NRS 199.280); Count 14 – Possession of Firearm with Altered or Obliterated Serial Number (Category D Felony – NRS 202.277); and Counts 15 through 17 – Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360). On October 28, 2015, Bacharach was arraigned and pleaded not guilty. An Amended Indictment was filed on November 2, 2015, making clerical corrections.

On November 2, 2015, Petitioner's jury trial commenced. On November 5, 2015, the jury returned a verdict finding Petitioner guilty of Counts 1 through 8, and 11 through 17.

On December 30, 2015, Petitioner was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – a maximum of 240 months with a minimum parole eligibility of 96 months, plus a consecutive term of 240 months maximum with a minimum parole eligibility of 96 months for the deadly weapon enhancement; Count 2 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 3 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 4 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 5 – a maximum of 72 moths with a minimum parole eligibility of 28 months; Count 6 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 7 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 8 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 11 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 12 - a maximum of 72 months with a

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On January 26, 2016, Petitioner filed a Notice of Appeal. On November 18, 2016, the Nevada Court of Appeals filed an Order Affirming Defendant's Judgment of Conviction. Remittitur issued on November 15, 2016.

On November 8, 2017, Petitioner filed a Motion for the Appointment of Counsel and Request for an Evidentiary Hearing. The State filed a Response to Defendant's Motion to Appoint Counsel and Request for an Evidentiary Hearing on November 21, 2017.

On November 16, 2017, Petitioner filed the instant Petition for Writ of Habeas Corpus. The State responds as follows.

ARGUMENT

I. PETITIONER'S CLAIM REGARDING DENIAL OF HIS MOTION FOR MISTRIAL IS BARRED UNDER THE DOCTRINE OF RES JUDICATA AND BY LAW OF THE CASE DOCTRINE

While Petitioner's response to question twenty-three states he is pursuing an ineffective assistance of counsel, the body of the claim is a substantive claim of judicial error for denying the motion for a mistrial. This claim is governed by the res judicata and law of the case since it was rejected on direct appeal.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made

after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6.

This Court has already once considered and denied Petitioner's claim of judicial error for denying the motion for mistrial. Re-litigation of this issue is precluded by the doctrine of res judicata. Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources..." Id.; see also Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's availability in the criminal context); York v. State, 342 S.W. 3d 528, 553 (Tex. Crim. App. 2011); Bell v. City of Boise, 993 F.Supp.2d 1237 (D. Idaho 2014) (finding res judicata applies in both civil and criminal contexts).

Petitioner argued in his direct appeal that the district court erred in denying his motion for mistrial following a witness' statement that she spoke with police officers in the gang unit. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. The Nevada Supreme Court found that Bacharach failed to demonstrate the denial of his motion for mistrial amounted to an abuse of discretion. Id. Furthermore, the Court explained even assuming that the district court did commit error, the error was harmless beyond a reasonable doubt because there was strong evidence of his guilt presented at trial. Id.

Just as he alleges now in his habeas petition, he alleged in his direct appeal that he was denied a fair trial and his due process rights due to the district court's denial of his Motion for Mistrial. *Compare* Petition at 8 *with* Bacharach, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. On the basis of this Court not granting his Motion for Mistrial, Petitioner argued (and continues to argue) judicial error. Id. In its Order of Affirmance the Nevada Supreme Court explained that although the State had asked the mother of Petitioner's children if she had previously engaged in a discussion with police officers regarding Petitioner

with the "gang unit," the mistrial was properly denied because the "statement was quick, the parties did not highlight it, and the parties did not talk about it further." Id. Because the Nevada Supreme Court has already once considered Petitioner's mistrial claim, it should find that re-litigation of the issue is barred under the doctrine of res judicata.

To the extent that the Court reviews for ineffectiveness, Petitioner cannot establish prejudice because the Nevada Supreme Court found that even if the mistrial was inappropriately denied Petitioner did not suffer prejudice. Id. at 3. This finding precludes a finding of prejudice for ineffective assistance of counsel purposes. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008) ("It is true that the 'substantial rights' standard of plain error review is identical to the 'prejudice' standard of an ineffective assistance claim."). Therefore, this Court should deny ground one of the Petition because it is barred under the doctrine of res judicata and Petitioner fails to show prejudice.

II. PETITIONER'S CLAIM OF JUDICIAL ERROR FOR DENYING CROSS-EXAMINATION OF "THE VICTIMS/OFFICERS BODY CAMERA" IS WAIVED AND BELIED BY THE RECORD.

Although Petitioner's response to question twenty-three, ground two, states he is pursuing ineffective assistance of counsel claim, the body of the claim is a claim of judicial error for denying cross-examination of "the victims/officers body camera." Petition at 9.

This claim of judicial error is waived due to Petitioner's failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Petitioner cannot demonstrate good cause and prejudice to ignore his procedural default because his claim looks to be nothing more than a naked allegation suitable only for summary denial. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984).

Petitioner did not object to the introduction of Officer McNabb's body camera footage at trial. JT Vol. 2 at 34. Petitioner's counsel cross-examined Officer McNabb whose body camera

video was shown to the jury. JT Vol. 2 at 71. During cross-examination the following exchange occurred:

> Q: Okay. With respect to the body camera, back in 2014 you had indicated you had only had only had it for about seven or eight months, is that correct?
> A: Seven or eight weeks.
> Q: Weeks, I'm sorry. Seven or eight weeks./ [sic] And you had indicated on direct that you turned it on and turned it off as you were making stops or you were approaching scenes. Were you given any training as to when you should use that discretion?
> A: I wasn't actually provided any training, no.
> Q: Okay. So you were just given a body camera?
> A: Yes
> . . .
> Q: Okay. So at the time on this day, it was discretionary as to when you turned on the body camera, is that correct?
> A: No. It was still – it was clear from – if I recall correctly that you turn it on for calls for service – you know, as you're arriving on a call of service or a vehicle stop, a person stop, you turn it on as you're initiating those.
> Q: When you were investigating the abandoned Honda, did you turn on the body camera as part of that investigation?
> A: I don't' remember.

JT Vol. 2 at 71-72.

Petitioner also cross-examined David Wagner whose home surveillance system filmed the civilian video presented to the jury. JT Vol. 1 at 253. Petitioner did not object to the introduction of the civilian video. JT Vol. 1 at 248. Wagner explained that he gave law enforcement the video his surveillance system had captured and that he had the system for the sole purpose of catching the perpetrators that were committing crimes in the neighborhood. JT Vol. 1 at 256-57. Therefore, Petitioner's claim that he was not permitted to cross-examine the State's presentation of video is nothing more than a bare and naked claim. Accordingly, this Court should deny his claim because it lacks support of the record.

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III. COUNSEL EFFECTIVELY CROSS-EXAMINED THE STATE'S WITNESSES CONFLICTING STATEMENTS

Petitioner claims that counsel was ineffective due to her failure to move to suppress or impeach witnesses offering conflicting statements identifying Petitioner at trial. Petition at 10.

"[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation...[but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, 563 U.S. 170, 189, 131 S.Ct. 1388, 1403 (2012) (internal quotation marks and citation omitted); see also Jackson v. Warden, Nev. State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) ("Effective counsel does not mean errorless counsel."). Under this test, the defendant must show first, that his counsel's representation fell below an objective standard of reasonableness, and second, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068. This Court need not consider both prongs, however if a defendant makes an insufficient showing on either one. Molina v. State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2052. Indeed, the question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105, 131 S.Ct. 770, 788 (2011); see also Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 ("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."). Accordingly, the role of a court in considering alleged 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). In doing so, courts begin with the presumption of effectiveness and the defendant

bears the burden of proving, by a preponderance of the evidence, that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004) (holding "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics," Donovan, 94 Nev. at 675, 584 P.2d at 711, but rather, the court must determine whether counsel made a "sufficient inquiry into the information...pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

Further, even if counsel's performance was deficient, "it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 562 U.S. at 104, 131 S.Ct. at 787 (quotations and citations omitted). Instead, the defendant must demonstrate that but for counsel's incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-112, 131 S.Ct. at 791-792 (internal quotation marks and citations omitted). All told, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S.Ct. 1473, 1485 (2010).

Petitioner cannot demonstrate deficient performance since conflicting statements are insufficient to suppress. See, Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) ("it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses"); Culverson v. State, 95 Nev. 433, 435, 596 P.2d

220, 221 (1979) (it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court).

The record does not support the claim that Counsel failed to impeach. Counsel impeached the witness's identification of Petitioner at trial. At trial, Jose Chavez, Norayma Gonzales, and Officer Ryan McNabb all identified Petitioner as the gunman. JT Vol. 1 at 166, 193, JT Vol. 2 at 49. Counsel cross-examined each of these witnesses. JT Vol. 1 173, 195, JT Vol. 2 at 51.

During cross-examination of Norayma Gonzales the following questions were presented to attack the credibility of her identification of Petitioner:

> Q: Okay. And this was in the middle of the night or this is around 10:30 at night, is that correct?
> A: Correct.
> Q: And so this area is dark except for like this traffic light here and this traffic light here, is that correct?
> A: That is correct.
> Q: Okay. Your apartment complex, it doesn't appear it's – has it's [sic] own like street light, is that correct?
> A: That is correct.
> Q: Okay. So it's pretty dark in here as well?
> A: Regardless of the light that's outside, yes.

JT Vol. 1 at 174.

During cross-examination of Jose Chavez counsel also asked questions to attack the credibility of his observations of Petitioner:

> Q: And you said it was dark out?
> A: Dark.
> Q: And you indicated that you couldn't see the person's face, you could only see shadows?
> A: Shadow.

JT Vol. 1 at 196.

When counsel cross-examined Officer McNabb she elicited the following testimony that called into question his identification of Petitioner:

> Q: Okay. And you recall that multiple times that you indicated that you couldn't really get a good look at the individual. You just knew they were heavy-set and wearing a white t-shirt, is that correct?
> A: No. I got a good look at him at the corner.
> Q: Okay. Do you remember hearing on the body camera video that you said that you didn't get a good look at him and that you just a white shirt [sic]?
> A: I remember giving out his – hearing that I gave out his description and then a white shirt – I think I may have said I didn't get a good look at him. That's like from beginning to end. But I definitely saw him pointing a gun at me, at the corner under the light, and I recognize him here today.

JT Vol. 2 at 67.

During closing argument counsel argued the flaws and inconsistencies with the eyewitness testimony to create doubt:

> I think that it's important to corroborate human testimony and human observance. You saw right away that humans are human. They are nervous, they are excited, there's adrenaline rushing, and especially in a circumstance like this there is excitement, there's lots of things that could cloud your member or your perception of an event.

JT Vol. 3 at 188.

Counsel also attacked the eyewitness testimony identifying Petitioner as the gunman during closing argument when she said:

> But obviously that was the testimony and that was the perception of those individuals that said they were watching that. Were they lying? No, I don't think that they intentionally lying or intentionally being misleading [sic]. But that's just the nature of being human beings I think is that sometimes we're fallible to, you know, the excitement, the adrenaline, the fear, the excitement of a circumstance or a situation that we find our self in.

Id. at 189-90.

Finally, Petitioner cannot prove that he was prejudiced in any way. Based upon the record presented it is clear that counsel zealously advocated for her client and called into question the perceptions of the State's witnesses. Moreover, the Nevada Supreme Court the

State presented strong evidence to demonstrate Petitioner's guilt at trial. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. Therefore, this Court should deny Petitioner's claim that Counsel was ineffective.

IV. PETITIONER'S CLAIM OF JUDICIAL ERROR FOR ADMITTING ALLEGEDLY SUGGESTIVE AND TAINTED IDENTIFICATION TESTIMONY IS WAIVED

Although Petitioner's response to question twenty-three states he is pursuing ineffective assistance of counsel claim, the body of the claim is a substantive claim of judicial error for admitting suggestive and tainted identification testimony. Petition at 11.

This claim of judicial error is waived due to Petitioner's failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner cannot demonstrate good cause and prejudice to ignore his procedural default because his claim looks to be nothing more than a naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Petitioner does not indicate how the identifications were suggestive and tainted. Further, Petitioner cannot demonstrate prejudice to ignore his procedural defaults because the Nevada Supreme Court found that his conviction was supported by strong evidence. Bacharach, Case No. 69677 (Order of Affirmance November 15, 2016) at 2-3.

An officer testified that he saw Petitioner shooting and driving in a dangerous manner. Id. Multiple other eyewitnesses from the neighborhood observed a person matching Petitioner's physical characteristics shooting at the officer and hiding his bulletproof vest and firearm. Id. Moreover, DNA evidence was discovered in the vehicle Petitioner was driving and his thumbprint was matched to the firearm he was carrying. Id.

Therefore, this Court should deny Petitioner's Writ of Habeas Corpus because he has waived ground four of his claim, makes a bare and naked claim, and has failed to demonstrate good cause and prejudice.

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CONCLUSION

Based on the foregoing, the State respectfully requests that the Court deny Defendant's Post-Conviction Writ of Habeas Corpus and Motion to Appoint Counsel

DATED this 29th day of December, 2017.

Respectfully submitted,

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

BY _____
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #6528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 29th day of December, 2017, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

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BY _____
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DISTRICT COURT
CLARK COUNTY, NEVADA

JOSHUA BACHARACH,
#1900105

Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-14-299425-1

DEPT NO: IX

STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR EVIDENTIARY HEARING

DATE OF HEARING: APRIL 29, 2020
TIME OF HEARING: 8:30 AM

COMES NOW, the State of Nevada, by STEVEN B. WOLFSON, Clark County District Attorney, through JONATHAN E. VANBOSKERCK, Chief Deputy District Attorney, and hereby submits the attached Points and Authorities in Response to Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus 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.

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POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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On November 2, 2015, Petitioner's jury trial commenced. On November 5, 2015, the jury returned a verdict finding Petitioner guilty of Counts 1 through 8, and 11 through 17.

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On January 26, 2016, Petitioner filed a Notice of Appeal. On November 18, 2016, the Nevada Court of Appeals filed an Order Affirming Defendant's Judgment of Conviction. Remittitur issued on November 15, 2016.

On November 8, 2017, Petitioner filed a Motion for the Appointment of Counsel and Request for an Evidentiary Hearing. The State filed a Response to Defendant's Motion to Appoint Counsel and Request for an Evidentiary Hearing on November 21, 2017.

On November 8, 2017, Petitioner filed Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). The State filed a Response on December 29, 2017. On January 3, 2018, the Court granted Petitioner's Motion to Appoint Counsel. On January 10, 2018, James A. Oronoz was confirmed as counsel. On March 14, 2018, the Court set a briefing schedule.

On February 24, 2020, Petitioner through counsel filed the instant Supplemental Post-Conviction Petition for Writ of Habeas Corpus ("Supplemental Petition"). The State's response follows.

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STATEMENT OF FACTS[1]

On the evening of June 26, 2014, Bacharach arrived at Eufrasia Nazaroff's home and asked to borrow her Maroon Dodge Intrepid. Eufrasia and Bacharach have three children in common, but were not cohabitating at that time. Bacharach was wearing a bright yellow shirt and a white ballistic bullet-proof vest over his clothing when he left with her vehicle.

At about 10:45 p.m., Ryan McNabb, a Police Officer with the Las Vegas Metropolitan Police Department, was at the corner of Walnut and Lake Mead when he noticed a Dodge Intrepid, occupied by a male driver, with the high beams on. Officer McNabb went north on Walnut, activated his emergency lights, got behind the vehicle, and radioed dispatch that he was going to make a car stop. As he was getting ready to inform dispatch of the license plate of the vehicle, the male driver, later identified as Bacharach, reached out of the driver door and fired a gun up in the air. Officer McNabb heard the shot and saw the muzzle flash.

Officer McNabb, informed dispatch that Bacharach had discharged a weapon and activated his body camera. The vehicle accelerated right after the shot and continued north on Walnut, then turned right on Carey, running through a Stop sign. As soon as Officer McNabb turned on Carey, Bacharach fired two shots at the patrol car. Officer McNabb had the patrol car driver side window halfway open and heard a "zing" sound right by his left ear. Bacharach accelerated to about 70 to 80 miles an hour and passed through a solid red light at the intersection of Lamb and Carey. Then two more shots, deemed to be the fourth and fifth shots, were fired by Bacharach in the direction of Officer McNabb's patrol vehicle after the intersection of Lamb and Carey.

The Dodge Intrepid being driven by Bacharach went over the curb at the corner of Carey and Dolly and came to a stop. Bacharach jumped out of the driver door, ran around the trunk, turned towards Officer McNabb, raised the gun at a parallel angle to the ground and fired at him.

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[1] The Statement of Facts were acquired from Respondent's Answering Brief in Bacharach v. State, Nevada Court of Appeals Case No. 69677. An edit has been made to omit the record citations.

Officer McNabb stopped the patrol car in front of 4585 East Carey, got out of the vehicle and saw Bacharach start to point the gun in his direction again. This time Bacharach was unable to fire and seemed to be manipulating the gun as if reloading or clearing a malfunction. Officer McNabb fired approximately five rounds to try to stop or incapacitate Bacharach. Bacharach fell backwards, turned, and took off running southbound on Dolly. Officer McNabb followed on foot and saw Bacharach near the intersection of Dolly and El Tovar. As Officer McNabb went around the corner onto El Tovar he saw a shadow go to his right across the sidewalk by a white truck. Officer McNabb heard sirens approaching and waited for back-up.

K9 Officer Ernest Morgan arrived to the Dolly and El Tovar area and performed a scan but could not locate Bacharach. Officer Morgan got his K9 out and went west on El Tovar when a woman exited her residence, located at 4586 El Tovar. She stated an unknown male was in her backyard. K9 Officer Morgan entered the home and as he exited to the back yard, located Bacharach by the east side of the rear of the home. Bacharach was laying on the ground and refused to comply with the commands to show his hands. The K9, Claymore, was released and ran directly towards Bacharach and bit him in the lower part of his leg. Bacharach was placed into handcuffs. Officer McNabb identified Bacharach as the person he had been chasing, although he was no longer wearing what was believed to have been a white shirt.

A ballistic vest with a white cover and .45 caliber semi-automatic Colt handgun on top of it, were located underneath the white pickup truck parked in front of 4586 El Tovar. Bacharach's left thumb print was identified towards the base of the Colt .45 magazine. A cartridge case was located on the northbound lane of North Walnut, by a church, a second cartridge case in the eastbound travel lanes of Carey, and a third cartridge case in the north gutter just south of 4060 East Carey. All three cartridge cases had head stamps that read "Speer 45 Auto." Those three cartridge cases were identified as having been fired from the Colt .45.

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Two unfired .45 caliber cartridges with head stamps of "Speer 45 Auto" were located on the ground by the maroon Dodge parked on the corner of the intersection of Carey and Dolly. Another unfired .45 cartridge was located on the sidewalk west of Dolly with a head stamp of "Winchester 45 Auto", which was still the same caliber but different manufacturer.

Crime Scene Analysts located an AK-style rifle, wrapped in a white shirt in the back seat of the Dodge Intrepid. A Colt .25 caliber firearm, with an obliterated serial number, was recovered from a black bag on the front driver's side floorboard of the Dodge. A rifle magazine was also recovered from that black bag. Bacharach's DNA was located on the Dodge Intrepid's steering wheel cover.

ARGUMENT

In the instant Petition, Petitioner argues the following: (1) the Court committed structural error by threatening Nazaroff and counsel was ineffective for failing to object to such threats, (2) counsel was ineffective for failing to object to Detective Jaegar's testimony; (3) counsel was ineffective for failing to object to the State's argument regarding the definition of reasonable doubt, (4) Petitioner incorporates all issues raised in his pro per petition, and (5) there was cumulative error. Petitioner also requests an evidentiary hearing. However, as will be discussed *supra*, all of Petitioner's arguments are meritless. As such, Petitioner is not entitled to an evidentiary hearing.

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

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's

representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

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

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

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel

cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

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

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

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

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

I. THE COURT DID NOT CREATE STRUCTURAL ERROR REGARDING NAZAROFF'S TESTIMONY AND COUNSEL WAS NOT INEFFECTIVE

Petitioner complains that the Court inappropriately threatened a witness, Nazaroff, in the jury's presence and that counsel was ineffective for failing to object. Supplemental Petition at 10-14. However, his claims are meritless.

As a preliminary matter, Petitioner has waived any allegation of judicial error by failing to raise this claim on direct appeal. NRS 34.724(a); NRS 34.810(1)(b)(2); Evans v. State, 117 Nev. 609, 646-47, 29P.3d 498, 523 (2001); Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Petitioner cannot demonstrate good cause to ignore his default because all of the facts and law necessary to raise his claim were available at the time he filed his direct appeal. Further, Petitioner fails to demonstrate an impediment external to the defense that prevented him from raising this complaint on direct appeal. Petitioner also cannot demonstrate prejudice

to rebut the bar to his judicial error claim or demonstrate ineffective assistance of counsel since his underlying complaint is meritless.

NRS 50.115(1) provides,

> 1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:
>
> (a) To make the interrogation and presentation effective for the ascertainment of the truth;
>
> (b) To avoid needless consumption of time; and
>
> (c) To protect witnesses from undue harassment or embarrassment.

In the instant case, outside the presence of the jury, defense counsel alerted the Court of her and the State's concern regarding Nazaroff causing a mistrial. Jury Trial Day 1 at 295. Specifically, the State and defense counsel wanted to ensure that since Nazaroff refused to meet with both parties, she did not testify to inadmissible evidence in front of the jury:

> MS. THOMSON: We have a witness, Eufrasia Nazaroff. She is the mother of the Defendant's children. She obviously has knowledge about all kinds of things that she's not allowed to talk about. She declined to come meet with us for pretrial, so we have not had that conversation with her about all the things she can't talks about. And because I expect that she probably won't be what I would call cooperative, I'd ask that the Court admonish her because my admonishing her is going to not have as much effect.
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> MS. NGUYEN: I would say –
>
> MS. THOMSON: Please.
>
> MS. NGUYEN: -- mostly my concerns are that have to do with actually my client's rights. I don't know what she would have to say. She has -- she hasn't been in contact with me and I know my investigators attempted to contact her as well. But I know that there's references at some point to Little Locos gang. I just want her to be admonished not to make reference to that, him being on probation, parole –
>
> THE COURT: Right. What –
>
> MS. NGUYEN: -- prior convicted felon, his moniker. I think there were admissions -- references to drugs or weed.
>
> THE COURT: What do you have her coming in for?

> MS. THOMSON: It is her car that he is driving on the night of the incident. She'll identify the vehicle, she will indicate that he was wearing the bullet-proof vest when he came to pick up the car from her. She will indicate that he had -- she had seen him with the firearms that were ultimately recovered in this case previously; that those were not firearms that she had in the vehicle and did not allow in her house.

Jury Trial Day 1, 295-97.

Recognizing that both parties were not able to pretrial Nazaroff, and still outside the presence of the jury, Nazaroff was brought into the courtroom. Jury Trial Day 1, 297. The Court proceeded to instruct her to answer counsel's questions and admonished her from discussing inadmissible evidence regarding the defendant including: "gang affiliation, any moniker, or nickname... drug use, probation, drug possession, parole, smoke and dope, the defendant was on probation or supervision." Jury Trial Day 1, 298-99. Further, the Court added, "[but] I can tell you I've had people violate my order and if you do you'll go to jail today and I'll have to get somebody to come get your child." Jury Trial Day 1, 298.

Petitioner cites to Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351 (1972), and its progeny to support his argument that the Court acted inappropriately. However, Webb is distinguishable from the instant case. In Webb, the trial court, on its own initiative, admonished the defendant's only witness by explaining that he would not have to testify, but if he did and lied, the Court would "personally see that [his] case goes to the grand jury and [he would] be indicted for perjury." Id. at 95-96, 93 S.Ct. at 352-53. The trial court warned the witness that the likelihood of the witness being convicted in such scenario would be great based on the witness's criminal record and that the witness should know the "hazard" he was taking by testifying. Id. After defense counsel objected, defense counsel still asked the witness to take the stand at which point the trial court interrupted and stated, "[c]ounsel, you can state the facts, nobody is going to dispute it. Let him decline to testify." Id. at 96, 93 S. Ct. at 353 (internal citations omitted). The witness then decided not to testify. Id. The U.S. Supreme Court ultimately determined that the trial court's actions were inappropriate. Id. at 97-98, 93 S.Ct. at 353. In reaching this conclusion, the Court explained that the trial court's threats–specifically, "that he expected [the witness] to lie, and went on to assure him that if he lied, he

would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole"–were strong enough to cause duress to the witness regarding his voluntary choice on whether to testify. Id. Further, the Court concluded that those specific threats ultimately drove the witness off the stand, which "deprived the [defendant] of due process of law under the Fourteenth Amendment." Id.

Here, while the Court explained to Nazaroff that she would be incarcerated if she perjured herself, the Court's threats did not reach the level of the trial court in Webb. Indeed, the Court did not show any indication that he believed Nazaroff was going to lie on the stand. The Court merely explained that if Nazaroff violated its order she would be incarcerated. Unlike the situation in Webb, such admonishment did not amount to threats which ultimately coerced Nazaroff not to testify. Further, the record does not indicate that the Court was attempting to convince Nazaroff not to testify.

Moreover, the Court's remarks in this case were within the authorized powers of NRS 50.115(1). Indeed, both defense counsel and the State alerted the Court that Nazaroff was uncooperative and that there was a legitimate concern that she might testify to inadmissible evidence in front of the jury. Contrary to Appellant's argument, which was made out of context, the Court did not instruct Nazaroff to testify untruthfully, but instead told her that she could not bring up topics that were inadmissible evidence. Supplemental Petition at 13. Thus, in order to protect Petitioner's rights to a fair trial, the Court appropriately admonished Nazaroff who was proven to be an uncooperative witness to both parties. Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962) ("An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court and prosecutor to see that he gets it") (citing State v. Haney, 222 Minn. 124, 23 N.W.2d 369). Thus, the Court did not err.

Accordingly, counsel was not ineffective for failing to object to the Court's admonishment as any objection would have been futile. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Regardless, any error would not establish prejudice to waive the default or ineffective assistance of counsel because the Nevada Court of Appeals found overwhelming

evidence of guilt on direct appeal. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. Therefore, Petitioner's claim should be denied.

II. PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

A. Counsel was not ineffective for failing to object to Detective Jaegar's testimony

Petitioner argues that Detective Jaegar offered inappropriate and unnoticed expert testimony regarding gunshot residue, cartridge casings, bulletproof vests, and bullet impacts. Supplemental Petition at 15-18.

A lay witness may testify to opinions or inferences that are "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. A qualified expert may testify to matters within their "special knowledge, skill, experience, training or education" when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. Indeed, "[t]he key to determining whether testimony constitutes lay or expert testimony lies with a careful consideration of the substance of the testimony—does the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience?" Burnside v. State, 131 Nev. 371, 383, 352 P.3d 627, 636 (2015).

Here, Detective Jaegar offered proper lay testimony based on his experience as a detective for each of the four subjects for which Petitioner takes issue. Supplemental Petition at 15-18. First, Petitioner complains that Detective Jaegar was unqualified to testify about gunshot residue. Supplemental Petition at 16. Jaegar testified that he had worked for the Las Vegas Metropolitan Police Department (LVMPD) for seventeen years and was within the past two years appointed as a Detective for the Force Investigation Team. Jury Trial Day 3, 95-96. His role in the investigation of Petitioner's case was the project manager of the crime scene. Jury Trial Day 3, 97. Accordingly, Jaegar described what he and the other investigating officers discovered during their search of the scene. Jury Trial Day 3, 100-05. When asked whether there was an attempt to obtain gunshot residue from Petitioner, he responded that

there was not as gunshot residue was not reliable. Jury Trial Day 3, 105-06. Jaegar based his testimony on his seventeen years of law enforcement experience wherein he did not recall a single instance in which he had collected gunshot residue as it was his experience that it is not reliable. Jury Trial Day 3, 105-06. Thus, Jaegar was not testifying that he received some specialized training or education that allowed him to testify, but instead was relying on his observations and experience as a detective to explain his investigation.

Second, Petitioner alleges that Jaegar inappropriately testified about the characteristics and behaviors of cartridge casings. Supplemental Petition at 17. Continuing to discuss his investigation, Jaegar was asked "in [his] experience, where can the casings end up?" Jury Trial Day 3, 109. Relying on not only his experience, but also common knowledge, he responded that "casings are really unpredictable" and proceeded to discuss what happens when a person fires a gun a particular way. Jury Trial Day 3, 109-110. Similarly, his testimony regarding his search for casings and how they can get stuck in particular places was based not only on common knowledge but based also on his experience as an officer. Jury Trial Day 3, 123. Accordingly, the State did not inappropriately rely on Jaegar's testimony and argue that "common sense" dictated the trajectory of the casings. Supplemental Petition at 17; Jury Trial Day 3, 186-87.

Third, Petitioner claims that Jaegar provided expert testimony on bulletproof vests. Supplemental Petition at 17. When asked if Jaegar was familiar with the bullet proof vest that was found at the scene, he used his years of experience as a detective for LVMPD to explain the rating system for bulletproof vests. Jury Trial Day 3, 114. Thus, Jaegar's response to the State's question here was also not specialized testimony that only an expert could provide.

Fourth, Petitioner complains about Jaegar's testimony regarding bullet impacts. Supplemental Petition at 18. Indeed, Jaegar used not only common knowledge, but also his experience as an officer to use a tennis ball analogy to explain the trajectory of bullets. Jury Trial Day 3, at 117. Such testimony therefore was also not "scientific, technical, and specialized." Supplemental Petition at 18.

In sum, Detective Jaegar's testimony amounted to lay testimony based on not only his many years of experience as an officer, but also common knowledge. As such, counsel was not ineffective for failing to object to Jaegar's responses as any objection would have been futile and unnecessary. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Further, any error could not establish prejudice to waive the default or ineffective assistance of counsel since the Nevada Court of Appeals found overwhelming evidence of guilt on direct appeal. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. Therefore, Petitioner's claims should be denied.

B. Counsel was not ineffective for failing to object to the State's discussion of reasonable doubt

Petitioner alleges that counsel failed to object to an inappropriate argument quantifying reasonable doubt. Supplemental Petition at 19-20.

In resolving claims of prosecutorial misconduct, the Nevada Supreme Court has provided a two-step analysis: (1) determining whether the comments were improper and (2) 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). Indeed, the Court considers a prosecutor's comments in context, and will not lightly overturn a criminal conviction "on the basis of a prosecutor's comments standing alone." Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (citing United States v. Young, 470 U.S. 1, 11, 105 S. Ct. 1038 (1985)). 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, the 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, the 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, the Court "will reverse only if the error substantially affects the jury's verdict." Id.

NRS 175.211(1) provides the definition of "reasonable doubt":

> A reasonable doubt is one based on reason. It is not mere possible doubt . . . Doubt to be reasonable must be actual, not mere possibility or speculation.

"The concept of reasonable doubt is inherently qualitative. Any attempt to quantify it may impermissibly lower the prosecution's burden of proof, and is likely to confuse rather than clarify." McCullough v. State, 99 Nev. 72, 75, 657 P.2d 1157, 1159 (1983). The Court further cautioned against an attempt to quantify, supplement, or clarify the statutorily prescribed reasonable doubt standard, explaining that when combined with the use of a disapproved reasonable doubt instruction, this may constitute reversible error. Holmes v. State, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342-43 (1998).

During the State's Closing Argument, the State argued that

> If [Petitioner's] guilty of one, he's guilty of all in the sense of proof that it is him in identity; not saying that we have necessarily met all of the elements. We're going to discuss that separately – consider each of the charge separately.
>
> But, if we've proven beyond a reasonable doubt that he committed one of them then it must be his identity as to all of them.

Jury Trial Day 3, 166.

Despite Petitioner's argument to the contrary, the State's comment on reasonable doubt was not improper or prejudicial. Indeed, the jury was properly instructed on reasonable doubt. Jury Instructions, filed Nov. 5, 2015, at 8; Jury Trial Day 3, at 154. It is presumed that jurors follow these instructions. Newman v. State, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013). Further, the State was not quantifying reasonable doubt, but instead was using the evidence

presented to argue that the element of identification as to who committed the crimes was established. In other words, the State did not modify the standard of reasonable doubt. Because the comment was not improper, there would be no need to evaluate the second prong of the prosecutorial misconduct analysis.

Accordingly, counsel was not ineffective as any objection would have been futile. See Ennis v. State, 122 Nev. at 706, 137 P.3d at 1103. Regardless, any error cannot establish prejudice to waive the default or ineffective assistance of counsel because the Nevada Court of Appeals found overwhelming evidence of guilt on direct appeal. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. Therefore, Petitioner's claim should be denied.

III. PETITIONER'S INCORPORATION OF PRIOR CLAIMS BY REFERENCE IS IMPROPER

Petitioner incorporates by reference the claims raised he raised in his *pro per* petition. Petition at 20-22. However, the Nevada Supreme Court has rejected incorporation by reference in the habeas context. Evans v. State, 117 Nev. 609, 647, 29 P.3d 498, 523 (2001) (overruled on other grounds by Lisle v. State, 131 Nev. 356, 351 P.3d 725). Not only are his claims below meritless, but also any error could not establish prejudice to waive the default or ineffective assistance of counsel because the Nevada Court of Appeals found overwhelming evidence of guilt on direct appeal. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2.

A. The Court did not violate Petitioner's Sixth Amendment right to a fair trial for refusing to grant counsel's request for mistrial when Nazaroff testified regarding the LVMPD Gang Unit

While Petitioner's response to question twenty-three states he is pursuing an ineffective assistance of counsel, the body of the claim is a substantive claim of judicial error for denying the motion for a mistrial. This claim is governed by the res judicata and law of the case since it was rejected on direct appeal.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6.

This Court has already once considered and denied Petitioner's claim of judicial error for denying the motion for mistrial. Re-litigation of this issue is precluded by the doctrine of res judicata. Exec. Mgmt. v. Ticor Titles Ins. Co., 114 Nev. 823, 834, 963 P.2d 465, 473 (1998) (citing Univ. of Nev. v. Tarkanian, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994)). "The doctrine is intended to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources..." Id.; see also Mason v. State, 206 S.W.3d 869, 875 (Ark. 2005) (recognizing the doctrine's availability in the criminal context); York v. State, 342 S.W. 3d 528, 553 (Tex. Crim. App. 2011); Bell v. City of Boise, 993 F.Supp.2d 1237 (D. Idaho 2014) (finding res judicata applies in both civil and criminal contexts).

Petitioner argued in his direct appeal that the district court erred in denying his motion for mistrial following a witness' statement that she spoke with police officers in the gang unit. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. The Nevada Supreme Court found that Petitioner failed to demonstrate the denial of his motion for mistrial amounted to an abuse of discretion. Id. Furthermore, the Court explained even assuming that the district court did commit error, the error was harmless beyond a reasonable doubt because there was strong evidence of his guilt presented at trial. Id.

Just as he alleges now in his habeas petition, he alleged in his direct appeal that he was denied a fair trial and his due process rights due to the district court's denial of his Motion for Mistrial. *Compare* Petition at 8 *with* Bacharach, Docket No. 69677 (Order of Affirmance,

November 15, 2016) at 2. On the basis of this Court not granting his Motion for Mistrial, Petitioner argued (and continues to argue) judicial error. Id. In its Order of Affirmance the Nevada Supreme Court explained that although the State had asked the mother of Petitioner's children if she had previously engaged in a discussion with police officers regarding Petitioner with the "gang unit," the mistrial was properly denied because the "statement was quick, the parties did not highlight it, and the parties did not talk about it further." Id. Because the Nevada Supreme Court has already once considered Petitioner's mistrial claim, it should find that re-litigation of the issue is barred under the doctrine of res judicata.

To the extent that the Court reviews for ineffectiveness, Petitioner cannot establish prejudice because the Nevada Supreme Court found that even if the mistrial was inappropriately denied Petitioner did not suffer prejudice. Id. at 3. This finding precludes a finding of prejudice for ineffective assistance of counsel purposes. See Gordon v. United States, 518 F.3d 1291, 1300 (11th Cir. 2008) ("It is true that the 'substantial rights' standard of plain error review is identical to the 'prejudice' standard of an ineffective assistance claim."). Therefore, this Court should deny ground one of the Petition because it is barred under the doctrine of res judicata and Petitioner fails to show prejudice.

B. The Court did not violate Petitioner's Sixth Amendment right to a fair trial by not permitting counsel to cross-examine the LVMPD officer about the body camera video

Although Petitioner's response to question twenty-three, ground two, states he is pursuing ineffective assistance of counsel claim, the body of the claim is a claim of judicial error for denying cross-examination of "the victims/officers body camera." Petition at 9.

This claim of judicial error is waived due to Petitioner's failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999). Petitioner cannot demonstrate good cause and prejudice to ignore

his procedural default because his claim looks to be nothing more than a naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Petitioner did not object to the introduction of Officer McNabb's body camera footage at trial. Jury Trial Day 2, at 34. Petitioner's counsel cross-examined Officer McNabb whose body camera video was shown to the jury. Jury Trial Day 2, at 71. During cross-examination the following exchange occurred:

> Q: Okay. With respect to the body camera, back in 2014 you had indicated you had only had only had it for about seven or eight months, is that correct?
> A: Seven or eight weeks.
> Q: Weeks, I'm sorry. Seven or eight weeks./ [sic] And you had indicated on direct that you turned it on and turned it off as you were making stops or you were approaching scenes. Were you given any training as to when you should use that discretion?
> A: I wasn't actually provided any training, no.
> Q: Okay. So you were just given a body camera?
> A: Yes
> . . .
> Q: Okay. So at the time on this day, it was discretionary as to when you turned on the body camera, is that correct?
> A: No. It was still – it was clear from – if I recall correctly that you turn it on for calls for service – you know, as you're arriving on a call of service or a vehicle stop, a person stop, you turn it on as you're initiating those.
> Q: When you were investigating the abandoned Honda, did you turn on the body camera as part of that investigation?
> A: I don't' remember.

Jury Trial Day 2, at 71-72.

Petitioner also cross-examined David Wagner whose home surveillance system filmed the civilian video presented to the jury. Jury Trial Day 1, at 253. Petitioner did not object to the introduction of the civilian video. Jury Trial Day 1, at 248. Wagner explained that he gave law enforcement the video his surveillance system had captured and that he had the system for the sole purpose of catching the perpetrators that were committing crimes in the neighborhood. Jury Trial Day 1, at 256-57. Therefore, Petitioner's claim that he was not permitted to cross-

examine the State's presentation of video is nothing more than a bare and naked claim. Accordingly, this Court should deny his claim because it lacks support of the record.

C. Counsel was not ineffective for failing to "suppress or impeach" a witness who presented conflicting statements at trial

Petitioner claims that counsel was ineffective due to her failure to move to suppress or impeach witnesses offering conflicting statements identifying Petitioner at trial. Petition at 10.

"[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation...[but] simply to ensure that criminal defendants receive a fair trial." Cullen v. Pinholster, 563 U.S. 170, 189, 131 S.Ct. 1388, 1403 (2012) (internal quotation marks and citation omitted); see also Jackson v. Warden, Nev. State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) ("Effective counsel does not mean errorless counsel."). Under this test, the defendant must show first, that his counsel's representation fell below an objective standard of reasonableness, and second, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Strickland, 466 U.S. at 687-688, 694, 104 S.Ct. at 2065, 2068. This Court need not consider both prongs, however if a defendant makes an insufficient showing on either one. Molina, 120 Nev. at 190, 87 P.3d at 537.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2052. Indeed, the question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105, 131 S.Ct. 770, 788 (2011); see also Strickland, 466 U.S. at 689, 104 S.Ct. at 2065 ("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."). Accordingly, the role of a court in considering alleged 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). In doing so, courts begin with the presumption of effectiveness and the defendant bears the burden of proving, by a preponderance of the evidence, that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011-1012, 103 P.3d 25, 32-33 (2004) (holding "that a habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence."). This analysis does not indicate that the court should "second guess reasoned choices between trial tactics," Donovan, 94 Nev. at 675, 584 P.2d at 711, but rather, the court must determine whether counsel made a "sufficient inquiry into the information...pertinent to his client's case." Doleman v. State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996).

Further, even if counsel's performance was deficient, "it is not enough to show that the errors had some conceivable effect on the outcome of the proceeding." Harrington, 562 U.S. at 104, 131 S.Ct. at 787 (quotations and citations omitted). Instead, the defendant must demonstrate that but for counsel's incompetence the results of the proceeding would have been different:

> In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland asks whether it is reasonably likely the results would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. The likelihood of a different result must be substantial, not just conceivable.

Id. at 111-112, 131 S.Ct. at 791-792 (internal quotation marks and citations omitted). All told, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371,130 S.Ct. 1473, 1485 (2010).

Petitioner cannot demonstrate deficient performance since conflicting statements are insufficient to suppress. See, Origel-Candid v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) ("it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witnesses"); Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221 (1979) (it is the function of the jury to weigh the credibility of the identifying witnesses); Azbill v. State, 88 Nev. 240, 252, 495 P.2d 1064, 1072 (1972), cert. denied, 429 U.S. 895, 97 S.Ct. 257 (1976) (In all criminal proceedings, the weight and sufficiency of the evidence are questions for the jury; its verdict will not be disturbed if there is evidence to support it and the evidence will not be weighed by an Appellate Court).

The record does not support the claim that Counsel failed to impeach. Counsel impeached the witness's identification of Petitioner at trial. At trial, Jose Chavez, Norayma Gonzales, and Officer Ryan McNabb all identified Petitioner as the gunman. Jury Trial Day 1, at 166, 193; Jury Trial Day 2, at 49. Counsel cross-examined each of these witnesses. Jury Trial Day 1, 173, 195; Jury Trial Day 2, at 51.

During cross-examination of Norayma Gonzales the following questions were presented to attack the credibility of her identification of Petitioner:

> Q: Okay. And this was in the middle of the night or this is around 10:30 at night, is that correct?
> A: Correct.
> Q: And so this area is dark except for like this traffic light here and this traffic light here, is that correct?
> A: That is correct.
> Q: Okay. Your apartment complex, it doesn't appear it's – has it's [sic] own like street light, is that correct?
> A: That is correct.
> Q: Okay. So it's pretty dark in here as well?
> A: Regardless of the light that's outside, yes.

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Jury Trial Day 1, at 174.

During cross-examination of Jose Chavez counsel also asked questions to attack the credibility of his observations of Petitioner:

> Q: And you said it was dark out?
> A: Dark.
> Q: And you indicated that you couldn't see the person's face, you could only see shadows?
> A: Shadow.

Jury Trial Day 1, at 196.

When counsel cross-examined Officer McNabb she elicited the following testimony that called into question his identification of Petitioner:

> Q: Okay. And you recall that multiple times that you indicated that you couldn't really get a good look at the individual. You just knew they were heavy-set and wearing a white t-shirt, is that correct?
> A: No. I got a good look at him at the corner.
> Q: Okay. Do you remember hearing on the body camera video that you said that you didn't get a good look at him and that you just a white shirt [sic]?
> A: I remember giving out his – hearing that I gave out his description and then a white shirt – I think I may have said I didn't get a good look at him. That's like from beginning to end. But I definitely saw him pointing a gun at me, at the corner under the light, and I recognize him here today.

Jury Trial Day 2, at 67.

During closing argument counsel argued the flaws and inconsistencies with the eyewitness testimony to create doubt:

> I think that it's important to corroborate human testimony and human observance. You saw right away that humans are human. They are nervous, they are excited, there's adrenaline rushing, and especially in a circumstance like this there is excitement, there's lots of things that could cloud your member or your perception of an event.

Jury Trial Day 3, at 188.

Counsel also attacked the eyewitness testimony identifying Petitioner as the gunman during closing argument when she said:

> But obviously that was the testimony and that was the perception of those individuals that said they were watching that. Were they lying? No, I don't think that they intentionally lying or intentionally being misleading [sic]. But that's just the nature of being human beings I think is that sometimes we're fallible to, you know, the excitement, the adrenaline, the fear, the excitement of a circumstance or a situation that we find our self in.

Id. at 189-90.

Finally, Petitioner cannot prove that he was prejudiced in any way. Based upon the record presented it is clear that counsel zealously advocated for her client and called into question the perceptions of the State's witnesses. Moreover, the Nevada Supreme Court the State presented strong evidence to demonstrate Petitioner's guilt at trial. Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. Therefore, this Court should deny Petitioner's claim that Counsel was ineffective.

D. The Court did not violate Petitioner's rights by admitting an alleged "tainted" and "unreliable" in-court identification

Although Petitioner's response to question twenty-three states he is pursuing ineffective assistance of counsel claim, the body of the claim is a substantive claim of judicial error for admitting suggestive and tainted identification testimony. Petition at 11.

This claim of judicial error is waived due to Petitioner's failure to raise it on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059. Petitioner cannot demonstrate good cause and prejudice to ignore his procedural default because his claim looks to be nothing more than a naked allegation suitable only for summary denial. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Petitioner does not indicate how the identifications were suggestive and tainted. Further, Petitioner cannot demonstrate prejudice to ignore his procedural defaults because the Nevada Supreme Court found that his conviction was supported by strong evidence. Bacharach, Case No. 69677 (Order of Affirmance November 15, 2016) at 2-3.

An officer testified that he saw Petitioner shooting and driving in a dangerous manner. Id. Multiple other eyewitnesses from the neighborhood observed a person matching Petitioner's physical characteristics shooting at the officer and hiding his bulletproof vest and firearm. Id. Moreover, DNA evidence was discovered in the vehicle Petitioner was driving and his thumbprint was matched to the firearm he was carrying. Id.

Therefore, this Court should deny Petitioner's Writ of Habeas Corpus because he has waived ground four of his claim, makes a bare and naked claim, and has failed to demonstrate good cause and prejudice.

IV. CUMULATIVE ERROR DOES NOT APPLY

The Nevada Supreme Court has not endorsed application of its direct appeal cumulative error standard to the post-conviction Strickland context. McConnell v. State, 125 Nev. 243, 259, 212 P.3d 307, 318 (2009). Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test").

Nevertheless, even where available a cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995). In fact, logic dictates that there can be no cumulative error where the defendant fails to demonstrate any single violation of Strickland. See Turner v. Quarterman, 481 F.3d 292, 301 (5th Cir. 2007) ("where individual allegations of error are not of constitutional stature or are not errors, there is 'nothing to cumulate.'") (quoting Yohey v. Collins, 985 F.2d 222, 229 (5th Cir. 1993)); Hughes v. Epps, 694 F.Supp.2d 533, 563 (N.D. Miss. 2010) (citing Leal v. Dretke, 428 F.3d 543, 552-53 (5th Cir. 2005)). Even if cumulative error was applicable, because Petitioner has

not demonstrated any claim that warrants relief under Strickland, there is nothing to cumulate. Therefore, Petitioner's cumulative error claim should be denied.

Petitioner fails to demonstrate cumulative error sufficient to warrant reversal. In addressing a claim of cumulative error, the relevant factors 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, 854-5 (2000). The issue of guilt was not close as the evidence against Petitioner was overwhelming. Indeed, there was sufficient evidence presented at trial to connect him to the charges for which he was convicted, as the Nevada Supreme Court indicated in its Order of Affirmance,

> Moreover, even assuming the district court committed error, the error was harmless beyond a reasonable doubt because there was strong evidence of his guilty presented at trial.

Bacharach v. State, Docket No. 69677 (Order of Affirmance, November 15, 2016) at 2. In other words, any error could not establish prejudice to waive the default or ineffective assistance of counsel since the Nevada Court of Appeals found overwhelming evidence on direct appeal. Therefore, his claim of cumulative error is without merit.

V. 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.

(emphasis added).

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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 her petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

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

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

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing be DENIED.

DATED this 27th day of March, 2020.

Respectfully submitted,

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

BY _____
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
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CERTIFICATE OF SERVICE

I certify that on the 27th day of March, 2020, I mailed a copy of the foregoing to:

JAMES ORONOZ, ESQ.
jim@oronozlawyers.com

BY _____
M. HERNANDEZ
Secretary for the District Attorney's Office

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DISTRICT COURT
CLARK COUNTY, NEVADA

JOSHUA BACHARACH, Petitioner, vs. WILLIAM GITTERE, in his official capacity as the Warden of the Ely State Prison; CHARLES DANIELS, in his official capacity as Director of the Nevada Department of Corrections; and the STATE OF NEVADA, Respondents.	CASE NO. C-14-299425-1 DEPT. NO. IX

REPLY TO STATE'S RESPONSE TO PETITIONER'S SUPPLEMENTAL POST-CONVICTION PETITION FOR WRIT OF HABEAS CORPUS AND REQUEST FOR EVIDENTIARY HEARING

Petitioner, JOSHUA BACHARACH, by and through his counsel of record, JAMES A. ORONOZ, ESQ., and RACHAEL E. STEWART, ESQ., hereby files this Reply to State's Response to Petitioner's Supplemental Post-Conviction Petition for Writ of Habeas Corpus and Request for Evidentiary Hearing pursuant to NRS Chapter 34. This Reply, including the following Points and Authorities, is made upon the pleadings and papers already on file, and

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any evidentiary hearing and oral argument of counsel deemed necessary by the Court.

Petitioner, JOSHUA BACHARACH, alleges that he is being held in custody in violation of the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States of America, as well as Articles I and IV of the Nevada Constitution.

DATED this 7th day of April, 2020.

/s/ James A. Oronoz
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MEMORANDUM OF POINTS AND AUTHORITIES

I. The Trial Court created a structural error because the Trial Court threatened Eufrasia Nazaroff prior to her testimony in front of the jury. Trial Counsel was ineffective for failing to object to the Trial Court's threats toward Ms. Nazaroff.

In the Response, the State argues that Mr. Bacharach waived "any allegation of judicial error by failing to raise this claim on direct appeal." State's Response ("Response"), at 9. The State further argues that Mr. Bacharach cannot demonstrate good cause and prejudice to overcome this procedural default. Response, at 9.

The State's argument on this issue is mistaken. NRS 34.724 and NRS 34.810(1)(b)(2) allow a petitioner to raise claims of constitutional violations in post-conviction habeas proceedings. In fact, NRS 34.724 provides:

> (1) Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State, or who claims that the time the person has served pursuant to the judgment of conviction has been improperly computed, may, without paying the filing fee, file a postconviction petition for writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that the person has served.

NRS 34.810(1)(b)(2) precludes claims that could have been "Raised in a direct appeal or prior petition for a writ of habeas corpus or postconviction relief..." However, NRS 34.810(1)(b)(2) does not contradict NRS 34.724 and preclude claims of constitutional violations. NRS 34.724 expressly permits a petitioner to challenge a conviction that violates the Constitution of the United States or the Constitution of Nevada.

In support of its arguments, the State cites *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001) and *Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *disapproved of by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). In *Evans*, the Nevada Supreme Court held that "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*, 117 Nev. at 646. Additionally, the *Evans* Court held that "Claims of ineffective assistance of counsel are properly presented in a timely, first post-conviction petition for writ of habeas corpus." *Id.*

Moreover, in *Franklin*, the Nevada Supreme Court dealt with a case where the petitioner filed a post-conviction petition for habeas corpus because his plea counsel did not inform him of his ability to file a direct appeal. The *Franklin* Court provided examples of situations where a defendant who pleaded guilty would need to appeal from his judgment of conviction and would be able to do so under Nevada law. The *Franklin* Court did not preclude constitutional claims from being raised in post-conviction proceedings.

Here, Mr. Bacharach's claim was properly raised in his post-conviction petition. As explained in *Weaver v. Massachusetts*, to raise a structural error under an ineffective-assistance claim, a petitioner must show both the attorney's deficient performance and prejudice. 137 S.Ct. 1899, 1910, 198 L.Ed.2d 420 (2017). In accordance with *Weaver*, Mr. Bacharach showed both deficient performance and prejudice in his Supplemental Petition. See, Supplemental Petition, at 13-14. Trial Counsel was deficient for failing to object to the threatening admonishment and protect Mr. Bacharach's rights to due process and a fair trial. Counsel's deficiency caused prejudice because Mr. Bacharach went to trial with a critical witness having been threatened by the Trial Court.

Contrary to the State's assertions, Mr. Bacharach properly raised this issue in his post-conviction habeas proceedings. Trial Counsel did not object and protect the record. Moreover, Trial Counsel did not even recognize the impropriety of the threatening admonishment. Accordingly, Mr. Bacharach raised the issue at his first opportunity.

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Next, the State argues that Mr. Bacharach's claim is meritless. Response, at 10. The State argues that the Court admonished Eufrasia Nazaroff outside the presence of the jury to ensure that she did not testify to inadmissible evidence. Response, at 10-11.

To be clear, the fact that the Court admonished Ms. Nazaroff against testifying about inadmissible evidence is not the issue at hand. The issue is the threatening manner in which the Court admonished Ms. Nazaroff.

The State distinguishes *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972), and argues that the threats made by the Trial Court in this case did not rise to the level of the trial court's admonishment in *Webb*. Response, at 12. Moreover, the State argues "Indeed, the Court did not show any indication that he believed Nazaroff was going to lie on the stand." Response, at 12. The State also argues "Further, the record does not indicate that the Court was attempting to convince Nazaroff not to testify." Response, at 12.

The State's distinguishing of the *Webb* case is misguided. In *Webb,* the United States Supreme Court specifically explained that the problem with the trial court's admonishment was that the court exerted "such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify." *Webb*, 409 U.S. at 98. That same standard applies to the instant case as well. The Trial Court in this case admonished Ms. Nazaroff to the extent that he threatened that she would "go to jail" and threatened to have "somebody to come get your child." Trial Tr. 137, November 2, 2015. The Trial Court's admonishment clearly threatened Ms. Nazaroff's personal liberty and her right to maintain custody of her own children. It would be inconceivable for these threats not to cause "such duress" on Ms. Nazaroff's mind that would preclude her "from making a free and voluntary choice whether or not to testify." See, *Webb,* 409 U.S. at 98.

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Additionally, the State argues that the Court's remarks were within the authorized powers of NRS 50.115(1) because both Trial Counsel and the State notified the Court that the witness was uncooperative. Response, at 12. The State also asserts that there was concern that the witness would testify to inadmissible evidence. Response, at 12. Finally, the State asserts that "Thus, in order to protect Petitioner's rights to a fair trial, the Court appropriately admonished Nazaroff who was proven to be an uncooperative witness to both parties." Response, at 12.

The State's argument about Ms. Nazaroff's cooperativeness again misses the issue. There is no way to know whether Ms. Nazaroff testified truthfully, regardless of her willingness to cooperate. The Trial Court admonished Ms. Nazaroff before she testified in front of the jury. The admonishment caused a structural error because the Trial Court's admonishment was so threatening that Ms. Nazaroff could not have made the "free and voluntary choice" to testify truthfully. Because of the Trial Court's threatening admonishment and Trial Counsel's failure to object to the threats, there is no way to know what Ms. Nazaroff would have said without the threats of incarceration or losing her children.

Finally, the State incorrectly argues that Trial Counsel was not ineffective for failing to object to the Court's admonishment because "any objection would have been futile." Response, at 12. An objection by Trial Counsel would have protected the record as to Mr. Bacharach's rights to due process and a fair trial. Trial Counsel's failure caused Mr. Bacharach to suffer the prejudice of having a critical witness testify under duress based on fear of incarceration and losing her children. Therefore, Counsel was ineffective.

For these reasons, the Trial Court and Trial Counsel caused a structural error in Mr. Bacharach's case. This Court must now reverse Mr. Bacharach's conviction and order a new trial.

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II. Ineffective Assistance of Counsel

a. Trial Counsel was ineffective for failing to object to Detective Jaeger's improper expert testimony.

Trial Counsel has a duty to provide effective assistance of counsel. U.S. Const. Amends. V, VI, and XIV; Nevada Const. Art. I. Counsel is ineffective when (1) counsel's performance is deficient based on an objective standard of reasonableness, and (2) counsel's deficiency caused prejudice to the defendant. *Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice occurs when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

NRS 50.275 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

In its Response, the State argues that Detective Jaeger "offered proper lay testimony for each of the four subjects for which Petitioner takes issue." Response, at 13. The State's arguments fail for several reasons.

First, the State argues that Detective Jaeger testified about gunshot residue based on his experience working "for the Las Vegas Metropolitan Police Department (LVMPD) for seventeen years and was within the past two years appointed as a Detective for the Force Investigation Team." Response, at 13. The State further argues that Detective Jaeger's testimony was based on "his seventeen years of law enforcement experience wherein he did not recall a single instance in which he had collected gunshot residue as it was his experience that it is not reliable." Response, at 14.

Essentially, the State argues that Detective Jaeger and his team did not request testing for gunshot residue because he believed it to be unreliable. During his testimony, Detective Jaeger admitted that he had not personally collected gunshot residue during his career.

> I don't think I've ever collected gunshot residue because it's just so erratic. It can be transferred really easily and it's just not reliable. Trial Tr. 105, November 4, 2015.

The State's argument is belied by Detective Jaeger's own admission at trial. The State argues that he did not collect the gunshot residue in this case because of his own experience as a detective, but Detective Jaeger testified that he had never collected gunshot residue. Clearly, his admission of never having collected gunshot residue undermines the State's assertion that he had experience in doing so.

Furthermore, Detective Jaeger explained the properties of how gunshot residue behaves. He explained that it "spreads in the air." Trial Tr. 106, November 4, 2015. He explained that it can get on equipment, hands, and clothes. *Id*. He explained that "as soon as someone's touched that residue, it is passed." *Id*. Finally, he explained that "it's just not reliable and it's just not something that's used." *Id*.

Again, this shows that Detective Jaeger had knowledge about the properties of gunshot residue, even though he had never collected or tested it himself. He could not have testified to those properties of gunshot residue based on his own experience. Therefore, he was testifying as an expert on gunshot residue because he gave scientific, technical, and specialized opinions that were not based on his experience and were offered to assist the jury with understanding the facts in issue.

Second, the State argues that Detective Jaeger relied on his own experience and common knowledge to testify about the characteristics of cartridge casings. Response, at 14.

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Additionally, the State argues that it did not "inappropriately rely on Jaeger's testimony and argue that "common sense" dictated the trajectory of the casings." Response, at 14.

The State's argument is mistaken. Detective Jaeger specifically addressed how cartridge casings would be ejected depending upon how a person held a handgun or leaned his body. Trial Tr. 109, November 4, 2015. Detective Jaeger further explained his own theory as to why they could not locate any of the casings at the scene.

While it is true that Detective Jaeger would have experience shooting his own firearms during the course of his career, his own experience does not explain his qualification to analyze how casings would react to another person shooting the gun. Additionally, Detective Jaeger's own experience as an officer would not allow him to predict the behavior of cartridge casings based on the manner in which other individuals hold their guns, stand, or move. *Id*. at 109. These opinions would have come through scientific training. It is clear that the State offered Detective Jaeger's testimony on this issue at trial to assist the jury with understanding the facts related to the behaviors of cartridge casings.

Furthermore, the State mischaracterized Mr. Bacharach's argument about the State's reliance on Detective Jaeger's testimony at trial. Mr. Bacharach did not argue that the State "inappropriately" relied on Detective Jaeger's testimony about the casings. To be clear, Mr. Bacharach argued that the State relied on Detective Jaeger's testimony to support the closing arguments at trial. In other words, Detective Jaeger's improper expert testimony was integral to the State's theory of the case. Therefore, he should have been properly noticed and qualified as an expert before being allowed to testify about this evidence.

Third, the State argues that Detective Jaeger testified about bullet proof vests because "he used his years of experience as a detective for LVMPD to explain the rating system for bulletproof vests." Response, at 14. The State's assertion is mistaken. At trial, Detective Jaeger

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testified about the vest found in evidence and explained the rating systems for different types of vests. His explanation went beyond that of personal experience because he assisted the trier of fact with technical explanations to understand the facts in issue regarding the bullet proof vest in evidence.

Fourth, the State argues that Detective Jaeger used common knowledge and his experience as an officer to explain "the trajectory of bullets." Response, at 14. The State argues that this testimony was not "scientific, technical, and specialized." Response, at 14. The State, however, is mistaken. At trial, Detective Jaeger used a tennis ball analogy to explain the angles and trajectory of bullets. Trial Tr. 117, November 4, 2015. Contrary to the State's argument, it is not "common sense" to use an analogy to explain the scientific details of predicting and analyzing bullet trajectories. He explained technical terms and concepts to assist the trier of fact with understanding the evidence without being qualified as an expert.

Accordingly, Detective Jaeger's testimony was not lay testimony. He went beyond the scope of using his experience as an officer and common knowledge to explain scientific, technical, and specialized knowledge to assist the jury with understanding facts in issue. Therefore, Trial Counsel should have objected to this unqualified expert testimony.

Thus, Trial Counsel was ineffective for failing to object to this improper expert testimony, and this Court should reverse Mr. Bacharach's conviction.

b. Trial Counsel was ineffective for failing to object to DDA Thompson's improper argument regarding the definition of reasonable doubt.

Criminal defendants are entitled to effective assistance of counsel. U.S. Const. Amends. V, VI, and XIV; Nevada Const. Art. I. Ineffective assistance of counsel occurs when (1) counsel's performance is deficient based on an objective standard of reasonableness, and (2) counsel's deficiency caused prejudice to the defendant. *Strickland,* 466 U.S. at 687–688. Prejudice occurs

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when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different. *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).

Nevada law provides a clear standard for reasonable doubt. NRS 175.211 provides:

1. A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

Attorneys may not "quantify, supplement, or clarify the statutorily prescribed standard" for reasonable doubt. *Daniel v. State*, 119 Nev. 498, 521, 78 P.3d 890 (2003).

In the Response, the State argues that the trial prosecutor's comment on reasonable doubt during closing argument "was not improper or prejudicial." Response, at 16. The State further argues that the jury was properly instructed with the Jury Instructions filed on November 5, 2015. Response, at 16. Finally, the State argues that the prosecutor did not quantify reasonable doubt, but rather, used the evidence "to argue that the element of identification as to who committed the crimes was established." Response, at 17. In other words, the State argues that it "did not modify the standard of reasonable doubt." Response, at 17.

The State's arguments misrepresent the issue. The State correctly asserts that the prosecutor was arguing the element of identity during the portion of the closing argument in question. However, during that argument, the prosecutor argued, "But, if we've proven beyond a reasonable doubt that he committed one of them then it must be his identity as to all of them." Trial Tr. 166, November 4, 2015.

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The State's closing argument at issue was not about the evidence. The State argued that it could establish criminal liability by way of identity for multiple counts without having to prove the element of identity beyond a reasonable doubt for each count. In other words, the State's argument effectively told the jury that the State did not have the burden to prove every element of every count beyond a reasonable doubt.

Trial Counsel was ineffective for failing to object to the improper rendition of the reasonable doubt standard. Had Counsel objected, there is a reasonable probability that the result of the trial would have been different because the jury would not have convicted Mr. Bacharach on all of the counts. Therefore, this Court should reverse the conviction and grant Mr. Bacharach a new trial.

III. Mr. Bacharach's Pro Per Claims

The State improperly argues that Mr. Bacharach "incorporates by reference" the claims he raised in his pro per petition. Response, at 17. The State relies on *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001) to assert that "the Nevada Supreme Court has rejected incorporation by reference in the habeas context." Response, at 17.

The State is mistaken. The situation in *Evans* is not applicable to the instant case. The *Evans* Court dealt with a petitioner who included a section in his opening brief "that asserts that trial counsel were ineffective "for the reasons set forth" in the issues raised in the rest of the brief." *Evans*, 117 Nev. at 647. The *Evans* Court held that it would not accept "such conclusory, catchall attempts to assert ineffective assistance of counsel." *Id*. at 647.

Here, Mr. Bacharach has not made any "catchall" attempt to raise his claims, nor has he incorporated his claims by reference. Mr. Bacharach filed his pro per Petition for Writ of Habeas Corpus on November 8, 2017. In the Supplemental Petition, Mr. Bacharach supplemented the pro per claims and specifically requested that the Court issue a written

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decision on each claim. Mr. Bacharach's pro per Petition is a valid legal document, and he has requested that the Court rule on each issue that he raised.

1. The District Court violated Mr. Bacharach's Sixth Amendment right to a fair trial for refusing to grant Trial Counsel's request for a mistrial when witness Eufrasia Nazaroff testified regarding the LVMPD Gang Unit.

The State argues that Mr. Bacharach's claim must be rejected pursuant to the doctrines of law of the case and res judicata because it was rejected on direct appeal. Response, at 17. "Under the law of the case doctrine, issues previously determined by this court on appeal may not be reargued as a basis for habeas relief." *Pellegrini v. State*, 117 Nev. 860, 888, 34 P.3d 519 (2001).

The State also argues that the Court has already denied the issue of judicial error by "denying the motion for mistrial." Response, at 18. The State argues, "Re-litigation of this issue is precluded by the doctrine of res judicata." Response, at 18. In support of this argument, the State cites *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 834, 963 P.2d 465, 473 (1998), citing *Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994), *holding modified by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998).

While these cases provide a framework for analyzing issue preclusion under res judicata, the Nevada Supreme Court clarified both of these cases in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709 (2008), *holding modified by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). The Nevada Supreme Court held that claims of issue preclusion must be analyzed under a four-factor test: "(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; ... (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and

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necessarily litigated." *Five Star Capital Corp*., 124 Nev. at 1055. In its Response, the State did not consider these four factors to argue that issue preclusion applies. Regardless, the State's argument for issue preclusion fails.

The issue in Mr. Bacharach's post-conviction Petition has not already been decided in a prior litigation. On direct appeal, Mr. Bacharach litigated the issue of judicial error for denying the mistrial under the abuse of discretion analysis. Here, Mr. Bacharach has raised a claim of constitutional error. Mr. Bacharach has not previously raised the issue of constitutional error in any proceedings. As the State cannot meet even the first factor for arguing issue preclusion, the argument must fail.

Therefore, the doctrines of res judicata and law of the case do not apply because the constitutional error was not previously litigated. Therefore, Mr. Bacharach requests that the Court consider the merits of this claim and reverse his conviction.

2. The District Court violated Mr. Bacharach's Sixth Amendment right to a fair trial because the Court did not allow Trial Counsel to cross examine the LVMPD officer about the body camera video.

The State argues that this claim is waived because Mr. Bacharach did not raise it on direct appeal. Response, at 19. The State's argument is mistaken.

NRS 34.724 provides:

> (1) **Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State**, or who claims that the time the person has served pursuant to the judgment of conviction has been improperly computed, **may, without paying the filing fee, file a postconviction petition for writ of habeas corpus to obtain relief from the conviction or sentence** or to challenge the computation of time that the person has served.

Although Mr. Bacharach did not raise this claim on direct appeal, NRS 34.724 does not preclude him from arguing this issue as a violation of his constitutional rights. Therefore, the Court should consider the merits of this claim and reverse Mr. Bacharach's conviction.

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3. Trial Counsel was ineffective for failing to "suppress or impeach" a witness who presented conflicting statements at trial.

Under *Strickland*, Counsel has a duty to provide effective assistance of counsel. Counsel is ineffective when (1) the performance is deficient based on an objective standard of reasonableness, and (2) the deficiency prejudiced the defendant such that the result of the trial was rendered unreliable. *Strickland*, 466 U.S. at 687–688.

Here, Mr. Bachrach asserted that Trial Counsel had readily available evidence to impeach the witnesses who identified him at trial. However, Trial Counsel did not use this evidence. Mr. Bacharach requests that the Court reverse his conviction and grant him a new trial. At a minimum, this Court should grant Mr. Bacharach an evidentiary hearing to expand the record on this issue.

4. The District Court violated Mr. Bacharach's rights by admitting a "tainted" and "unreliable" in-court identification.

The State argues that Mr. Bacharach has raised a "bare and naked claim" by not indicating "how the identifications were suggestive and tainted." Response, at 26. This is mistaken.

NRS 34.724 allows a petitioner to raise claims of constitutional violations. Mr. Bacharach has raised a claim that his rights were violated. Thus, the Court should grant him an evidentiary hearing to present testimony on the issue and expand the record on this claim.

IV. Cumulative Error

The State argues that the cumulative error analysis should not apply to "the post-conviction Strickland context." Response, at 26. However, Nevada law does not preclude cumulative error review. Additionally, Mr. Bacharach has claimed cumulative error based on the numerous errors in this case—not just ineffective assistance of counsel. The State has not addressed any other error at all.

In Nevada, cumulative error analysis turns on the following factors: (1) whether the issue of guilt or innocence is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. *DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108 (2000).

As Mr. Bacharach has demonstrated in his Petition and Supplement, the issue of guilt or innocence was close, the errors were numerous, and the crimes charged were severe. Thus, Mr. Bacharach requests that this Court find cumulative error in this case and reverse his conviction.

V. Evidentiary Hearing

The State argues that expanding the record is not necessary in this case because the Petition "can be disposed of with the existing record." Response, at 28.

The State's argument is incorrect. Mr. Bacharach has, in fact, raised claims that would entitle him to relief in both his Petition and Supplemental Petition. Therefore, Mr. Bacharach requests that this Court grant an evidentiary hearing to allow him to present evidence to support his claims.

CONCLUSION

Mr. Bacharach's conviction must be reversed. For the reasons outlined in Mr. Bacharach's Petition and Supplemental Petition, this Court must vacate his conviction and grant him a new trial. In the alternative, Mr. Bacharach requests that this Court grant an evidentiary hearing to allow him to present evidence and expand the record in support of his claims.

DATED this 7th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Eighth Judicial District Court in Clark County, Nevada on April 7, 2020. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I hereby certify and affirm that I mailed a copy of the foregoing document on April 7, 2020, postage prepaid and addressed to the following:

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DISTRICT COURT

CLARK COUNTY, NEVADA

JOSHUA BACHARACH, Appellant, v. THE STATE OF NEVADA, Respondent.	CASE NO. C-14-299425-1 DEPT. NO. IX **NOTICE OF APPEAL**

NOTICE is hereby given that Appellant JOSHUA BACHARACH hereby appeals to the Nevada Supreme Court from the Findings of Fact, Conclusion of Law and Order rendered in this action on the 5th day of May, 2021.

DATED this 6th day of May, 2021.

ORONOZ & ERICSSON, LLC

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CERTIFICATE OF ELECTRONIC SERVICE

The undersigned hereby certifies that electronic service was completed via the Odyssey E-File & Serve System and emailed to the following recipient(s) on this 6th day of May, 2021.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that service was completed by sending a copy of this Notice of Appeal via U.S. mail on this 6th day of May, 2021, to the following recipient pursuant to NRAP 3(d)(2).

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