IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY WHITE,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82798

RESPONDENT'S ANSWERING BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

TROY WHITE, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 82798

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ROUTING STATEMENT

Pursuant to NRAP 17(b), the Supreme Court may assign this case to the Court of Appeals.

STATEMENT OF THE ISSUES

1. The district court did not abuse its discretion by not finding trial counsel ineffective for failing to conduct a proper forensic investigation and analysis on Appellant's cellular phone.
2. The district court did not abuse its discretion by not finding trial counsel and appellate counsel ineffective for failing to object to the State's insinuation of prior unknown acts of domestic violence.
3. The district court did not abuse its discretion by not finding trial counsel ineffective for failing to ensure the police obtained a warrant to conduct forensic analysis on the phone attributed to Echo Lucas in violation of the Sixth, Fourth, and Fourteenth Amendments to the United States Constitution.

4. The district court did not abuse its discretion by not finding that Appellant received ineffective assistance of trial and appellate counsel for failure to object and raise on appeal improper prosecutorial misconduct.
5. The district court did not abuse its discretion by not finding that Appellant received ineffective assistance of trial and appellate counsel for failure to object and raise on appeal the district court's giving of Instruction Numbers 18 and 28 in violation of the Fifth and Fourteenth Amendments to the United States Constitution.
6. The district court did not err by not reversing Appellant's conviction based upon cumulative error.
7. The district court did not err by not allowing Appellant to address all of his issues during the evidentiary hearing.

STATEMENT OF THE CASE

On December 12, 2017, Appellant Troy White (hereinafter "Appellant") was charged by way of Information with the following counts: Count 1 - Burglary While in Possession of a Firearm (Category B Felony - NRS 205.060); Count 2 - Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165); Count 3 - Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 4 - Carrying a Concealed Firearm or Other Deadly Weapon (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 5, 6, 7, 8, and 9 - Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508(1)). 1 AA 1-5.

On February 4, 2013, Appellant filed a pre-trial Petition for Writ of Habeas Corpus, to which the State filed a Return on March 19, 2013. 11 AA 1786. On March 27, 2013, the district court granted Appellant's Petition as to Count 1 only and denied the Petition as to Count 2 through 9. 11 AA 1786. The State filed a Notice of Appeal

that same day. 11 AA 1786. On July 10, 2014, the Nevada Supreme Court affirmed the district court's dismissal of Count 1 and Remittitur issued on August 4, 2014. 11 AA 1786.

On March 24, 2015, the State filed an Amended Information with the following charges: Count 1- Murder With Use of a Deadly Weapon (Category A Felony - NRS 200.010, 200.030, 193.165); Count 2- Attempt Murder With Use of a Deadly Weapon (Category B Felony - NRS 200.010, 200.030, 193.330, 193.165); Count 3 - Carrying a Concealed Firearm or Other Deadly Weapon (Category C Felony - NRS 202.350(1)(d)(3)); and Counts 4, 5, 6, 7, and 8 - Child Abuse, Neglect, or Endangerment (Category B Felony - NRS 200.508(1)). 1 AA 21-24.

Appellant's jury trial commenced on April 6, 2015, and concluded on April 17, 2015. 1-2 AA 29-263. The State also filed a Second Amended Information on April 6, 2015, charging the same counts as listed in the Amended Information. 2 AA 264-267. On April 17, 2015, the jury returned a verdict as follows: as to Count 1 - Guilty of Second Degree Murder with Use of a Deadly Weapon; as to Count 2 - Guilty of Attempt Murder with Use of a Deadly Weapon; as to Count 3 -Guilty of Carrying a Concealed Firearm or Other Deadly Weapon; and as to Counts 4, 5, 6, 7, and 8 - Guilty of Child Abuse, Neglect, or Endangerment. 10 AA 1553-1555.

On July 20, 2015, Appellant was sentenced to the Nevada Department of Corrections as follows: as to Count 1 - to Life with eligibility for parole after serving

a minimum of ten (10) years, plus a consecutive term of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; as to Count 2 - to a maximum of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months, plus a consecutive term of one hundred ninety-two (192) months with a minimum parole eligibility of seventy-six (76) months for the use of a deadly weapon; consecutive to Count 1; as to Count 3 - to a maximum of forty-eight (48) months with a minimum parole eligibility of nineteen (19) months, concurrent with Counts 1 & 2; as to Count 4 - to a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, consecutive to Counts 1 & 2; as to Count 5- to a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; as to Count 6 - to a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; as to Count 7 - to a maximum of sixty (60) months with a 11 minimum parole eligibility of twenty-four (24) months, concurrent with all other counts; as to Count 8 - to a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months, concurrent with all other counts. 10 AA 1567. Appellant was awarded one thousand eighty-eight days (1,088) days credit for time served with an aggregate sentence of Life with a minimum of thirty-four (34) years in the Nevada Department of Corrections. 10 AA 1567-1587.

Appellant's Judgment of Conviction was filed on July 24, 2015. 10 AA 1588-1590. An Amended Judgment of Conviction was filed on February 5, 2016, removing the aggregate sentence language. 10 AA 1589-1599.

On August 12, 2015, Appellant filed a Notice of Appeal. 10 AA 1591. On April 26, 2017, the Nevada Supreme Court affirmed Appellant's Judgment of Conviction and Remittitur issued on May 22, 2017. 11 AA 1786.

On April 24, 2018, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction). 11 AA 1600. On December 20, 2018, Appellant filed a Supplemental Brief in Support of his Petition for Writ of Habeas Corpus and Motion for Authorization to Obtain Expert and for Payment of Fees Incurred Herein. 11 AA 1608. On March 26, 2019, the State filed its Response. 11 AA 1640. On April 24, 2019, Appellant filed his Reply and Motion for Authorization to Obtain Investigator and Payment of Frees Incurred Herein. 11 AA 1666. The State filed its Opposition on May 2, 2019. The district court granted the Motion for an Investigator on June 12, 2019. The Order was filed on June 21, 2019.

On September 2, 2020, the district court denied the Petition in part as to the cell phone and ordered a limited evidentiary hearing on the remaining issues—specifically whether counsel was ineffective for failing to investigate the cell phone. 11 AA 1754. On March 4, 2021, the district court held an evidentiary hearing where Appellant's prior counsel, Chief Deputy Public Defender Scott Coffee, testified

regarding his investigation of Appellant's cell phone. 11 AA 1770. Following the evidentiary hearing, the district court denied the Petition in its entirety. 11 AA 1785. The Findings of Fact, Conclusions of Law and Order was filed on April 13, 2021. 11 AA 1785.

On April 16, 2021, Appellant filed a Notice of Appeal. 11 AA 1836. Appellant filed the instant Opening Brief on September 2, 2021.

STATEMENT OF THE FACTS

At the beginning of June of 2012, Appellant and his wife, Echo Lucas, separated. 7 AA 1032. Appellant and Echo were married and had been living together at 325 Altamira, Las Vegas, Clark County, Nevada, with Echo's children Jayce, Jodey, Jesse, Jett, and Jazzy. 3 AA 193-195. After their separation, Appellant began staying with his friend Herman Allen. 3 AA 196. Appellant would still come over to Echo's residence on the weekends to care for the children. 3 AA 197.

While separated, Echo started dating Joe Averman. 3 AA 198. Jayce thereafter heard Appellant describe Echo as a "bitch." 3 AA 199. Appellant also told Jodey he hated Joe because Echo was cheating on him with Joe. 4 AA 568. Appellant called and sent text messages to Joe warning him to stay away from Echo or he would kill him and there would be "repercussions." 7 AA 1037. Appellant's threatening calls and text messages to Joe continued up until Echo's death on July 27, 2012. 7 AA 1037.

On July 9, 2012, Appellant posted on Facebook "[h]ave you heard the quote, 'If you love someone set them free, if they come back they're yours, if not they never were'? I like this version instead, 'If you love someone set them free, if they don't come back hunt them down and kill them!' Ha ha ha." 6 AA 843. He repeated this phrase to his friend Allen seven (7) to ten (10) days before he murdered Echo. 7 AA 1152. On July 14, 2012, Appellant sent a message on Facebook, stating that Echo and he were separated, and that "God is really helping me as a testimony. The adulterers leave to continue in their sins" and "[t]he whore and whoremonger are still alive and I'm not in prison. No joke intended." 6 AA 845. Appellant also sent text messages to Echo and, on July 20, 2012, he told her via a text message: "I hate you for choosing him over me." 6 AA 919.

Beginning at 12:25 PM on July 26, 2012, Echo and Appellant again began exchanging text messages about their relationship. 8 AA 1298. When Appellant attempted to call Echo in response to one of her text messages, Echo sent a text message reading: "JUST TEXT PLEASE." 8 AA 1299. During this series of text messages, Appellant accused Echo of being indecisive in choosing between him and Joe. 8 AA 1300. At 4:04 PM, Appellant asked Echo if she would be interested in spending some time with him that weekend and Echo declined, claiming she needed to babysit. 8 AA 1300. Appellant again expressed frustration to Echo with the status of their relationship before ending their text conversation at 9:06 PM. 8 AA 1301.

On Friday, July 27, 2012, between 2:30 a.m. and 3:00 a.m., Appellant arrived very early to work and notified his boss he needed to leave early because he could not sleep the night before and was tired. 6 AA 930. Appellant's regular shift was between 5:00 AM and 1:30 PM. 6 AA 928. Appellant's supervisor described Appellant as depressed and quiet on July 27. 6AA 931. While at work, Appellant resumed texting Echo at 3:30 AM, stating: "If you still love me at all, you will call me one more time for me to say one last thing to you." 8 AA 1301. After Appellant then made a series of outgoing calls to Echo, she texted him in response "STOP, STOP, STOP." 8 AA 1302. Appellant then sent Echo a series of three (3) text messages reading:

> I hope you're happy. The other day in the store you said you were not . . . I think your time set back up. I've given you enough time to make a decision. You say you want your marriage back but you prove otherwise. If you really wanted your marriage back, if you wanted just to come back to me instead of having to have more time with Joe. . . Goodbye.

8 AA 1302. However, just nine (9) minutes after that message, Appellant texted Echo and told her he would be coming to her house later that morning, whether or not she called the police, because he wanted to see the children and say something to her. 8 AA 1303-04. He thereafter texted that he changed his mind and would not be coming after all. Id.

At around 5:00 AM, Appellant again called Echo and left a voicemail message. 8 AA 1305. Appellant also continued to text Echo accusing her of choosing Joe over him and ruining their family. Id. At approximately 7:45 or 8:15 AM, before Appellant left his workplace, he spoke with his boss and discussed his marriage problems and told him that Echo was cheating on him. 6 AA 932. Appellant stated, "I just want to kill them." Id. Appellant soon thereafter left work carrying a backpack. 6 AA 934.

The text messages sent by Appellant became angrier starting at approximately 9:00 AM. 8 AA 1305. At 9:41 AM, Appellant called Echo again and left another voicemail message. 8 AA 1306. When Echo once again responded to Appellant's call by texting him to stop trying to call her, Appellant replied with a text reading: "Obviously you're full of s---, you don't care about me, you don't love me. You know what, I would put up everything to be able to talk to you." Id. When Echo refused Appellant's subsequent text messages demanding her to call him, he sent her the following series of messages starting at 10:06 AM: "Then you don't love me . . . Get ready for hell . . . You will see." 8 AA 1307. Appellant then began calling Echo names and daring her to have Joe meet Appellant for a physical altercation. 8 AA 1308. At 10:30 AM, Appellant once again texted Echo: "Either you want me or him, it's that simple, but you choose him." 8 AA 1309. Appellant's last text message to

Echo was sent at 11:26 a.m. "But now you're all pissed off, now you think I'm an a*** whatever, again or just wait and see." 8 AA 1314.

Just before noon, Appellant arrived at the 325 Altamira residence carrying a backpack. 7 AA 1042. When Appellant entered the home, he no longer had the backpack. 3 AA 470. Jayce saw Appellant and felt something was wrong because his father never came by on Friday at this time. 3 AA 471. Appellant appeared as if "he was looking for somebody . . . like trying to do something." 3 AA 470. Appellant told Echo he wanted to speak to her for five (5) minutes and Echo agreed, leading Appellant to the craft room. 7 AA 1426. After a short time, Jayce heard Appellant and Echo raising their voices. 3 AA 487. Joe, who was in the bedroom located directly across from the craft room, heard Echo say in a fearful, loud voice "no, Troy, please don't, stop." 7 AA 1047. Then the door to the craft room opened. 3 AA 473. Jayce walked over to the hall by that room. Id. Joe also opened the door to the bedroom. 3 AA 473. Echo was trying to exit the room, but Troy grabbed her arm and pulled her back into the room. 7 AA 1049. Echo stated "No, please stop, I won't go with Joe again!" 4 AA 564. Appellant pulled out a gun from his waist area and shot Echo at about an arm's length. 3 AA 474. When Joe tried to help Echo, Appellant shot him twice, striking his arm and abdomen. 7 AA 1051-52. A neighbor heard two metallic noises and a woman screaming. 4 AA 669. Joe fell to the ground with a fractured hip. 7 AA 1052.

Jayce asked Appellant "why'd you shoot my mommy." 3 AA 473. Appellant did not reply but walked back and forth and stated that if he was going to go to prison he was going to kill Joe. 7 AA 1054. Appellant stood over Joe and pointed the gun to his forehead. Id. Jodey and Jayce then came into the room and Appellant tried to get them out of the bedroom. 7 AA 1054. However, Jodey, Jayce and Jesse hit Appellant and threw things at him in hopes that he would stop. 4 AA 554.

Jayce ran to her mother and asked multiple times if she was ok. 3 AA 475. Echo did not respond, all Jayce heard were gurgling noises coming from Echo. Id. Echo's face was without color. Id.

Joe was on the ground of the bedroom and had blood all over his stomach. 3 AA 477. When Joe asked Jayce for the phone, he gave it to him. 4 AA 587. Jodey ran outside and Appellant followed. Id. When Jodey ran outside he noticed a backpack in the driveway. 4 AA 587-88. Jodey ran to a neighbor's home and asked them to call the police because "my dad just shot my mother and her friend." 4 AA 555; 5 AA 760-61. The neighbors took Jodey and their children into the house as they called 911. 5 AA 760. Jodey said Appellant shot his mother and her friend "because his mother was cheating with the friend." 5 AA 765.

Appellant went back inside, saw Joe with the phone, and took it from him. 3 AA 477. Appellant told Joe he was not going to call anyone and said, "I told you this was going to happen if you didn't stay away." 7 AA 1063. Appellant then hid

the gun behind his back, went back outside and desperately yelled out "Jodey, Jodey!" 3 AA 478. Joe heard sirens at a distance. 7 AA 1067. Appellant grabbed the keys of a 2008 silver Dodge Durango registered to Echo and him, got in, and fled. 3 AA 478-79.

Officers arrived on the scene and located Joe in a bedroom to the left of the hallway and Echo across the hall in a craft room. 6 AA 787. Joe was down and bleeding right inside the doorway, Echo was lying on her back and had an apparent gunshot wound to the chest. Id. She did not appear to be breathing and her skin was blue and discolored. Id. Joe's lower torso and leg area were covered with blood. 6 AA 789. Joe said he was shot by Appellant. 6 AA 793. Jazzy was found unharmed in a crib near Joe. 6 AA 793.

Officers found two (2) shell casings in the hallway and another on the carpet to the left of where Echo was laying. 6 AA 795. Las Vegas Metropolitan Police Department Crime Scene Analyst Tracy Kruse processed the scene and located a bullet and a backpack in the driveway. 4 AA 599. An empty firearm holster was located inside the backpack. 4 AA 602. A bullet hole was located on the south facing wall west of the front door. 4 AA 602-03. In the master bedroom, by the far left corner where a crib was located, the dresser mirror had a bullet hole which corresponded with the hole in the exterior of the residence. 4 AA 608. A black tank

top was impounded which had a bullet hole. 4 AA 607. A white iPhone, belonging to Echo, was also impounded from the scene. 4 AA 608.

At approximately 5:30 or 6:00 PM, Appellant turned himself in to the Yavapai Sheriff's Office, in Prescott, Arizona and told officers he had shot his estranged wife and her new boyfriend in Las Vegas earlier that morning. 4 AA 651; 5 AA 737. Appellant also stated that the handgun he had used in the shooting that morning was in the spare tire compartment in the car. 5 AA 738. Subsequently, the Durango was processed and a bullet strike consistent with the vehicle having been parked with the driver's side closest to the front door of Echo's home when the bullet went through the wall was noted. 4 AA 618. A black Taurus PT92 C 9mm firearm, some magazines, and a single cartridge were located inside the vehicle. 4 AA 619. The firearm was empty, and a total of twenty-one (21) rounds were found within the magazines in the vehicle. 4 AA 622, 658. Appellant's DNA was found on the firearm. 7 AA 984.

On July 28, 2012, Dr. Lisa Gavin, a forensic pathologist, conducted an autopsy on Echo. 5 AA 693. An entrance gunshot wound was located in the right upper quadrant of Echo's abdomen. 5 AA 699. Stippling was present indicating that Echo was shot from about 6 to 12 inches away. 5 AA 702-03. The bullet went through the right side of her abdomen, through her diaphragm, liver, pancreas, aorta, spinous process, spine, and stopped in her left back soft tissues and muscle. 5 AA

703. Echo's lungs collapsed due to the bullet traveling through her diaphragm. 5 AA 705. Dr. Gavin concluded Echo's manner of death to be homicide. 5 AA 708.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's denial of Appellant's Petition for Writ of Habeas Corpus (Post-Conviction). Petitioner has raised five (5) grounds for relief in his post-conviction Petition for Writ of Habeas Corpus alleging ineffective assistance of counsel on the part of trial and/or appellate counsel. For the reasons set forth below, the district court did not err when it denied Appellant's claims of ineffective assistance of counsel. As the individual claims were properly denied, there is no error to cumulate. Further, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. See McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318. Therefore, Appellant has not established cumulative error. For the following reasons, the district court's denial of Appellant's Petition for Writ of Habeas Corpus and his request for a broader evidentiary hearing should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW FOR INEFFECTIVE ASSISTANCE OF COUNSEL

This Court reviews the district court's application of the law de novo and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). This

Court reviews a district court's denial of a habeas petition for abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made by the district court so long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

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.

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

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).

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.

II. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO ANALYZE APPELLANT'S CELL PHONE

A. Appellant's Petition for Writ of Habeas Corpus failed to allege specific facts which if true, would entitle him to relief

Appellant argues that the district court abused its discretion when it found that counsel was not ineffective for failing to request a forensic analysis of Appellant's cell phone. Appellant states, "the district court determined that forensic analysis would not have been necessary because Mr. White would have known the contents of his own phone . . . While it is true that Mr. White would have known the contents of his own phone, Mr. White had the categorical Fifth Amendment right not to testify." Opening Brief at 17.

Appellant appears to misconstrue the district court's findings. The district court did not conclude that Appellant should have testified as to the contents of his phone. Rather, the district court held that Appellant failed to support his allegation that his cell phone would contain impeachment material with specific facts, and thus failed to meet the standard under Hargrove and NRS 34.735. See 11 AA 1793. "Bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel; claims asserted in a petition for post-conviction relief must be supported with specific factual allegations which if true would entitle petitioner to relief. See Hargrove, 100 Nev. at 502.

Because it was Appellant's cell phone, he was in the best position to assert that he did not send threatening messages to Mr. Averman. Appellant could have simply told his attorney that he did not send any threatening messages to Mr. Averman or what impeachment material a forensic analysis would have uncovered. As the district court stated, "White offers no facts indicating that such a forensic analysis would have provided witness impeachment evidence, only a bare and naked assertion that such analysis could have provided impeachment evidence." 11 AA 1793. Appellant's opening brief is similarly devoid of any specific factual allegations. This is insufficient to meet the standard under Hargrove. See Hargrove, 100 Nev. at 502 ("Appellant's motion consisted primarily of 'bare' or 'naked' claims for relief, unsupported by any specific factual allegations that would, if true, have

entitled him to withdrawal of his plea. Specifically, appellant's claim that certain witnesses could establish his innocence of the bomb threat charge was not accompanied by the witness' names or descriptions of their intended testimony."). Thus, the district court properly denied the claim.

B. Appellant cannot show that analyzing the cell phone would have altered the outcome of the trial

Appellant's next argument is that the district court erred when it determined that trial counsel made a reasonable strategic decision not to investigate the cell phone because it could do more harm than good. Opening Brief at 18. Appellant argues that the decision not to have the phone analyzed was not a "strategic decision," and that had the phone been analyzed, the defense would have had a stronger case for manslaughter. Id. at 18, 22.

A defendant who contends he received ineffective assistance because his counsel did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See Love, 109 Nev. at 1138, 865 P.2d at 323.

"[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Id. (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to

investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145. Indeed, it is well established that "counsel is not required to unnecessarily exhaust all available public or private resources." Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Trial counsel's decision not to hire an expert is "entitled to a 'strong presumption' of reasonableness." Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (quoting Harrington, 562 U.S. at 104, 131 S. Ct. at 787). Even if counsel chooses a less than "exemplary" option, "a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen." Id. at 2410 (quoting Burt v. Titlow, 571 U.S. 12, 22-23, 134 S. Ct 10, 17-18 (2013).

Here, Appellant argues that the decision not to have the phone analyzed "did not constitute a strategic decision." Opening Brief at 18. However, this claim is clearly belied by the record. At the March 4, 2021, evidentiary hearing, Appellant's trial counsel, Mr. Coffee, testified as follows:

> Q: And are you saying there was something that concerns you that you would worry the State may attain something damaging?
> A: That always concerns me. That despite -- despite what is there, you know, the odds are, and again I haven't analyzed the phone so I suppose somebody would need to

> look at the phone, but the obvious thing is it proves that Mr. Averman was telling the truth. Mr. Averman's credibility was already suspect given what we had. Given that he had lied about work and given that he'd moved in with friend's best wife [sic]. There were a variety of things. Mr. Averman, in my opinion, did not come across as the most likable witness or likable person in this particular case. And it just seemed to me the risk outweighed the benefits of doing additional forensic testing.
>
> Q: Okay, I recognize that you were concerned about risks. Mr. Coffee, couldn't you have requested permission to obtain the phone and have your own expert analyze it so that, for example, Ms. Mercer would not have had the results of that analysis?
>
> A: No, not really. I mean, could I ask for it? I suppose so. And the minute that I asked for it, my guess is that Mr. Mercer is smart enough, having dealt with her for 20 years, give or take, to analyze the thing herself. If I'm looking for something, she's going to be looking for something. So the problem is I trigger an investigation irrespective of what I do.
>
> **Q: And this is something you had thought through. Is that right?**
>
> **A: Something I considered, at least, yeah. As soon as we start, you know, no stone unturned. Some of the times as soon as you start turning over stones, things get bad.**

11 AA 1774-75. (emphasis added). At the evidentiary hearing, Mr. Coffee expressed concern that requesting an investigation of the phone could either confirm what Mr. Averman was saying or produce something harmful to the defense. Id. He also pointed out that there had been other impeachment evidence offered against Averman. Id. Based on this, the district court concluded that trial counsel made a reasonable strategic decision not to have the phone analyzed. See 11 AA 1795.

Appellant's argument that this was not a "strategic decision" is unclear. Appellant cites to the following exchange from the evidentiary hearing:

> Q: So at some point, did you consider having a forensic analysis conducted on Troy White's phone to disapprove [sic] Joe Averman's testimony that he had received threatening messages from Mr. White?
> A: To be honest, I did not.

11 AA 1773. Although Mr. Coffee does appear to have contradicted himself at the evidentiary hearing, it is clear later in the record that he did weigh the decision of whether to have the phone analyzed. See 11 AA 1774-75. Accordingly, the district court did not err when it found that trial counsel was not ineffective for failing to have the phone analyzed. See Love, 109 Nev. at 1138.

Appellant asserts that had the phone been analyzed, there is a reasonable probability that the result of the trial would have been different because "Mr. White would have been able to undermine the evidence of threat and established [sic] a stronger case for manslaughter instead of murder." Opening Brief at 22. As explained above, Appellant fails to specify what impeaching evidence would be contained on the phone, and thus, this claim fails under Hargrove. 100 Nev. at 502.

Even assuming Appellant did not send any threatening messages to Mr. Averman, Appellant fails to explain how impeaching Mr. Averman on this one issue would have changed the outcome of the trial when the State produced extensive evidence that this was not a crime committed in the heat of passion. The State

introduced text messages, Facebook messages, voicemails, and comments made to other people showing that this was something Appellant thought about for several weeks leading up to the homicide. Thus, the district court did not err when it concluded that Appellant did not satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had counsel obtained a forensic examination of the phone. See Molina, 120 Nev. at 192, 87 P.3d at 538. Therefore, the district court properly denied the claim.

III. THE DISTRICT COURT PROPERLY HELD THAT COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED ALLEGATIONS OF PRIOR BAD ACTS

Appellant's second claim of ineffective assistance of trial counsel alleges that the district court erred by finding both trial and appellate counsel effective despite failing to object to insinuations that Appellant committed domestic violence. NRS 48.045 provides as follows:

> 1. Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
> (a) Evidence of a person's character or a trait of his or her character offered by an accused, and similar evidence offered by the prosecution to rebut such evidence;
> (b) Evidence of the character or a trait of character of the victim of the crime offered by an accused, subject to the procedural requirements of NRS 48.069 where applicable, and similar evidence offered by the prosecution to rebut such evidence; and

> (c) Unless excluded by NRS 50.090, evidence of the character of a witness, offered to attack or support his or her credibility, within the limits provided by NRS 50.085.
> 2. Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
> 3. Nothing in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense. As used in this subsection, "sexual offense" has the meaning ascribed to it in NRS 179D.097.

To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). The prosecutor has the duty to request that the jury be instructed on the limited use of prior bad act evidence, and if the prosecutor fails to request the instruction, the district court should raise the issue sua sponte. Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128 (2001).

Here, Appellant alleges that the district court erred by finding both trial and appellate counsel effective despite failing to object to insinuations that Appellant

committed domestic violence. Appellant argues that the following question posed to minister Tim Henderson was an "insinuation" of bad act evidence:

> Q: You don't know what things the defendant might have done to her, or what she might have done to him?
> A: No, I'm not aware.

8 AA 1219. However, when read in context, it is clear that the foregoing question was asked to show that Mr. Henderson lacked intimate knowledge of Appellant and the victim's marriage—not to establish a prior bad act:

> Q: Just so we're clear, you have no idea the things that might have upset either Echo or the defendant in the course of their relationship that caused it to ultimately end in early 2012, correct?
> A: No, I'm not aware of that. No.
> Q: You don't know what things the defendant might have done to her, or what she might have done to him.
> A: No, I'm not aware.

8 AA 1219. This question is facially vague and could have referred to any number of "things" that could have happened within their marriage. No reasonable juror would have understood it to be a reference to a prior act of domestic violence. Further, as Mr. Henderson answered in the negative, no bad act evidence was ever actually introduced. Thus, it is impossible to analyze this question under a bad act framework. See Tinch, 113 Nev. at 1176.

Appellant also argues that the following question posed to Echo's mother, Amber Gaines, insinuated that a prior bad act had occurred:

> Q: At the beginning of 2012 did you learn that he may not be such a wonderful husband to Echo?
> A: Absolutely, yes.
> Q: Is it your opinion that things got worse between Troy and Echo after June 2012?
> A: Yes.
> Q: Were you privy, were you aware of telephone conversations, did you overhear any telephone conversations between the defendant and Echo?
> A: Yes.
> Q: Was he a nice guy on that when he was talking to her about this?
> A: Absolutely not.

8 AA 1254. Once again, when read in context, it is clear that no reasonable juror would have interpreted this to mean that a prior incident of domestic violence had occurred. The prosecutor was asking Ms. Gaines about verbal communications that occurred between the victim and Appellant. As with Appellant's previous citation, no bad act evidence was ever actually introduced.

Appellant argues that the "insinuation was more powerful than an actual presentation of a bad act." Opening Brief at 24. Appellant provides no legal authority for this assertion, and as such this argument should be summarily rejected. Jones v. State, 113 Nev. 454, 468, 937 P.2d 55, 64 (1997) (holding that Jones' unsupported contention should be summarily rejected on appeal).

The questions posed to Mr. Henderson and Ms. Gaines referenced no specific bad acts whatsoever committed by Appellant. Objecting to these questions on a "bad act" basis would thus have been futile, as there was no legal basis for such an

objection. Pursuant to Ennis, 122 Nev. at 706, 137 P.3d at 1103, counsel cannot be ineffective for failing to make futile objections or arguments.

In any case, Appellant has not shown a reasonable probability that the result of the trial would have been different had the State not posed such questions or if trial counsel had objected to them as there was substantial evidence showing that Appellant was guilty of the murder of Ms. Lucas. There were multiple eyewitnesses to the murder and Appellant even told Arizona police that he shot his wife and her boyfriend when he turned himself in. 5 AA 737. In addition, the State introduced forensic evidence showing that Appellant's DNA was found on the firearm and that the bullet strikes in his vehicle were consistent with his car being parked outside of the home during the shooting. 7 AA 984. Thus, Appellant cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to these alleged bad acts. See Strickland, 466 U.S. at 687-88.

Appellant's sole argument that appellate counsel was ineffective on this issue was that appellate counsel did not raise such on direct appeal. Opening Brief at 27. As set forth above, there was no legal or factual basis for such an argument on appeal; appellate counsel cannot be ineffective for failing to raise futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103.

For the reasons set forth above, Appellant has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his trial counsel or appellate counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Therefore, the district court properly denied Appellant's claim of ineffective assistance of counsel on this matter.

IV. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO SUPPRESS EVIDENCE OBTAINED FROM ECHO LUCAS'S CELL PHONE

A. Appellant had no reasonable expectation of privacy in messages he sent to Ms. Lucas

Appellant asserts trial counsel was ineffective for failing to "ensure the police obtained a warrant to forensically analyze the phone attributed to Echo Lucas." Opening Brief at 28. The meaning of this assertion is unclear; Appellant identifies no legal support for the proposition that defense counsel has a duty to prospectively instruct police to obtain a warrant prior to conducting a search under the Fourth Amendment. Respondent will proceed under the assumption that Appellant is arguing trial counsel was ineffective for failing to suppress the information from Ms. Lucas's cell phone.

Appellant concedes that "[i]f in fact Ms. Lucas was the owner and sole individual who would have standing, this issue would admittedly be invalid. However, Post-Conviction Counsel for Mr. White has not been able to locate proof

of this assertion." Opening Brief at 29. Appellant also states that post-conviction counsel has been unable to locate phone records showing who owned the phone. Id. At no point does Appellant allege that the phone actually belonged to someone other than Ms. Lucas. It is unclear who else Appellant believes the phone may have belonged to or who else would have had standing to object to a search of the phone. As this claim is lacking in factual specificity, it should be denied under Hargrove. 100 Nev. at 502.

Even assuming Ms. Lucas was not the only person with standing to object to a search of the phone, Appellant had no legitimate expectation in the privacy of messages he sent to Ms. Lucas. "[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. 735, 743–44, 99 S. Ct 2577, 2581 (1979). Once Appellant sent the subject messages to Ms. Lucas, he no longer had control over what Ms. Lucas or anyone with access to her phone would do with those messages and he voluntarily ran the risk that they would be viewed by other parties. As Appellant has no legitimate expectation of privacy in text messages voluntarily sent to a third party, he has no standing to contest its search. Accordingly, whether Ms. Lucas had singular standing over the cell phone is ultimately irrelevant.

Appellant cites Riley v. California, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), to support his claim. However, this case is easily distinguishable. In Riley, the

defendant's personal cell phone was searched after he was taken into custody. Here, the cell phone belonged to the victim. 134 S. Ct. at 2481. Thus, unlike in Riley where the defendant had standing to assert a Fourth Amendment violation, Appellant has submitted no evidence that he has standing to assert a Fourth Amendment violation as it pertains to a search of Ms. Lucas's cell phone.

B. Carpenter does not apply retroactively

Appellant cites Carpenter v. United States, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018), for the proposition that Appellant had a reasonable expectation of privacy in messages he sent to Ms. Lucas. Appellant argues that "the text messages in question were between Mr. White and Ms. Lucas. There is a clear privacy interest in communication between two people operating cell phones." Opening Brief at 30.

As an initial matter, Carpenter is distinguishable from this case. Carpenter held that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through cell-site location information (CSLI), and that the Government must generally obtain a search warrant supported by probable cause before acquiring CSLI from a wireless carrier. 138 S. Ct. at 2217. In this case, the State did not introduce evidence of Appellant's location as captured by CSLI; instead, the State introduced the substance of the texts sent by Appellant to Ms. Lucas's phone.

Second, Carpenter was decided three years after Appellant's trial and is not retroactive. Carpenter holds that the Government must generally obtain a warrant supported by probable cause before acquiring cell-site location information (CSLI) from a wireless carrier. Carpenter, 138 S. Ct. at 2221. Although Appellant does not address whether or not this is a new rule, clear Nevada precedent reveals that not only is Carpenter a new rule, it does not fall into one of the two narrow exceptions to the prohibition on retroactivity of new constitutional rules.

This Court has "detailed the rules of retroactivity, applying retroactivity analysis only to new constitutional rules of criminal law if those rules fell within one of two narrow exceptions." Colwell v. State, 118 Nev. 807, 820, 59 P.3d 463, 531 (2002). Colwell was premised on the United States Supreme Court's decision in Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060 (1989). A brief digression on Teague is therefore in order.

In Teague, the United States Supreme Court did away with its previous retroactivity analysis in Linkletter,[1] replacing it with "a general requirement of nonretroactivity of new rules in federal collateral review." Colwell, 118 Nev. at 816, 59 P.3d at 469–70 (*citing* Teague, 489 U.S. at 299-310, 109 S. Ct. at 1069–76). In short, the Court in Teague held that "new constitutional rules of criminal procedure

[1] Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731 (1965).

will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310, 109 S. Ct. at 1075. This holding, however, was subject to two exceptions: first, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'" Id. at 311, 109 S. Ct. at 1075 (quoting Mackey v. United States, 401 U.S. 667, 692, 91 S. Ct. 1160, 1165 (1971); and second, a new constitutional rule of criminal procedure should be applied retroactively if it is a "watershed rule[ ] of criminal procedure." Id. at 311, 109 S. Ct. at 1076 (*citing* Mackey, 401 U.S. at 693–94, 91 S. Ct. at 1165).

This Court found Teague's retroactivity analysis too restrictive and its "new rule" analysis too broad. While adopting its general framework, the Colwell Court chose "to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require." Colwell, 118 Nev. at 818, 59 P.3d at 470; see also id. at 818, 59 P.3d at 471 ("Though we consider the approach to retroactivity set forth in Teague to be sound in principle, the Supreme Court has applied it so strictly in practice that decisions defining a constitutional safeguard rarely merit application on collateral review.").[2]

[2] As the Court explained in Colwell, it was free to deviate from the standard laid out in Teague so long as it observed the minimum protections afforded by Teague. See 118 Nev. at 817–18, 59 P.3d at 470–71; see also Johnson v. New Jersey, 384 U.S. 719, 733, 86 S. Ct. 1772, 1781 (1966)).

First, the Colwell Court narrowed Teague's definition of a "new rule," which it had found too expansive.[3] Id. at 819–20, 59 P.3d. at 472 ("We consider too sweeping the proposition, noted above, that a rule is new whenever any other reasonable interpretation or prior law was possible. However, a rule is new, for example, when the decision announcing it overrules precedent, or 'disapproves a practice this Court had arguably sanctioned in prior cases, or overturns a longstanding practice that lower courts had uniformly approved.'" (quoting Griffith v. Kentucky, 479 U.S. 314, 325, 107 S. Ct. 708, 714 (1987)). And second, the Court in Colwell expanded on Teague's two exceptions, which it had found too "narrowly drawn":

> When a rule is new, it will still apply retroactively in two instances: (1) if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense; or (2) if it establishes a procedure without which the likelihood of an accurate conviction is seriously diminished. These are basically the exceptions defined by the Supreme Court. But we do not limit the first exception to 'primary, private individual' conduct, allowing the possibility that other conduct may be constitutionally protected from criminalization and warrant retroactive relief. And with the second exception,

[3] This has the effect of affording greater protection than Teague insofar as defendants seeking collateral review here in Nevada will be able to avail themselves more frequently of the principle that "[i]f a rule is not new, then it applies even on collateral review of final cases." Colwell, 118 Nev. at 820, 59 P.3d at 472. Under Teague's expansive definition for "new rule," most rules would be considered new by Teague's standards and, thus, "given only prospective effect, absent an exception." Id. at 819, 59 P.3d at 471.

> we do not distinguish a separate requirement of 'bedrock' or 'watershed' significance: if accuracy is seriously diminished without the rule, the rule is significant enough to warrant retroactive application.

Id. at 820, 59 P.3d at 472. One year later, this Court articulated its retroactivity rules:

> [O]n collateral review under Colwell, if a rule is not new, it applies retroactively; if it is new, but not a constitutional rule, it does not apply retroactively; and if it is new and constitutional, then it applies retroactively only if it falls within one of Colwell's delineated exceptions.

Clem v. State, 119 Nev. 615, 628, 81 P.3d 521, 531 (2008). Carpenter does not apply retroactively to Appellant's case under this Nevada precedent. First, its general warrant requirement for CSLI *is* a new rule. It does not "merely interpret[] and clarif[y] an existing rule." Colwell, 118 Nev. at 820, 59 P.3d at 531. In fact, it "disapproves a practice this Court had arguably sanctioned in prior cases." Id. at 819–20, 59 P.3d. at 472.

The Ninth Circuit discussed and confirmed this lack of a warrant requirement in United States v. Wright, No. 2:17-cr-00160-JAD-VCF, 2018 U.S. Dist. LEXIS 63851, at *3–4 (D. Nev. Apr. 16, 2018)—a decision issued just six days before Carpenter. Wright clarified that "many districts, including the District of Nevada, have ruled that an order under 18 U.S.C. § 2703(d) can be used to obtain historical" CSLI. Id. As this Court discussed in Taylor, other circuits have held the same. 7 AA 1539-42 (*citing* United States v. Davis, 785 F.3d 498, 511 (11th Cir. 2015); In re Application of the U.S. for Historical Cell Site Data, 724 F.3d 600, 612-13 (5th Cir.

2013); In re Application of U.S. for an Order Directing Provider of Elec. Commc'n Serv. to Disclose Records to Gov't, 620 F.3d 304, 313 (3d Cir. 2010)). Carpenter directly contradicts this precedent; it disapproves of the practice of relying upon Stored Communication Act subpoenas to obtain CSLI—making Carpenter a new rule. Thus, Carpenter would only apply retroactively if it fell under one of the two narrow exceptions. Clem, 119 Nev. at 628, 81 P.3d at 531.

However, Carpenter does not fall under the retroactivity exceptions. First, it does not narrow the category of criminal conduct or limit whether defendants can be punished based on their status. Colwell, 118 Nev. at 820, 59 P.3d at 472. It has nothing to do with a defendant's behavior or classification whatsoever, and thus cannot fall under this exception. Second, it does not "establish[] a procedure without which the likelihood of an accurate conviction is seriously diminished." Id. A new procedure, such as this new warrant requirement, that "does not alter any right fundamental to due process" cannot satisfy Colwell's second retroactivity exception. Ennis, 122 Nev. at 704, 137 P.3d at 1102. The Stored Communications Act already required that the State meet the "specific and articulable facts" standard to be granted a subpoena for CSLI. 18 U.S.C. § 2703(d). Carpenter has not changed or added any "right fundamental to due process." Ennis, 122 Nev. at 704, 137 P.3d at 1102. Its new procedure merely heightens the standard from "specific and articulable facts" to the "probable cause" warrant standard. Indeed, the United States Supreme Court

took care to say that obtaining such a warrant is something that the government must "generally" do—articulating that it is not a blanket obligation, specifically when a warrant exception applies. Carpenter, 138 S. Ct. at 2221.

Further, Appellant ignores the fact that Carpenter does not prevent the State from obtaining or using the CSLI altogether. Carpenter does not prohibit the use of CSLI; it merely adds a (generally applicable) warrant requirement for obtaining it. Appellant does not, and cannot, argue that any text messages obtained by subpoena could not also have been obtained by search warrant. He just assumes that the text messages would have been excluded from trial: a bare and naked assertion insufficient for obtaining post-conviction relief. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Thus, even given Carpenter's new warrant requirement, the likelihood of accurate convictions is not "seriously diminish[ed]." Carpenter cannot be retroactively applied.

C. Appellant cannot demonstrate plain error

As trial counsel did not object to this issue, all but plain error is waived. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997). "[R]eversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan v. State, 131 Nev. Adv. Op. 6, 343 P.3d 590, 593 (2015).

Here, Appellant cannot demonstrate plain error because, as explained above, he does not have standing to contest a search of Ms. Lucas's cell phone. Even if Appellant did have standing, he cannot show that the result of the proceedings would have been different had counsel moved to suppress the text messages. See Strickland, 466 U.S. at 697. Appellant cannot show, and does not even attempt to argue, that police could not have obtained a search warrant or that the evidence would have been suppressed had counsel objected to it at trial. Moreover, there were multiple eyewitnesses to the murder of Ms. Lucas and substantial evidence showing that Appellant was guilty of that murder including forensic evidence and Appellant's own statements to police when he turned himself in. 7 AA 984; 5 AA 737. Thus, Appellant cannot satisfy his burden of showing a reasonable probability that the outcome of the trial would have been more favorable had trial counsel objected to the introduction of Appellant's text messages. Accordingly, the district court properly denied Appellant's claim of ineffective assistance of counsel on this issue.

V. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO ARGUMENT BY PROSECUTOR AS TO HEAT OF PASSION AND MANSLAUGHTER

Appellant argues that the prosecutor mischaracterized the standard of proof necessary to find the defendant guilty of manslaughter in closing arguments. Opening Brief at 31. Appellant concedes that the jury instructions properly instructed the jury on manslaughter. Opening Brief at 31. Despite Appellant's

concession that the jury was properly instructed as to the relevant standard of proof, Appellant argues that the State's closing argument somehow nullified the jury instructions, that trial counsel was ineffective for failing to object to that closing argument, and that appellate counsel was ineffective as well for failing to raise this issue on appeal. Opening Brief at 34. Petitioner's claims are without merit and should be denied.

Appellant concedes that the jury *was* properly instructed on the proper standard of proof. It is unclear how counsel could be ineffective for failing to object to argument based on a paraphrasing of a jury instruction that Petitioner agrees was proper. Further, the State's closing argument did not direct the jury to disregard the written jury instructions regarding the standard of proof necessary to find the Appellant guilty of manslaughter. Indeed, Appellant has cited to no such language in the State's closing because it does not exist. Instead, Petitioner merely asserts—without support—that "the prosecutor repeatedly informed the jury that the State's burden of proof was much less than the law required." Opening Brief at 34.

Rather than instructing the jury to disregard the jury instructions, the State's closing argument illustrated how Appellant did not possess a provocation sufficient to manifest a passion so "irresistible" that he could not control himself in the killing of Ms. Lucas. This is merely a paraphrase of the "heat of passion" defense as cited by Appellant. Indeed, unlike the prototypical example of a man finding another man

in bed with his wife and being so overcome with passion that he kills without thought or judgment, here, Petitioner had been separated from Ms. Lucas for months, and he knew that the victim and her boyfriend had been seeing each other for some time prior to the killing. 7 AA 1037. Further, Appellant did not suddenly walk into a bedroom and find the decedent and another man in the embrace of passion; instead, Mr. Averman walked into a room where Petitioner and the victim were arguing, then Appellant opened fire, killing Ms. Lucas and wounding Mr. Averman. 7 AA 1049-52. The State's argument that Appellant did not possess "irresistible" passion that overcame his judgment in the killing of Ms. Lucas is nothing more than a paraphrasing of a proper jury instruction and in no way suggested a different burden of proof. Even assuming *arguendo*, that the Prosecutor did misstate the standard of proof for manslaughter, any such misstatement was rectified by the jury instructions which Appellant concedes accurately stated the relevant law. See Randolph v. State, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001) (finding no prejudice where the prosecutor misstated the standard of reasonable doubt because "the jury instruction correctly defined reasonable doubt"); see also Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions.").

As the State's argument was proper and the jury was correctly instructed on the burden of proof associated with manslaughter and the heat of passion defense, any objection to such at trial would have been futile. Counsel cannot be ineffective

for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. While Appellant argues that raising this issue on appeal "would have mandated reversal," Appellant sets forth no argument that removing the allegedly improper language from the State's closing would create a reasonable probability that the result of either the instant trial or any trial subsequent to remand would have been or would be different. Opening Brief at 35.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Petitioner's claim of ineffective assistance of counsel on this issue was properly denied by the district court.

VI. COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE DOUBT AND EQUAL AND EXACT JUSTICE INSTRUCTIONS

Appellant argues that trial counsel and appellate counsel were ineffective for failing to challenge the following jury instruction on reasonable doubt:

> INSTRUCTION NO. 27
> 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.

10 AA 1541; Opening Brief at 36. Appellant also argues counsel was ineffective for failing to challenge Instruction Number 38 on "Equal and Exact Justice," which reads as follows:

> INSTRUCTION NO. 38.
> Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed, and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

10 AA 1552; Opening Brief at 37. The Nevada Supreme Court has already found Instruction Number 27 permissible in Elvik v. State, 114 Nev. 883, 985 P.2d 784 (1998) and Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998). As to the second challenged instruction, Petitioner also asserts that Instruction Number 38 improperly minimized the State's burden of proof and was thus improper pursuant to Sullivan v. Louisiana, 508 U.S. 275, 281 (1993), yet provides no legal analysis in support of this assertion. Further, there is controlling case law directly adverse to his arguments regarding the propriety of the "equal and exact" jury instruction:

> Appellant contends that the district court denied him the presumption of innocence by instructing the jury to do "equal and exact justice between the Defendant and the State of Nevada." *This instruction does not concern the presumption of innocence or burden of proof.* A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. Appellant was not denied the presumption of innocence.

Leonard v. State, 114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

As set forth above, there are controlling Nevada cases directly adverse to Petitioner's arguments that the challenged jury instructions were improper; thus, any objection to them at trial would have been futile, as would be any argument that they were improper on direct appeal. Trial counsel cannot be ineffective for failing to make futile objections or arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Further, as such argument would have been futile, appellate counsel was not ineffective for failing to raise such argument on appeal. Petitioner sets forth no argument that an alternate, acceptable jury instruction would create a reasonable probability that the result of his trial would have been different. Opening Brief at 38.

For the reasons set forth above, Petitioner has failed to show pursuant to Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068 that his counsel's representation fell below an objective standard of reasonableness, nor that but for

counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. Therefore, the district court correctly denied this claim.

VII. APPELLANT HAS NOT ESTABLISHED CUMULATIVE ERROR

Appellant asserts that all of the alleged errors contained in his Petition warrant a finding of cumulative error. Opening Brief 24. The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (*citing* Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, the Nevada Supreme Court plainly said about the application of the cumulative error standard to ineffective assistance claims, even after acknowledging that some courts have applied that doctrine saying, "[w]e are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective

assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error as to defendant's claims of the ineffective assistance variety. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 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.").

Here, Appellant explicitly claims cumulative error based on ineffective assistance of counsel, and requests that the Court overturn his conviction. Opening Brief at 40. However, Petitioner was unable to demonstrate prejudice on any of his ineffective assistance of counsel claims. Thus, since none of his ineffective assistance of counsel claims are prejudicial or demonstrate error, there cannot be a finding for cumulative error. Lee v. Lockhart, 754 F.2d 277, at 279 (cited by McConnell, at FN 17).

VIII. APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Appellant argues that the district court erred by not granting Appellant an evidentiary hearing as to all of the cell phone issues. Opening Brief at 41. Appellant

also requests an evidentiary hearing regarding (1) the domestic violence issue, and (2) the reasonable doubt and equal and exact justice instructions. Opening Brief at 28, 38. NRS 34.770 determines when a defendant is entitled to an evidentiary hearing. It reads:

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

The Nevada Supreme Court has held that if a petition can be resolved without expanding the record, then no evidentiary hearing is necessary. Marshall v. State, 110 Nev. 1328, 885 P.2d 603 (1994); Mann v. State, 118 Nev. 351, 356, 46 P.3d 1228, 1231 (2002). A defendant is entitled to an evidentiary hearing if his petition is supported by specific factual allegations, which, if true, would entitle him to relief unless the factual allegations are repelled by the record. Marshall, 110 Nev. at 1331, 885 P.2d at 605; see also Hargrove v. State, 100 Nev. 498, 503, 686 P.2d 222, 225 (1984) (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). "A claim is 'belied' when it is contradicted or proven to be false by the record as it

existed at the time the claim was made." Mann, 118 Nev. at 354, 46 P.3d at 1230 (2002). It is improper to hold an evidentiary hearing simply to make a complete record. See State v. Eighth Judicial Dist. Court, 121 Nev. 225, 234, 112 P.3d 1070, 1076 (2005) ("The district court considered itself the 'equivalent of . . . the trial judge' and consequently wanted 'to make as complete a record as possible.' This is an incorrect basis for an evidentiary hearing.").

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

In this case, the district court did not err when it held that a further expansion of the record on the cell phone issues was not warranted. First, the district court correctly held that an evidentiary hearing regarding a forensic analysis of

Appellant's cell phone was not warranted because counsel made a reasonable strategic decision not to have the phone analyzed. Thus, because Appellant could not prove that counsel was ineffective for failing to obtain a forensic analysis of the cell phone, a search of the phone would be in vain. Second, an evidentiary hearing on Echo Lucas's cell phone was not warranted because Appellant lacked standing to challenge a search of the phone.

Further, the district court did not err in not granting an evidentiary hearing regarding the domestic violence issue and the reasonable doubt and equal and exact justice instructions as these issues are belied by the record, are not supported by the law, and did not warrant an expansion of the record. Appellant fails to adequately analyze why an evidentiary hearing is warranted on these issues. As Appellant's claims of ineffective assistance of counsel are without merit, Appellant was not entitled to an additional evidentiary hearing on any of his other ineffective assistance of counsel claims.

CONCLUSION

Wherefore, the State respectfully requests that the district court's denial of Appellant's Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) be AFFIRMED.

/ / /

/ / /

Dated this 4th day of October, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the type-volume limitations of NRAP 32(a)(8)(B) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,673 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 4th day of October, 2021.

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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 4, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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