IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Dec 15 2020 02:19 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

THOMAS CASH,
Appellant(s),

vs.

WILLIAM A. GITTERE, WARDEN,
Respondent(s),

Case No: A-20-818971-W

Docket No: 82060

RECORD ON APPEAL

ATTORNEY FOR APPELLANT
THOMAS CASH #1203562,
PROPER PERSON
P.O. BOX 1989
ELY, NV 89301

ATTORNEY FOR RESPONDENT
AARON D. FORD,
ATTORNEY GENERAL
555 E. WASHINGTON AVE., STE. 3900
LAS VEGAS, NV 89101-1068

A-20-818971-W **Thomas Cash, Plaintiff(s)**
vs.
William Gittere, Defendant(s)

I N D E X

THOMAS CASH
Inmate Name

Prison No. 1203562
P O Box 1989
ELY, NV. 89301

(COURT CLERK: COURTESY COPY PLEASE.)

FILED
AUG 0 3 2020
CLERK OF COURT

In Propria Persona

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

THOMAS CASH
Petitioner,

v.

WILLIAM GITTERE
Respondent.

Case No. C-18-329699-1

Dept. No. VIII

Date of Hearing: A-20-818971-W Dept. 9

Time of Hearing:
(Not a Death Penalty Cast)

PETITION FOR WRIT OF HABEAS CORPUS
(POST-CONVICTION)(NON DEATH)

INSTRUCTIONS:

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

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

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

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the

institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

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

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

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

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of you liberty: ELY STATE PRISON, WHITE PINE COUNTY

2. Name and location of court which entered the judgment of conviction under attack: EIGHTH JUDICIAL DISTRICT COURT

3. Date of judgment of conviction: 8-20-2018

4. Case Number: C-18-329699-1

5. (a) Length of sentence: Life without the possibility of Parole.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

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

_____

7. Nature of offense involved in conviction being challenged: Second degree murder with a deadly weapon

_____

8. What was your plea? (check one)

(a) Not guilty X (c) Guilty but mentally ill _____

(b) Guilty _____ (d) Nolo contender _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment of information, or if a plea of guilty was negotiated, give details: no

_____

_____

_____

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

(a) Jury ✓

(b) Judge without a jury _____

11. Did you testify at the trial? Yes _____ No ✓

12. Did you appeal from the judgment of conviction?

Yes ✓ No _____

13. If you did appeal, answer the following:

(a) Name of court: Nevda Supreme Court

(b) Case number or citation: 77018

(c) Result: Denial

(d) Date of result: Oct. 11, 2019

(Attach copy of order or decision, if available)

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

N/A

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

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

(a) (1) Name of court: _____

(2) Name of proceeding: _____

(3) Grounds raised: _____

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

(5) Result: Ø

(6) Date of result: _____

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

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

(1) Name of court: Ø

(2) Nature of proceeding: _____

(3) Grounds raised: _____

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

(5) Result: _____

(6) Date of result: _____

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

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

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

(1) First petition, application or motion?

Yes ✓ No _____

(2) Second petition, application or motion?

Yes _____ No ✓

(3) Third or subsequent petitions, applications or motions?

Yes _____ No ✓

Citation or date of decision.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length)

Timely Appealing.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

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

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a, (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N6

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

If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: _____

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack:

Yes _____ No *

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

(a) Ground One:

Petitioner 4th, 5th, 6th, and 14th amendments was violated when it used Petitioners' Post Arrest Silence by the State.

Supporting Facts:

The State impermissibly elicted testimony about Petitioners Post arrest silence (AA 1236-98 and 1315-35) Petitioner did not testify during the trial. However, Petitioner was not Proctected from self incriminating evidence that attacked Post arrest silence. The Preludicial inadmissible Post arrest silence (PAS) was extremly harmful to Petitioners Substantial constitutional rights and effected the outcome of the Proceedings. The State Pressed the inference of guilt through rebuttal witness calling and closing arguments, making the closure of trial Prejudicial. Such error and inclusion of other errors persuaded the Jury to a guilty verdict. The State called Gill as a rebuttal witness without being required to State who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations. The State may rebuttal defense witness with the witness statements and testimonies but Petitioner P.A.S. is error thats harmful. The P.A.S. was grossly used as evidence of guilt toward Petitioner. The error seriously effected the fairness, integrity, on Public reputation of Judicial Proceedings. The States case was not strong as a sole witness incriminated Petitioner. This error falls under Judicial and Prosecutorial Misconduct, the require reversal.

(b) Ground Two:

The Court violated Petitioners' 6th, 5th, 8th, and 14th amendments through an illegal sentence.

Supporting Facts:

Petitioner was acclaimed as a hibitual criminal under the Nevada Revise Statute 207.010. (see Supreme Court Affirmation order No. 77018, September 12, 2019, pp. 1-4). The lower Court found Petitioner a hibitual criminal by recognizing two allege Prior felonY convictions. One being

See Judgment of conviction that validates two allege Prior felonY convictions. AnY crime of which fraud or intent to defraud is an element, or of Petit, larcenY, or of anY felonY, who has previouslY been two times convicted, whether in this State or elsewhere, of anY crime which under the laws of the situs of the crime or of this state would amount to a felonY, is a hibitual criminal and shall be Punished for a categorY B felonY bY imprisonment in the State Prison for a minimum term of not less the five Years and a maximum term of not more than twentY Years. Since the statute reQuires Prior felonY convictions the State can not count the Present conviction as a third Prior felonY. Thus, Petitioner was sentence to life without the possibilitY of Parole. Petitioner is currentlY suffering an error sentence.

(c) Ground Three:

Petitioners 4th, 5th, 6th, 8th, and 14th amendments was violated through the Prosecutorial Misconduct.

Supporting Facts:

During the trial proceedings the State misstated evidence in order to create Prejudice towards Petitioners substantial rights. The State expressed personal opinion that Davis Punched Petitioner in the nose to take Devine awar from that act to dilute Petitioners self defense against Davis and Devine. (see AA 1271-72) The State testified that witness Flores could see the incident just fine. (AA1276) Though she testified her visual was good intil she openned the front door and the ordeal was basicallY concluded. (AA 840-68). The State Argued witness Flores heard the victims impact and ran outside. This is complete fabrication to create false inflammatorY allege testimonY. (AA 1279 and contrarY 847). State also claimed that witness Flores gave testimonY to seeing Petitioner deliver the first Punch, which is afoul blow. (AA 1321-28). No evidence exist of the victim receiving two sharP force inSuries thouGh the State argued that Petitioner PlunGed the Knife into the victim twice. This inflammatorY argument was afoul misleadinG and PreJudice to Petitioners Substantial rights. The State also violated Petitioners Post Arrest Silence that made it impossible for a fair trial (see Ground 1) Prosecutorial Misconduct shall not afford the State to have another shot at Petitioner once such misconduct is concluded as harmful error, as it Places Petitioner at risk of Double JeopardY. The State Argued Petitioners Juvenile criminal historY at the sentencinG hearinG that was taintinG and PreJudice (AA 1350-78) The State failed to ProperlY file the hibitual criminal statute.

The State failed to Properly file the hibitual Criminal status. The State never added the hibitual Criminal statute as a charged Count. The State failed to show the Court that Petitioner was represented by Counsel at the moment the allege Prior convictions was affirmed as a conviction. Petitioner appeal Counsel failed to add this ground towards Petitioners direct appeal even though Petitioner pleaded for such. The State simple file a sentencing memorandum and assumed the hibitual Criminal statute was properly filed. (AA1345) The Court failed to confirm if the state properly filed the statute properly. Such review would have shown the State failed to follow the reauired Procedure. The failure of the statute being charged as an official charged Count makes the sentence under the statute invalid. It shall be noted that Petitioners AA 1346-49 is not in Petitioners Possession. Prior Counsel never Provided them. Please strike lines 14-15.

The Prosecutorial Misconduct is valid grounds for reversal. The State never filed a proper notice of intent to seek the hibitual criminal statute. An oral or memorandum that the State may allege is not enough.

The State Produce the Judgment of Conviction out of California to establish prior convictions but such fact infirmity could only be established as fact only in the State of the conviction after conviction of primary offense. Making the States exhibits invalid and sentence a error.

—

① Petitioner allege Priors was very stale and or trivial.

"

(d) Ground Four:

Petitioners 6th and 14th amendments was violated through the Courts Presentation of Jury instruction's.

Supporting Facts:

Jury instruction numbers 1, 17, 20, and 31 fails to be neutral and unbias. It informs the Jury that they can convict on certain terms but she's away from being unbias by also mentioning that the contrary shall produce a verdict of not guilty. Jury instruction numbers 21, 25, and 27 expresses the position of the instruction but fails to instruct the Jury if such instruction is believed they may find the defendant not guilty. Then Jury instruction number 22 and 23 conflicts with Jury instructions 21, 25, and 27. Thus, attempts to confuse the Jury and do away with or waterdown Jury instruction numbers 21, 25, and 27. Instruction No. 23, fails to express what "negate" means and fails to express the contrary to become impartial. The instruction disputes fear as insufficient to justify a killing. This is desisned to take away the belief of imminent danger of self and or others being sufficient, and attacks the Post arrest silence of the States introduce testimony, and statements of, "Defendant not wanting to get hit again." Jury instruction No. 30 express "abiding conviction," the Supreme Court already ruled not to use. Jury instruction number 37 instructs the Penalty Phase not to be considered in deliberation but then biasly express first degree murder penalty. The first degree murder penalty instruction should have been a isolated instruction and not included with a impartial instruction since such requirement literally express conviction. (see Jury instruction's No.'s 1, 17, 20, 21, 25, 22, 27, 23, 30, 31, and 37).

11

(e) Ground Five:

Court violated Petitioners' 6th and 14th amendments was violated through the errorred Jury instruction Proceedings.

Supporting Facts:

The Jury instruction Proceeding was conducted in a manner where Petitioner was not informed the true full context of any of the Jury instruction's. (AA 1108-1114). Instead of the instruction's being read word for word each one was given a number and title. The title consisted of the first few words of the instruction or what the instruction was incompassing. Doing this left Petitioner unaware of the true content of each Jury instruction. Thus, enabling Petitioners' objection's and challenges when necessary.

The Court errorred on this conduct was extremly harmful since it misinformed the Jury bias laws and confusion.

This error also falls under ineffective Counsel of Petitioners Counsel.

(f) Ground six: Petitioners 6th, 8th, and 14th amendments was violated through Counsels ineffective assistance of Counsel.

Supporting facts:

I. Counsel failed to investigate Petitioners' case to be adaquently prepared for trial. This failure influence the outcome of Petitioners trial. Petitioner inquired to Counsel of what did he actually do on the case and Counsel responded that he, "reviewed the States open file." Counsel did absolutely nothing on an investigative stand point beside the above mentioned. Counsel failed to have the investigator or himself to interview any of the witnesses toward the case. In fact, Counsel manipulative Petitioner to assume that investigative work was foregoing. Counsel claimed he had a big biker looking dude as an investigator and would commet on how Petitioners daughter looked, only to influence Petitioner to assume that he spoke to a witness. In actuality Counsel interviewed no witnesses at all. Counsel did not even subpoena any witnesses for trial. Thus, Counsel did not conduct proper preperation for trial. Petitioners defense witnesses was only able to testify is because Petitioner informed them to show up to the courthouse and wait outside the courtroom. Since they testified at the preliminary hearing they was allowed to testify even though Counsel did not have them subpoenaed, or on the witness list. What Counsel did was investigate the case during trial. (Exh. No 1 P.2)

Counsel failed to acquire a pathologist expert witness to view the evidence of the case to conclude in referrence to the evidence the most probable position Petitioner and the victim was in at the time of the stab, the number concluded on the stab, and the probability or lack of in relations towards the States theory of a standing up plunge, and two sharp force stabs. This ineffectiveness contributed towards Petitioners conviction. (see ground 3); AA1291, state argue two sharp insuries; AA699-700, Pathologist

for State can't tell the position of the body when stabbed).

Counsel fatally failed to explore all avenues of the case that could have change the strategy Plea bargaining stage and or the outcome of the trial, and or penalty stage. This was done when Counsel failed to canvas Petitioners' neighbor's to see if ther had relevant information to the case and other relevant witnesses to introduce EzeKiel Devine Prior bad act of serval layers. (See Exhibit No. 1)

Counsels' failure to interview Sandi Cash hinder Petitioner to fully cross examine Devine about him being of not visiting the Place of residence of Petitioners home, the recent threats Devine made toward the home and Petitioner, and the intertwiness of the prior acts in relations to the case. This failure to canvas Ms. Cash Presudice Petitioner. (Exh No. 1, P. 1)

Supporting facts:

II. Failure to adaQuentlY establish Petitioners theorY of defense cause Counsel to Proform well below the reQuired effective standard. Counsel failed to Produce JurY instruction's that would have showed the JurY established law that Petitioner had the right of Defense of Others and continue into the instruction of Self Defense. Counsel lack of such afforded Petitioner to be Painted as the bad guY for not Just calling the Police or verballY requesting Davis to leave. Had Counsel represented Petitioners best interest the JurY would have been aware that Petitioners action of defending his Daughter was completelY within the law.

Counsel failed to establish foundational evidential evidence of whY Petitioner had a small work Knief on Petitioners Person, So when Counsel attempted to explain such it was dismiss through the Court.

Counsels' failures left argument for the State and Court and JurY to view Petitioner as an weapon carrier at all times for the wrong reasons.

Without Counsel creating a foundational defense and Proffer of instructions to the JurY Counsel argument becomes weak as JurY instruction No. 41 explains attornies argument is not evidence. This ineffective Counsel negativelY effected Petitioners' substantial rights.

Supporting facts:

III. Counsel failure to object to witness KYriell Davis testimonY ranting establish Counsel to Proform well below the effective standard reQuirement.

Counsel was ineffective when Counsel allowed the State to call Davis to the stand and Just rant the incident through testimonY without the State being required to break the testimonY

into Procedural ask and answer Questioning. (AA896-900).
Counsel ineffectiveness of this error allows the State
witness the opportunity to rant the vital Part of Davis
testimony, eliminating room for error. After such ranting
the State was allowed to systemactically go back on'y
then to rerun the story through asked and answering
Procedure. Never did Counsel object to the Question's
being already answered through the Prior rant (AA900-946)
This engrains into the Jury inflammatory testimony. Such error
Violated Petitioners substantial rights.
Supporting Facts:
II. Counsel failed to Protect Petitioners' Post arrest
Silence. This failure effected Petitioner substantial rights.
Petitioner defer supporting facts on Ground No. 1. (AA1236-60 id).
Counsel should have objected to the States rebuttal
witness Matthew Gills. If the Court failed to recognize the
Presudicial effects of the rebuttal witness Counsel should
have the requested rebuttal witness first testify outside
the Presence of the Jury to renew the objection once the
Predudice was shown. Petitioner basically was vacant of
Counsel at the moment of this ineffectiveness.
Supporting Facts:
V. Counsels' failure to impeach witness Kyriell
Davis created ineffectiveness. Witness Davis was the sole
witness for the State that testified to seeing a Knief and
alleging Petitioner was moving toward the victim with the
Knife. No testimony exist of any Person seeing Petitioner
Chase and stab the victim. Being that the State is depending
on Davis testimony Primarily, an attack on his credibility
could have changed the outcome of the verdict.

Davis committed an obvious perjury while giving testimony for the State when he falsely testified that witness Brittney Tuner left the sceen once the fight with himself and Petitioner occurred, and Petitioner had to call her back to the sceen to get the baby.[1] (AA 912-15)

This false perjury could have easily been impeached through the testimony of Tuner, (AA 1114-70) through Kinchron, (AA 1170-1232), White, (AA 1081-1106), and possibly Flores, (AA 839-68). Though the impeach did not strick at the stab incident, such perjury would have gone to insight to the Jury that Davis committed perjury, and his testimony can be subject to full waiver as a disregard of testimony, or in part, and can be weighed when considering Davis credibility. This being the sole witness for the State incriminating Petitioner could have changed the outcome of the verdict. (see Jury instruction No. 34)

(g) Ground seven: Petitioners' 6th and 14th amendments was violated due to accummulative errors.

Supporting facts: Accummulative errors of the State, Counsel, and Court effective Petitioner from receiving an impartial trial proceeding that fatally effective Petitioners' substantial constitutional rights. (See grounds 1-6).

(h) Ground eight: Petitioners 6th and 14th amendments was violated when Appeal Counsel filed Petitioners writ of Direct Appeal before consulanting with Petitioner.

Supporting facts: Petitioners appeal Counsel failed to communicate with Petitioner before he wrote up Petitioners

[1] Line 4; sixth word "Petitioner is meant to be worded Davis.

Direct appeal. Petitioner had no line of communication beins exercised bY Counsel. Once Counsel finallY came to visit Petitioner the Direct appeal was already written. Petitioner informed Counsel to hold off on filing the writ because Petitioner wanted to research the grounds drafted and add additional grounds after Petitioner completed research, such as speedY trial violations and Prosecution misconduct. The next daY Counsel filed the disputed writ. Thus, Counsel attempted to make it look like consulted with Petitioner but did no such thing. This ineffective appeal Counsel hinder Petitioners foundational grounds of Prosecution misconduct that Counsel address with merits/citations, Jury instruction and Procedure, ect. (see grounds 1-7). This error was harmful to Petitioners' substantial rights.

(I) Ground Nine: Petitioners 6th and 14th amendments was violated when the Court violated the Speedy Trial Act.

Supporting Facts:

When it came time for the Court to honor Petitioners nonwaiver of the Speedy Trial Act the Court errorlY did a continuance on the trial against mutual consent. Petitioner is without the minute records to defer clearitY, so Petitioner Preserve this ground.

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

EXECUTED at Ely State Prison, Nevada on the 16 Day of July, 2020.

Thomas Cash
IN PROPER PERSON

VERIFICATION

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

Thomas Cash
Petitioner

CERTIFICATE OF SERVICE BY MAIL

I do certify that I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS to the below addresses on this 16 day of JULY 2020, by placing the same into the hands or prison law library staff for posting in the U.S. Mail, pursuant to N.R.C.P. 5:

STEVEN D. GRIERSON
Clerk of the Court
200 LEWIS AVE. 3RD FLOOR

LAS VEGAS, Nevada 89 155-1160

Thomas Cash
Signature of Petitioner In Pro Se

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document.

Petition For Writ of Habeas Corpus (Post-Conviction) (Non Death)
(Title of Document)

filed in case number: C-18-329699-1

☑ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS125B.055)

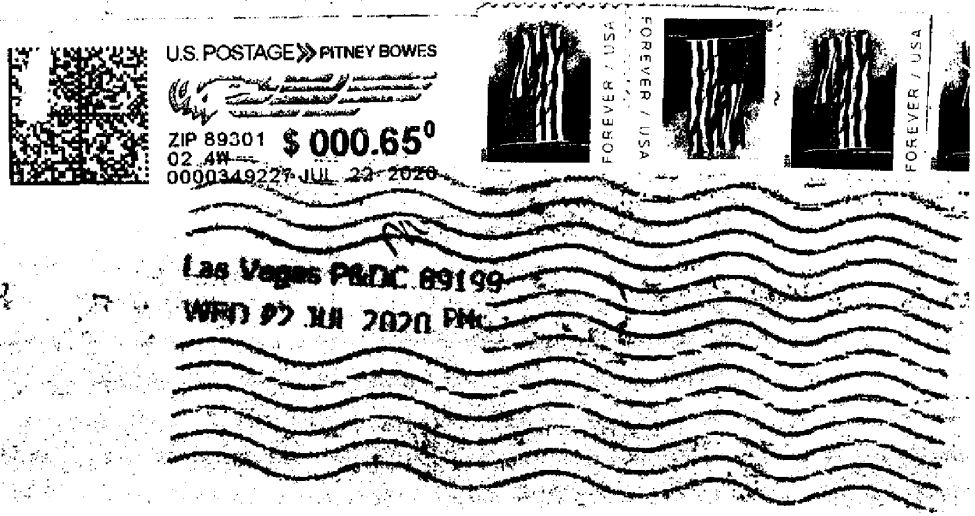
Date: July 16, 2020

Thomas Cash
(Signature)

Thomas Cash
(Print Name)

N/A
(Attorney for)

Thomas Cash #1203562
PO Box 1989
Ely, NV 89301-1989



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Steven D. Grierson, Clerk of the Court
200 Lewis Avenue, 3rd Floor
Las Vegas, NV 89155-1160

(COURT CLERK: COURTESY COPY PLEASE)

District Court
Clark County Nevada

FILED
AUG 03 2020
CLERK OF COURT

Thomas Cash
Petitioner, Case No. C-18-329699-1

vs

A-20-818971-W
Dept. 9

State of Nevada
Respondent

Memorandum of Points and Authorities In Support of Writ of Habeas Corpus (Post-Conviction) come now, Thomas Cash, petitioner, in proper person under Haines v. Kerner, 92 S.Ct. 594, 596 (1972) (Pro Se pleading are to be held to less stringent standard than pleadings drafted by attorneys) and submit the instant Memorandum of Points and Authorities in support of Writ of Habeas Corps (Post-Conviction)

Prepard by: Thomas Cash

(Assistance of (2) two Law Clerks)

Table of Contents

Table of Authorities

CASES	PAGE NO
	16.
	16.
	16.
	17.
	27.
[redacted]	
	27.
	27.
	27.
	28
	23.
	23, 25
	26.
	26.
	4.
	4.
	4.
	5.

III

JUDGEMENT of CONVICTION

The JUDGEMENT of CONVICTION WAS FILED ON AUGUST 20,2018, The NEVADA SUPREME COURT ISSUED it's ORDER of AFFIRMANCE ON October 12,2019.

The INSTANT WRIT of HABEAS CORPUS Post-CONVICTION) petition MADE IN ACCORDANCE with NRS 34.726(1) TIMELY AND before this COURT for REVIEW.

IV

Jurisdictional Statement

This is a Writ of Habeas Corpus (Post-Conviction) from a verdict following a jury trial held before The Honorable Douglas Smith in the Eighth Judicial District Court, the subsequent Judgement of Conviction, and appeal from the Supreme Court of the State of Nevada. This ~~COU~~ court has Jurisdiction to hear this Writ of Habeas Corpus (Post-Conviction) and/or appeal pursuant to NRS 177.015 (3), which provides for the right to appeal a final judgement in a criminal case.

Rule 17 Routing Statement

This Appeal is presumptively assigned to the Supreme Court because it relates to a convictions for a category A felony NRAP 17(b)(1).

Issues Presented For Review

Whether Mr. Cash is entitled to relief or in the alternative an evidentiary hearing, on his claims of ineffective assistance of counsel, where counsel failed to interview and call witnesses also failure to investigate thoroughly in preparation for trial

V

Statement of the Case

Although the exact depiction of the initial altercation between Cash and Davis is in some dispute, the differing version agree that there was minimal successful punching and it was mostly wrestling. At that point Ezekiel interject himself into the fight either on his own or at Davis request. All testimony showed Ezekiel "exited the car and joined the fray, starting by "breaking apart" Davis and Cash. The State's other witness (Brittney) said that Ezekiel broke them apart by punching Cash in the face, also Angel and Kincheon testified that Ezekiel punched Cash in the face, Cash told the police that the first time he had ever seen Ezekiel was when Ezekiel punched him in the face. Thus, there was virtually unanimous testimony that Ezekiel's first interaction with Cash was to punch Cash in the face while Cash was being held by Davis. The police said Cash had the facial injuries and bloody clothes to match the punch to the face, furthermore,

there was nothing to dispute Cash characterization of Ezekiel punch to the face as a massive blow that dazed (him) Cash and made him believe that Ezekiel must had a weapon in hand. The police testimony of Cash's injury from his face soaked his shirt and pants. Further supporting his belief Ezekiel might be using a weapon were two different witness testified they heard Davis request Ezekiel to bring some kind of weapon from the car (Angel heard "go get my thing out of the car" while Kinchron heard "bring my shit".)

This rationale strongly supports Cash's self-defense claim, he did not resort to deadly force until attacked by the second man. And until that man had hit him in the face so hard and caused so much bodily harm that Cash believed he was hit with a weapon. Cash did reasonably believe he was in danger, that Ezekiel will either kill him or cause him great bodily injury. Cash was in fear of his life, and it was neccessary under the circumstance for him to use self-defense

FORCE OR MEANS that MIGHT CAUSE the DEATH OR GREAT BODILY INJURY to HIMSELF. PRIOR to the INCIDENT ON DECEMBER 11th 2017, DAVIS HAS REPEATEDLY THREATEN BRITTNEY AND CASH SAYING "he would shoot up the house and "MR. CASH IF NEED BE. ANGEL HEARD DAVIS tell EZEKIEL go get MY THING, AND KINCHRON HEARD HIM SAY "BRING MY SHIT."

It IS CLEAR UNDER these FACTS that CASH could NOT HAVE SAFELY RETREATED FROM both who WAS STRIKING HIM AND DAVIS without the USE of his KNIFE. It IS IMPORTANT to NOTE that this RETREAT WAS NOT REQUIRED by NEVADA LAW before EXERCISING his RIGHT to SELF-DEFENSE. It IS CLEAR IN THIS CASE that the STATE FAILED to MEET their BURDEN of PROVING BEYOND A REASONABLE DOUBT that CASH DID NOT ACT IN SELF-DEFENSE.

IN ORDER to CLAIM SELF-DEFENSE, [A] PERSON who DOES the KILLING [MUST] ACTUALLY AND REASONABLE BELIEVE: [T]hat there IS IMMINENT DANGER that the ASSAILANT will EITHER KILL HIM OR CAUSE HIM GREAT BODILY INJURY; AND [T]hat IT IS ABSOLUTELY NECESSARY UNDER the CIRCUMSTANCES FOR HIM to USE

IN SELF-DEFENSE FORCE OR MEANS that might cause the death of the other person, for the purpose of AVOIDING DEATH OR GREAT BODILY INJURY to HIMSELF. RUNION V. STATE 116 NEV. 1041, 1051, 13 P.3d 52, 59 (2000). Whether DEFENDANT REASONABLY BELIEVED he WAS IN FEAR of DEATH OR GREAT BODILY HARM IS A QUESTION of FACT for the JURY. DAVIS V. STATE, 130 NEV. 136, 143, 321 P.3d 867, 872 (2014).

UNDER the TESTIMONY ELICITED AT TRIAL, NO REASONABLE JURY could FIND that the STATE PROVED CASH DID NOT ACT IN SELF-DEFENSE. NEVADA CASE LAW AND STATUTES HAVE ALSO long held THERE IS NO DUTY to RETREAT before EXERCISING YOUR RIGHT to SELF-DEFENSE. STATE V. GRIMMETT, 33 NEV. 531, 534, 112 P. 2d 273 (1910) (RECOGNIZING "The Right to STAND HIS GROUND AND SLAY HIS ADVERSITY"), NRS 200.120(2) ("A PERSON IS NOT REQUIRE to RETREAT before USING DEADLY FORCE"). THIS COURT HAS ALSO held that ONE good REASON that NEVADA DOES NOT REQUIRE A PERSON to RETREAT IS that "it IS often quite difficult ... to determine whether A PERSON should REASONABLY believe that he MAY RETREAT FROM A VIOLENT ATTACK IN COMPLETE SAFETY.

4

"Culverson V. State, 106 Nev. 484, 489, 797 P.2d 238, 240 (1990)

In fact, the State not once but twice incorrectly and improperly told the jury that Cash had the duty to retreat, telling the jury that "he could have retreated" and "he could have ran inside. He could have yelled for help."

Mr. Cash trial attorney (Kenneth W. Long, ESQ) failed to object to this argument. Mr. Cash did not receive effective assistance of counsel at trial. Cash informed his defense attorney that Sandi Cash Earl was present at the scene of the alleged crime, and would corroborate his testimony. All though Sandi Cash Earl was available, counsel never interview Sandi Cash Earl or called Sandi Cash Earl as a witness. This reduce the trial to a credibly contest between Mr. Cash and the alleged victim.

Standard of Review

Mr. Cash contends that he was deprived of his right the effective assistance of counsel because his trial counsel failed to conduct an adequate per-trial investigation in preparation for trial communicate to secure vital information to investigate in preparation; and failed to call witnesses at trial. In violation of the sixth amendment and fourteenth amendment to the United States Constitution.

The question of whether a criminal defendant have received ineffective assistance of counsel presents a mixed question of law and facts and is subjected to independent review. Molina v. State, 87 P.3d 533, 537 (Nev. 2004) Smith v. Ylst, 826 F.2d 872, 875 (9th Cir. 1987). cert. denied, 488 US 829, 109 S.Ct. 83 (1988).

The Sixth Amendment that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." The Supreme Court has instructed that the Sixth Amendment recognizes the right to counsel because it envisions counsel playing a role that is critical to the ability of the adversial

system to produce just results. Strickland v. Washington, 466 US 668, 685, 104 S.Ct. 2052 (1984) The Nevada Courts review claims of ineffective assistance of counsel under the two-part test set forth in Strickland v. Washington 104 S.Ct. 2052 (1984) see Rubo v. State 194 P.3d 1224 (Nev. 2008). Under Strickland the defendant must demonstrate that his counsel's performance was deficient, and, it fell below and objective standard of reasonableness and that the deficient performance prejudiced the defense. Id at 466 U.S. at 687; Williams v. Taylor-US- 120 S.Ct. 1166 (2003) The United States v. Chronic, 466 US 648, 104 S.Ct. 2039 (1984) decided on the same day as Strickland. The Supreme Court created an exception to Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstance ars so egregiously prejudiced that ineffective assistance of counsel presumed." Stand v. Dugger, 911 F.2d 741, 744 (11th Cir. 1991) (enbance) (citing chronic 466 US at 658)". Chronic presumes prejudice where there has been an actual breakdown in the adversial

7

PROCESS AT TRIAL TOOMEY V. BUNNEL, 898 F.2J 741, 744 (9th CIR.)

IN POWELL V. ALABAMA, 287 US 45 (1932) THE U.S. SUPREME COURT HELJ THAT COUNSEL HAS A JUTY TO PERFORM ADEQUATELY DURING PERTRIAL MATTERS TO INCLUDE INVESTIGATION. IJ-; SEE SANBORN V. STATE 812 P.2J 1279 (NEV. 1991) (CONCLUDING COUNSEL WAS INEFFECTIVE IN FAILING TO CONJUCT PRETRIAL INVESTIGATION).

A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL IS ALSO EXAMINED UNJER STRICKLANJ, 104 S.CT. 2052 (1984) TO ESTABLISH PREJUJICE BASED ON THE JEFICIENT PERFORMANCE OF APPELLATE COUNSEL, THE JEFENJANT MUST SHOW THAT THE OMITTED ISSUE WOULJ HAVE A REASONABLE PROBABILITY OF SUCCESS ON APPEAL. SEE DUHAMEL V. COLLINS 955 F.2J 962 (5th CIR. 1992); FIRESTONE V. STATE, 83 P.3J 279, 281 (NEV. 2004).

Legal Arguments

Ground One

*Trial Counsel was ineffective

* In failing to conduct adequate and thorough investigations in preparation for trial.

* In violation of the Sixth Amendment to the U.S. Constitution.

The Nevada Supreme Court reviews claim of [redacted] ineffective assistance of counsel under the reasonably effective test set fourth in Strickland V. Washington -- US --, 104 S.Ct. 2052 (1984); Adopted in Warden V. Lyons, 683 P.2d 504 (Nev. 1984) under Strickland, an ineffective assistance of counsel claim has two components: (1) deficient performance, and (2) prejudice.

To establish deficient performance, a petitioner must demonstrat that counsel's representation fell below an objective standard of reasonableness and but for counsel's error. The results of the proceedings would have been different. And, prejudice is established when petitioner demonstrates a reasonable probability to undermine the confidence in the outcome of the trial based on counsel's

Deficient performance, Williams V. Taylor ---U.S---, 1205 S.Ct. 1166 (2003).

DEFICIENT PERFORMANCE

A. Failure to consult and communicate

Mr. Cash asserts that trial counsel (Mr. Long) was ineffective in failing to properly consult and communicate with him, failed to review evidence and witnesses statements for favorable information and inconsistent facts, failure to have a investigator to investigate any of the case. After telling him over and over the names of potential witnesses and addresses (Sandi Cash Earl) he never interview any of the witnesses in this case.

Supreme Court Rule (SCR 154) Cleary States:

A Lawyer shall keep a client status of a matter and promptly comply with reasonable request for information. (2) "A Lawyer shall explain a matter to the extent necessary to permit a client to make informed decisions regarding the representation." In the instant case, Mr. Cash's sworn affidavit alleges that from that time in which counsel was hired and on thorough the pretrial

10

PROCEEDING to the DAY IN WHICH TRIAL COMMENCED, TRIAL COUNSEL NEVER CAME to SEE ME MORE then (4) four TIME WITHIN the (7) SEVEN MONTHS I WAS WAITING for TRIAL. The INVESTIGATOR NEVER CAME to SEE ME OR talked to me the whole TIME I WAS WAITING for TRIAL. In HARRIS AND through RAMSEYER V. Blodgett, 853 F. Supp 1239 (W.D. WASH 1994) The Court held that COUNSEL HAD A DUTY to KEEP IN CONTACT AND CONSULT WITH HIS CLIENT REGARDING IMPORTANT ISSUES AND DECISIONS of HIS defense. At A MINIMUM, the CONSULTATION should be SUFFICIENT to DETERMINE All legal AND RELEVANT INFORMATION KNOWN to the DEFENDANT. Id AT 1258; SEE Also United States V. Tucker 716 F.2d 882 N12.

HERE TRIAL COUNSEL's OVERALL LACK of COMMUNICATION, (VISIT, telephone call, letters) DURING MR. CASH INCARCERATION, CREATED AN ACTUAL BRAK DOWN IN the ADVERSIAL PROCESS, BECAUSE the of PROVIDING CRITICAL FACTS AND INFORMATION to ASSIT TRIAL COUNSEL IN the PREPARATION of the TRIAL." AN effective ATTORNEY MUST play the ROLE of AN ADVOCATE RATHER than A MERE FRIEND of the COURT." OSBORNE V. SHILLINGER, 861 F.2d 612, 625 (10th Cir 1988)

11

(quoting Evitts v. Lucey, 469 US 387, 394)(1985).

Here the circumstances presented in this matter demonstrates the constructive absence of an Attorey dedicated to the protection of his client's rights under our adversial system of justice. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) therefore, trial counsel's failure to communicate is a direct violation of the Sixth Amendment to effective representation.

Not only did Kenneth W. Long, ESQ, failed to defend Mr. Cash properly, he failed to do a thorough investigation. He failed to interview and call witnesses that could of help Mr. Cash defense. He failed to make the appropeiate objection during trial. The prosecutor was well aware that they faily to prove beyond a reasonable doubt that Cash did not act in self-defense, and only by improperly convincing the jury that Mr. Cash should have retreated did they have of convicting him. Kenneth W. Long inadequate investigation, consultation and trial preparation felled far outside the range of

REASONABLE PROFESSIONAL ASSISTANCE, THEREFORE KENNETH W. LONG PERFORMANCE WAS DEFICIENT, AND DID PREJUDICE MR. CASH FROM RECEIVING A FAIR TRIAL. A REASONABLE PROBILITY IS A PROBABILITY SUFFICIENT TO UNDERMINE CONFIDENCE IN THE OUTCOME." STRICKLAND 466 U.S. AT 694.

THERE IS REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

ON AUGUST 20, 2018 MR. CASH WAS SENTENCED BY JUDGE DOUGLAS SMITH TO LIFE WITHOUT THE POSSIBILITY OF PAROLE UNDER THE LARGE HABITUAL CRIMINAL ENHANCEMENT FOR THE SEEOND DEGREE MURDER CONVICTION.

B. FAILURE to INTERVIED AND CALL WITNESSES:

IN STATE V. LOVE, 865 P.2d 322 (NEV. 1993) THE COURT held:

"... FAILURE of RELATIVELY INEXPERICED COUNSEL to CALL POTENTIAL WITNESSES, COUPLED WITH the FAILURE to PERSONALLY INTERVIEW WITNESSES SO AS to MAKE AN INTELLIGENT, TACTICAL DECISION LEADS this COURT to CONCLUDE IN A CASE WITH little DIRECT EVIDENCE of GUILT, NOT ONLY WAS COUNSEL INEFFECTIVE, but that the ERRORS of COUNSEL WERE SO SERIOUS AS to DEPRIVE the DEFENDANT of A FAIR TRIAL who's RESULTS ARE UNRELIABLE AND therefore to PREJUDICE HIM."

HERE, DESPITE TRIAL COUNSEL'S REFUSAL to COMMUNICATE AND LISTEN to MR. CASH ADVICE ON getting A CONTINUANCE ON TRIAL AFTER COUNSEL CLAIM he would DURING COURT PROCEEDING; MR. CASH PROVIDED TRIAL COUNSEL WITH INFORMATION of WITNESSES AGAIN. THAT he WANTED to HAVE INTERVIEWED AND CALLED AT TRIAL to GIVE FAVORABLE TESTIMONY. THE LIST INCLUDES. 1. SANJI CASH EARL Exhibit 1-

2. ANGEL TURNER Exhibit 1-

In Warner V. State, 729 P.2d 1359 (1986), The court, when addressing a claim of ineffective of trial, the court held:
... The failure to use the publice defenders full time investigatore to investigate the background of the victim, ... and contact witnesses, ... constitute inadequate pretrial investigation resulting in the ineffective assistance of counsel.
In instant case, trial counsel was hired and told numerous of times by Mr. Cash what witnesses to go interview, the names, numbers, and addresses of witnesses and yet counsel and investigator did not use the contacts, to interviewed any witnesses or investigate the case to secure evidence regarding Mr. Cash actions of self-defense
In preparing for trial thus constituting inadequate pretrial investigation resulting in the ineffective assistance of counsel especially considering facts that Mr. Cash reminded trial counsel of favorable information to have investigator to investigate.

SEE BERRY V. GRAMELY, 74 F. SUPP. 2D 808 (N.D. I 111999) (COUNSEL INEFFECTIVE IN FAILING TO VISIT CRIME SCENE OR EMPLOY AND INVESTIGATOR TO LOCATE AND INTERVIEW WITNESSES TO CORROBORATE DEFENDANT TESTIMONY) HARRIS BY AND THROUGH RAMSEYER, V. WOOD, 64 F. 3D 1432 (9TH CIR. 1995) (COUNSEL INEFFECTIVE IN FAILURE TO RETAIN PRIVATE INVESTIGATOR). TO ADD INSULT TO INJURY MR. CASH PREVIOUS ATTORNEY HANDED OVER THE FILE AND CRITICAL EVIDENCE TO TRIAL COUNSEL, AND NOT A SINGLE FACT OF MR. CASH INVESTIGATION WAS FOLLOWED UP BY TRIAL COUNSEL OR USED DURING MR. CASH TRIAL ON BEHALF OF HIS DEFENSE. SEE U.S. V. ARMONTROUT, 900 F.2D (8TH CIR. 1990) (HOLDING THAT TRIAL COUNSEL'S FAILURE TO CONDUCT A INVESTIGATIONS IN NOT CONTACTING POTENTIAL WITNESSES WHEN THE DEFENDANT PROVIDED COUNSEL WITH THEIR NAMES WHICH WOULD HAVE SUPPORTED THE DEFENSE... CONSTITUTING INEFFECTIVE ASSISTANCE OF COUNSEL); REYNOSO V. GIURBINO 462 F.3D 1099 (9TH CIR. 2006) (SAME).

HERE DESPITE COUNSEL BEING PROVIDED WITH COMPLETE INFORMATION AND FILE OF CASE WHICH CONTAINED CRUCIAL WITNESSES

ACCOUNTS of the INCIDENT AND FAVORABLE EVIDENCE that COULD HAVE BEEN OFFERED to bolster Mr. Cash DEFENSE, COUNSEL, for Absolutely NO logical REASONING FAILED to UTILIZE such INFORMATION AND his ACTIONS, OR lack there of CAN hardly be SAID... [to be] A strategic choice. "SANDERS V. RATTELLE, 21 F.3d 1146, 1175 (9th Cir. 1994) THAT IS CONSISTANT with the SIXTH AMENDMENT RIGHT to effective ASSISTANCE of COUNSEL to RENDER REPRESENTAION that "fell below AN OBJECTIVE STANDARD of REASONABLENESS." DEMONSTRATING DEFICIENT PERFORMANCE UNDER STRICKLAND, 104 S.CT. 2052.

PREJUDIAL EFFECT

The PREJUDICAL effect of TRIAL COUNSEL INEFFECTIVE ASSISTANCE IN this CASE IS IRREPARABLE to DENY Mr. Cash his SIXth & Fourteeth AMENDMENT RIGHT to the U.S. CONSTITUTION AND WARRANT the REVERSAL of the CONVICTION AND REMAND FOR A NEW TRIAL.

With this CASE between A CLASH of self-DEFENSE theory of IMMINENT DANGER, ACTUAL DANGER, AND IN INSTANCE of APPARENT DANGER which NEVADA's

17

STATUTORY RECOGNIZE that self-defense IS A JUSTIFICATION FOR HOMICIDE, AND the STATE MUST PROVE BEYOND A REASONABLE DOUBT. NEVADA CASE LAW AND STATUTES HAVE ALSO long held THERE IS NO DUTY to RETREAT before EXERCISING YOUR RIGHT of SELF-DEFENSE.

It WAS IMPORTANT FOR TRIAL COUNSEL to PRESENT the JURY WITH EVERY FORM of VIABLE EVIDENCE to show MR. CASH ACTUAL INNOCENCE. WITHOUT QUESTION, TRIAL COUNSEL'S FAILURE to COMMUNICATE WITH HIS CLIENT, FAILURE TO INTERVIEW AND CALL WITNESSES, FAILURE to INVESTIGATE AND CALL WITNESSES DID DEPRIVED the JURY of VITAL TESTIMONY AND EVIDENCE AND CAUSED the JURY to REACH AN UNSUPPORTED GUILTY VERDICT of COUNT 1 MURDER WITH the USE of A DEADLY WEAPON AND LIFE UNDER the LARGE HABITUAL ENHANCEMENT WITHOUT the POSSIBILITY of PAROLE.

When CONSIDERING the totality of the CIRCUMSTANCES, TRIAL COUNSEL'S ACTION OR LACK thereof, HAVE CREATED A UNFAIR PREJUDICE AND THERE IS MORE THAN A "REASON PROBABILITY" that but FOR COUNSEL'S ERROR the RESULTS of the TRIAL WOULD HAVE BEEN

EXTREMLEY DIFFERENT. WILLIAM V. TAYLOR 120 S.CT. 1166 (2003).

THE PREJUDICE CREATED HERE HAS UNDERMINED THE RELIABILITY IN THE JURYS VERDICT AND ENTIRE TRIAL PROCESE IN VIOLATION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSITANCE OF COUNSEL, THE RIGHT TO FAIR TRIAL AND EQUAL PROTECTION AND DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION. WITH GOOD CAUSE APPEARING THE CONVICTION MUST BE REVERSED AND REMANDED FOR A NEW TRIAL.

State Appellate Procedure

Mr. Cash did not receive assistant on Direct Appeal.

On Aug. 20, 2018 Appellate Attorney was appointed to Mr. Cash. On Oct. 1, 2018 41 days later appellate attorney receive Mr. Cash case file in district court.

Mr. Rutledge came to see me (Mr. Cash) on March 13th 2019 at High Desert State Prison only (1) once for 10 minutes, and stated he would come and see me again which he never did. On March 14, 2019 Mr Rutledge filed a opening brief that was worthless, so deficient it was inexcusable.

Due process is offended if attorney does not provide effective assistant for the appeal.

U.S. Constitution Amendment 14th affords a criminal defendant the right to counsel on first appeal as a right from judgement of conviction.

As for professional responsibility of counsel, the appellate lawyer must master the trial record, thouroughly research the and exercise judgement in identifying the arguments that may be advanced on appeal.

Appellate counsel was neglectful for not perfecting the direct appeal, the result was that appellant was deprived of his right to a direct appeal. The negligent failure to perfect an appeal amounts to a complete denial of assistance of counsel during a critical stage of the criminal proceedings.

In Mr. Cash' brief on the issues of argument, relating to insufficient evidence produced by the State to meet their burden of proving the defendant did not act in self-defense. Mr. Rutledge did not seriously present this issue for the courts consideration because he does not cite any authority for prosecutorial misconduct. It was counsel responsibility to present relevant authority and cogent argument, issues not so present need not be addressed by the court.

Maresca v. State, 103 Nev 669, 673, 748 P.2d 3, 6 (1987) (refusing to consider prosecutorial misconduct argument where no authority is present.) A criminal defendant is entitled to constitutionally effective assistance of counsel on direct appeal. Petitioners former Appellate

21

COUNSEL WAS INEFFECTIVE BECAUSE the ATTORNEY FAILED to ADEQUATELY PRESENT ARGUMENTS, AND RAISE ISSUES ON DIRECT APPEAL. MR. CASH REPLY BRIEF WAS FILED ON 22ND of APRIL 2019. MR. RUTLEDGE FAILED AGAIN to CONSULT. WITH MR. CASH. COUNSEL OBLIGATION to ASSIST the DEFENDANT ON IMPORTANT DECISION INCLUDES A DUTY to CONSULT WITH the DEFENDANT "STRICKLAND 466 U.S. AT 688."

22

*Ground 2: Ineffective Assistance of Appellate Counsel in Violation of the petitioner's Sixth and Fourteenth Amendment Right to the U.S. Constitution.

The Constitution to effective assistance of counsel extends to a Direct Appeal, Burke v. State, 110 Nev. 1366, 1368, P.2d 267, 268 (1994). A criminal defendant is entitled to constitutionally effective assistance of counsel on direct appeal Evitts v. Lucey, 469 U.S. 387, 394 (1985) In order to prove ineffective assistance of counsel, a petitioner must first show that his attorney's performance was deficient and, second, demonstrate that such deficiency caused him prejudice. In Strickland, 466 U.S. at 687. See also Roe v. Flores-Ortega, 528 U.S. 470, 145 L.Ed.2d 985 (2000) (holding the Strickland test applies to claims that counsel was ineffective for failing to consult.) The Supreme Court explained that a counsel's failure to consult with defendant about an appeal constitutes deficient performance if the attorney had a duty to consult. An attorney may not speak cursorily with a defendant about his right to appeal and call it

23

"CONSULTATION". FROM STRICKLAND, WHICH MAD IT CLEAR, THAT THE ADVICE AN ATTORNEY DISPENSES DURING CONSULTATION "MUST" MEET AN "OBJECTIVE STANDARD of REASONABLENESS."

MR. BRIAN RUTLEDGE, APPELLATE COUNSEL KNEW THAT PETITIONER WANTED HIM TO FILE A DIRECT APPEAL. A DEFENDANT HAS THE ULTIMATE AUTHORITY TO MAKE THE FUNDAMENTAL DECISION AS to WHETHER to TAKE AN APPEAL, AND COUNSELS OBLIGATION to ASSIST A DEFENDANT INCLUDES A DUTY to CONSULT WITH THE DEFENDANT ON IMPORTANT DECISIONS. MR. RUTLEDGE CAME to SEE PETITIONER ON MARCH 13th, 2019 AT High DESERT STATE PRISON ONE TIME. MR. RUTLEDGE MADE the REPRESENTATION to the PETITIONER THAT HE WAS GOING to FILE A DIRECT APPEAL. MR. RUTLEDGE CONSULTATION ON MARCH 13, 2019 ONLY LASTED 10 MINUTES, WHICH HE PROMISSED to RETURN to High DESERT STATE PRISON to SPEAK WITH PETITIONER AGAIN, WHICH HE NEVER DID. MR. RUTLEDGE FILED APPELLATE OPENING BRIEF ON MARCH 14th, 2019. COUNSELS OBLIGATION IS to ASSIST the DEFENDANT INCLUDES A DUTY to CONSULT WITH DEFENDANT ON

IMPORTANT DECISIONS STRICKLAND, 4166 U.S. AT 688. NOT ONLY DID MR. RUTLEDGE MAKE REPRESENTATION to the PETITIONER but he also MADE them to the COURT.... well SIT there AND FRETTER out what those ISSUES ARE AND put those all IN A APPEAL BECAUSE ~~he~~ he HAS that RIGHT. The PETITIONER ALSO MAILED letter's to APPELLATE COUNSEL MR. RUTLEDGE. (SEE EXHIBITS 2)

THERE IS NO QUESTION that the PETITIONER WAS UNHAPPY WITH the COURTS PREVIOUS RULINGS (DENIAL of MOTION to DISMISS MURDER CHARGE, MOTION to DISMISS BATTERY CHARGE AS A LESSER INCLUDED OFFENSE, AND DENIAL of MOTION to STRIK HABITUAL CRIMINAL ENHANCEMENT) AND the NUMEROUS MOTIONS, MEMORANDUMS, AND NOTES to the COURT that the PETITIONER FILED.

COUNSEL HAS A CONSTITUTIONAL DUTY to CONSULT WITH A DEFENDANT ABOUT AN APPEAL WHEN; 1) ANY RATIONAL DEFENDANT ~~would~~ would WANT AN APPEAL; OR 2). The DEFENDANT REASONABLE DEMONSTRATED AND INTEREST IN APPEALING- FLORES-ORTEGA, 528 US AT 480.

IN ORDER to ESTABLISH that he WAS PREJUDICED BY COUNSEL'S UNPROFESSIONAL ACTS which WERE UNREASONABLE. The DEFENDANT

25

must show that "there is a reasonable probability that 'but for counsel's deficient failure to consult with him about an appeal' Flores-Ortega 528 US at 484, he would have file an appeal.

A defendant has a right to pursue a direct appeal even if frivolous, which counsel must assist as "an active advocate on behalf of his client." Anders v. California, 386 US. 738, 744, 87 S.Ct. 1396 (1967).

The United States Supreme Court held that the "fundamental decision of whether to appeal rests with the defendant." Jones v. Barnes, 463 US. 745, 751, 103 S.Ct. 3308 (1983).

There is no question that the petitioner wanted a direct appeal, and that he was prejudiced by Mr. Rutledge's ineffectiveness, because he was not afforded a direct appeal with consultation in violation of the Sixth and Fourteenth Amendment right to the U.S. Constitution and Article 1. section 8 to the Nevada Constitution. Therefore petitioner is entitled to relief, the conviction must be revered and remanded for a new trial.

26

*GROUND 3

REQUEST FOR EVIDENTIARY HEARING

IN BERRY V. STATE, 363 P.3D 1143 (NEV. 2015), RELYING ON MANN V. STATE, 46 P.3D 1228, 1230 (NEV. 2002). THE COURT HAS LONG RECOGNIZED A PETITIONERS ASSERTS A CLAIM SUPPORTED BY SPECIFIC FACTUAL ALLEGATION NOT BELIED BY THE RECORD THAT, IF TRUE, WOULD ENTITLE YOU TO RELIEF. IJ AT 363, AT 1155, SEE ALSO HATHAWAY V. STATE, 71 P.3D 503, 508 (NEV. 2003) (REVERSING AND REMANDING DISTRICT COURTS DENIAL OF A WRIT OF HABEAS CORPUS FOR DISTRICT COURT TO CONDUCT AN EVIDENTIARY HEARING ON PETITIONERS SPECIFIC FACTUAL ALLEGATIONS CONTAINED IN THE SWORN AFFIDAVIT NOT BELIED BY THE RECORD.)

MR. CASH WRIT OF HABEAS CORPUS/POST-CONVICTION PETITION CHALLENGES THE VALIDITY OF THE JURY'S VERDICT AND RESULTING IN A CONVICTION BASED ON A CLAIMS OF INEFFECTIVE ASSISTIVE OF COUNSEL. AS, THE INEFFECTIVE ASSISTIVE OF COUNSEL CLAIMS ARE SUPPORTED BY SPECIFIC FACTUAL ALLEGATIONS, EVIDENCE AND THE SWORN AFFIDAVIT. SEE [redacted] VALLIANCOURT V. WARDEN, 529 P.2D 204 (NEV. 1974) (... IT'S ERROR

27

to RESOLVE APPARENT FACTUAL DISPUTE WITHOUT GRANTING THE ACCUSED A EVIDENTIARY HEARING.")

MR. CASH ASSERTS that his TRIAL AND APPELLATE COUNSEL'S WAS INEFFECTIVE AND IN ASSERTING his CLAIMS he MAKES SPECIFIC FACTUAL ALLEGATION OF EVENTS OUTSIDE the RECORD that WARRANT AN EVIDENTIARY HEARING. SEE DOWN-MORGAN V. UNITED STATES, 765 F.2d 1534 (11th Cir. 1985) (CONCLUDING that the DEFENDANT WAS ENTITLED TO AN EVIDENTIARY HEARING to DETERMINED whether COUNSEL WAS INEFFECTIVE BASED UPON the UNDERLYING ARGUMENTS AND FACTUAL ASSERTIONS PRESENTED IN the DEFENDANTS AFFIDAVIT.) WHEN CONSIDERING the totality OF THE CIRCUMSTANCES OF the FACTUAL ALLEGATIONS, EVIDENCE AND CONSTITUTIONAL VIOLATIONS ALLEGED WITHIN the PETITION AND SUPPORTED BY MR. CASH SWORN AFFIDAVIT, he IS ENTITLED TO AN EVIDENTIARY HEARING TO RESOLVE APPARENT FACTUAL DISPUTES WITHIN the RECORD AND CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. GOOD CAUSE APPEARING, the COURT MUST APPOINT COUNSEL AND CONDUCT AN EVIDENTIARY HEARING. RELIEF IS WARRANTED.

CONCLUSIN

Wherefore, Mr. Cash respectfully request of this court to grant the petition in it's entirety and award the relief so requested of a new trial. In the alternative appoint counsel and conduct an evidentiary hearing on the claims of ineffective assistance of counsel and grant the appropriate relief. Grant and other relief deemed appropriate.

Date this 16 day of July 2020.

Print name: Thomas Cash
Signature: Thomas Cash
Number *1203562
Address: P.O. Box 1989
Ely, Nevada,
89301

EXHIBIT 1

Date: 11/24/2019

To whom it may concern:

I Sandi M Cash the undersigned do hereby swear that all the following statement description of events are true and of my own knowledge, I believe to be true and correct. This is what my testimony would have been if I had been called to testify at trial. Thomas Cash attorney Mr. Kenneth W. Long never did interview me.

On or around October or November, I was awakened out of my sleep by my niece Brittney Turner, at 3999 Pistachio Nut Ave Las Vegas, Nv 89115; to come assist her to get her child Londyn Davis. She woke me up saying "Auntie can you come downstairs with me to get my baby so Kyirell (Davis) won't do anything to me". I got up and went outside with her, as soon as we got outside Brittney said "why did you bring him to my house" "you know I don't like him" (she was speaking on Zeek)(Ezekiel Devine) Kyirell started screaming at Brittney grabbing Brittney by the hood of her sweater. I stepped in and said, "you guys need to stop, Brittney get the baby and let's go". They started arguing more, kyriell then told "Brittney get whoever you want to fight me. I don't care call your cousins, uncle, daddy anybody". I then grabbed Londyn and said Brittney "let's go". Kyriell looked at me and said "you can go get yo uncle (Thomas Cash) right now. Go get him go get him!!! I'll shoot up this whole house up. I'll take my daughter". I said, "I'm not doing that just give us the baby and leave". In the mist of kyriell trying to grab Brittney I got between the two and he reached over me trying to grab her and ended up scratching me. I told them "it's too late for all of this, the neighbors are starting to come out. Come on Bri" I got the baby diaper bag and we went inside the house. Kyreill and Zeek (Ezekiel Devine) were sitting in front of the house in a white car for about another 5-8 minutes while Kyriell was calling Brittney's phone for her to come back outside. I did not tell my uncle (Thomas Cash) about the incident or express my concerns to my uncle (Thomas Cash) or my sister (Antoinette White) therefore he was unaware that kyriel had any issue with him. I solemnly swear my words are true. Pursuant to NRS 208.165. I Declare under penalty of perjury that the forgoing is true and correct.

Date this: 3rd day of Jan 2020.

x

State of Nevada
County of Clark

This instrument was acknowledged before me on the day of 01/03/2020, **by** Sandi Cash **and** N/A.

Notary Signature

RIKKI PAYTON
Notary Public - State of Nevada
County of Clark
APPT. NO. 12-7113-1
My App. Expires Feb. 12, 2024

11/05/2019

To whom it may
concern,

I Angel Turner undersigned to hereby swear that all the following statement description of events are true and of my knowledge, information, and to those I believe to be true and correct. My stepfather Thomas Cash attorney Mr. Kenneth W. Long never did interview me before I testified at pre-trial or before I testified at trial. The only reason I came to court to testify for my stepfather is because my mother Antoinette White, took me out of school to bring me to court, both times I testified at pre-trial because the attorney Mr. Long never called and asked me to come to court or subpoena me to come to court .

I declare under penalty of perjury that the foregoing its true and correct as I have written to be pursuant to N.R.S. 208.16, I declare under penalty of perjury that the foregoing is true and correct.

Date this Jan 13 2020 day of 20 . Angel Turner

x

State of Nevada
County of Clark

This instrument was acknowledged before me on the day of 01/03/2020 **by** Angel Turner **and** N/A.

Notary Signature _____

RIKKI PAYTON
Notary Public - State of Nevada
County of Clark
APPT. NO. 12-7113-1
My App. Expires Feb. 12, 2024

Exh. No. 1, Page 2.

EXHIBIT 2

Thomas Cash
1203562*
H.D.S.P.
P.O.Box 650
Indian Springs
NV.89070

Octobe 22,2018
Dear Mr.Rutledge

Mr.Rutledge my name is Thomas Cash you wa appointed to be my Attorney on [redacted] Aug.20,2018. But when we went to court on Oct.1,2018 was the first time we talked to each other, you told me that you was going to come and talk to me about my appeal. So we could talk about what issues I would like to raise on appeal. It have now been (3) three weeks and you have not came to see me, I would like to know when your coming because I got some issues I would like to talk to you About. So when are you coming to see me.

Thomas Cash
Thomas Cash

Thomas Cash
1203562*
H.D.S.P.
P.O.Box 650
Indian Springs
NV. 89070

December 10, 2018
Dear Mr. Rutledge

Mr. Rutledge this is Thomas Cash writin to you again, because it have now been over (2) two months since I last wrote to you about coming to see me. I would like to know when your coming because I have a few issues I would like for you to raise on my appeal. I also would like to know what issues you was looking at raising on my appeal. I also would like to know when do you have to file my appeal with the courts. But I would like for you to come see me before it get to late, and you have to rush and file it I hope you come see me before the New Years

Thomas Cash
Thomas Cash

Exh. No 2, Page 2

FILED
AUG 0 3 2020
CLERK OF COURT

(Court Clerk: Courtey)
Copy Please

Thomas Cash
1203562
P.O. Box 1989
Ely, NV. 89301

A-20-818971-W
Dept. 9

IN THE Eighth DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF Clark

Thomas Cash
Petitioner,

vs.

Gittere William
Warden; State of Nevada,

Respondents.

CASE NUMBER: C-18-329699-1

EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING

COMES NOW, Thomas Cash the Petitioner, in proper person, and moves this Court for its order allowing the appointment of counsel for Petitioner and for an evidentiary hearing. This motion is made and based in the interest of justice.

Pursuant to NRS 34.750(1):

> A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petitioner is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:
>
> (a) The issues presented are difficult;
>
> (b) The petitioner is unable to comprehend the proceedings, or

(c) Counsel is necessary to proceed with discovery.

Petitioner is presently incarcerated at ELY STATE PRISON, is indigent and unable to retain private counsel to represent him.

Petitioner is unlearned and unfamiliar with the complexities of Nevada state law, particularly state post-conviction proceedings. Further, Petitioner alleges that the issues in this case are complex and require an evidentiary hearing. Petitioner is unable to factually develop and adequately present the claims without the assistance of counsel. Counsel is unable to adequately present the claims without an evidentiary hearing.

Dated this 16 day of JULY, 2020.

Thomas Cash

In Proper Person

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he is a person of such age and discretion as to be competent to serve papers.

That on 7-16-20, 2020, he served a copy of the foregoing Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing by personally mailing said copy to:

District Attorney's Office
Address:
200 Lewis Ave. 8th Floor
Las Vegas, NV. 89155-1160

Warden William Gittere
Address:
P.O. Box 1989
Ely, NV. 89301

Thomas Cash
Petitioner

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

APPOINTMENT of COUNSEL
(Title of Document)

filed in District Court Case number C-18-329699-1

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-or-

B. For the administration of a public program or for an application for a federal or state grant.

Thomas Cash
Signature

7-16-20
Date

THOMAS CASH
Print Name

PETITIONER
Title

THOMAS CASH
NDOC # 1263562
ELY STATE PRISON
P.O. Box 1989
ELY, NEVADA, 89301
Proper Person

(COURT CLERK: COURTESY COPY PLEASE)

FILED
AUG 03 2020
CLERK OF COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

* * *

THOMAS CASH,
Petitioner/Defendant,

vs.

STATE OF NEVADA,
Respondent.

CASE NO. C-18-329699-1
DEPT. NO. VIII

EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER

DATE:
TIME:

A-20-818971-W
Dept. 9

COMES NOW, Defendant THOMAS CASH in proper person, and moves this Court for an Order directing the NDOC to transport the Petition/Defendant from Ely State Prison, Ely, Nevada, to Clark County in order to be present in time for the hearing set for 16 day of JULY, 2020, Department No. VIII Case No. C-18-329699-1.

This Motion is based on the papers on file herein and the Affidavit of Petitioner attached hereto.

Dated this 16 day of JULY, 2020.

Submitted by:

Thomas Cash
Defendant

[redacted]

CERTIFICATE OF SERVICE BY MAIL

I, THOMAS CASH, hereby certify pursuant to Rule 5(b) of the NRCP, that on this 16 day of JULY, 2020, I served a true and correct copy of the above-entitled TRANSPORT PRISONER ORDER postage prepaid and addressed as follows:

STEVEN D. GRIERSON
CLERK of the COURT
200 LEWIS AVE. 3rd FLOOR
LAS VEGAS, NV. 89155

Signature Thomas Cash

Print Name THOMAS CASH
Ely State Prison
P.O. Box 1989
Ely, Nevada 89301-1989

AFFIDAVIT OF: THOMAS CASH

STATE OF NEVADA)
: ss
COUNTY OF CLARK)

I, THOMAS CASH, do hereby affirm under penalty of perjury that the assertions of this affidavit are true:

1.That I am the Petitioner in the above-entitled action and that I make this affidavit in support of EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER, attached hereto.

2. That I am over eighteen (18) years of age; of sound mind; and have a personal knowledge of and, am capable to testify to the matter as stated herein.

4. That on 16 day of JULY, 2020, I have a hearing scheduled at ___a.m. in Department No. VIII and request the court to order the NDOC to transport me for set hearing

I, THOMAS CASH, do hereby state and declare under penalty of perjury and pursuant to NEVADA REVISED STATUTE 208.165 that the foregoing statements are true and correct, and to the best of my own personal knowledge and belief, as to any such matter that may be stated upon belief, I sincerely believe them to be true,

DATED THIS 16 day of JULY, 2020.

Affiant,

Thomas Cash

[redacted]

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding _____

TRANSPORT PRISONER ORDER
(Title of Document)

filed in District Court Case No. C-18-329699-1

☒ Does not contain the social security number of any person.

-OR-

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

_____
(State specific law)

-OR-

B. For the administration of a public program or for an application for a federal or state grant.

_____

Thomas Cash
(Signature)

7-16-20
(Date)

(Court Clerk: Courtesy Copy Please)

FILED
AUG 03 2020
CLERK OF COURT

A-20-818971-W
Dept. 9

AFFIDAVIT of THOMAS CASH

STATE of NEVADA)
) ss
COUNTY of CLARK)

I, THOMAS CASH after being duly sworn, depose and state the following;

1) That I AM the defendant/petitioner in case no. C-18-329699-1 of The Eighth Judicial District Court, Clark count, Nevada.

2) I AM 18 years old of age or over and competent to testify to the contents of this AFFIDAVIT, HOWEVER, AS I AM unlearned in the ART of LAW AND have a 12th grade education, AND I had a few legal ASSISTANTS at Ely State PRISON to ASSIST ME IN PREPARING this AFFIDAVIT AND MY WRIT of HABEAS CORPUS/ Post-CONVICTION petition.

3) That DUE to the NATURE of the CHARGES I STAND CONVICTED for; The complexities of the LAW; MY INABILITY to COMPREHEND the post-CONVICTION PROCEEDINGS AND MY INDIGENCY to RETAIN private COUNSEL, I RESPECTFULLY REQUEST of the DISTRICT COURT to APPOINT ME COUNSEL.

4) That on or about DECEMBER 12, 2017 C-18-329699-1 AND ON DECEMBER 11, 2017 MICHAEL SCHWARTZ WAS APPOINTED to REPRESENT ME, AND CAME to SEE ME ONCE, WITH A INVESTIGATOR IN DECEMBER

1

2017 for about 5 minutes.

5) My second attorney Kenneth Long was hired on December 21, or 28 of 2017 from the time of Mr Kenneth Long was retained and on through the commencement of my trial. I never seen an investigator, and only seen Mr. Kenneth Long a few times which was cursorily.

6) Mr. Kenneth Long and investigator which refused to do any investigation in my case, nor come to see me to discuss the facts of a defense for my case.

7) That prior to trial I had written trial counsel Mr. Kenneth Long multiple time to come see me.

8) That Mr. Kenneth Long refused to communicate with me, by not responding to my letter, or phone calls. The investigator in my case never came to see me, never conducted any investigation in my case. After I reminded my attorney Mr. Long of the witnesses names and address repeatedly. Despite my previous attorney provided Mr. Long with his entire investigation file of my case. Mr. Long refuse to utilize any aspect of his investigation evidence, and witnesses in preparation of my defense and during

the trial to prove my innocence.
9) I asked Mr. Long to have the investigator to go speak with the witnesses about what they observed on the day of the incident and previous times and what they observed befor the incident on December 11th, 2017. Mr. Long refuse to present thie critical evidence, to the jury.
10) [redacted] That I don't believe Mr. Long investigated and represented, my case and defense to it's fullest potentials to the district court prior to trial and to the jury during trial.
11) Mr. Brian Rutledge my Appellate counsel was ineffective assistance of Appellate counsel. Mr. Rutledge never consulted [redacted] with me on any issues on appeal or any important decision. He only came to see me one time cursorily for about 10 minutes. He told me he was going to come back to see me, but he never did.
11) I wrote Mr. Rutledge multiple letters asking Mr. Rutledge to come see me so we can talk about what issues we were going to Appeal, but he never answer any of my letters back.
12) That the contents of this affidavit are true and accurate to the best of my personal

3

Knowledge.

13) This affidavit is executed under the penalty of perjury pursuant to N.R.S. 208.165

Dated this 16 day of July 2020.

Thomas Cash

Thomas Cash

#1203562

P.O. Box 1989

Ely, Nevada, 89301

Electronically Filed
08/06/2020 3:07 PM
CLERK OF THE COURT

PPOW

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Cash,

Petitioner,

vs.

William Gittere,

Respondent,

Case No: A-20-818971-W
Department 9

ORDER FOR PETITION FOR WRIT OF HABEAS CORPUS

Petitioner filed a Petition for Writ of Habeas Corpus (Post-Conviction Relief) on August 03, 2020. The Court has reviewed the Petition and has determined that a response would assist the Court in determining whether Petitioner is illegally imprisoned and restrained of his/her liberty, and good cause appearing therefore,

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

IT IS HEREBY FURTHER ORDERED that this matter shall be placed on this Court's Calendar on the 7th day of October, 2020, at the hour of 8:30 AM (subject to change to 1:45 PM) ~~o clock~~ for further proceedings.

Dated this 6th day of August, 2020

District Court Judge

358 809 EA4F 20F7
Cristina D. Silva
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Cash, Plaintiff(s)	CASE NO: A-20-818971-W
vs.	DEPT. NO. Department 9
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

Electronic service was attempted through the Eighth Judicial District Court's electronic filing system, but there were no registered users on the case.

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 8/7/2020

Thomas Cash

#1203562
ESP
P.O. Box 1989
Ely, NV, 89301

Electronically Filed
8/7/2020 7:45 AM
Steven D. Grierson
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
****

Thomas Cash, Plaintiff(s) vs. William Gittere, Defendant(s)	Case No.: A-20-818971-W Department 9

NOTICE OF HEARING

Please be advised that the Plaintiff's Ex Parte Motion (s):

1) Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing
2) Ex Parte Motion for Order to Transport Prisoner

in the above-entitled matter is set for hearing as follows:

Date: October 07, 2020

Time: 8:30 AM

Location: RJC Courtroom 11B
Regional Justice Center
200 Lewis Ave.
Las Vegas, NV 89101

NOTE: Under NEFCR 9(d), if a party is not receiving electronic service through the Eighth Judicial District Court Electronic Filing System, the movant requesting a hearing must serve this notice on the party by traditional means.

STEVEN D. GRIERSON, CEO/Clerk of the Court

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 9(b) of the Nevada Electronic Filing and Conversion Rules a copy of this Notice of Hearing was electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

By: /s/ Michelle McCarthy
Deputy Clerk of the Court

RSPN
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH,
#7053124
Petitioner,

-vs-

THE STATE OF NEVADA,

Respondent.

CASE NO: C-18-329699-1
A-20-818971-W

DEPT NO: IX

STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION), MOTION FOR APPOINTMENT OF COUNSEL, AND REQUEST FOR AN EVIDENTIARY HEARING

DATE OF HEARING: OCTOBER 7, 2020
TIME OF HEARING: 1:45 PM

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 Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, and Request for an Evidentiary Hearing.

///

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///

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

POINTS AND AUTHORITIES

STATEMENT OF THE CASE

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

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

On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS 207.010(1)(b).

On August 3, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State's Response follows.

STATEMENT OF FACTS[1]

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

The events of this day started when Kyriell Davis, twenty-eight years Petitioner's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their child. Eventually, Kyriell pushed Brittney away from him with his hands. Upon hearing this verbal argument, Petitioner came down to intervene. Appellant asked whether Kyriell hit Brittney—Brittney answered no and told Petitioner to mind his own business.

Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell: multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back turned to Petitioner, without provocation by Kyriell. Petitioner later admitted that he threw the first punch. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. At about that time, two cars drove up the road and separated Ezekiel and Petitioner from Kyriell. Kyriell saw a flash in Petitioner's hand as the cars came by and tried to warn Ezekiel. While Petitioner and Kyriell were separated, Petitioner stabbed Ezekiel straight through the heart. Ezekiel collapsed in the middle of the street and quickly died.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. He then observed Brittany yelling at Petitioner. Petitioner took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Petitioner. After Petitioner tried to punch Kyriell, Kyriell and Petitioner interlocked and Petitioner tried to slam him to the ground. Kyriell never swung his fist at Appellant. Petitioner and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. Kyriell saw a flash from Petitioner's hand as a car came drove in between the group, leaving Petitioner

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[1] The State adopts the Statement of the Facts from its Answering Brief in response to Petitioner's direct appeal. For the sake of clarity, citations to the appellate record have been omitted and "Appellant" has been replaced with "Petitioner."

and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. Soon after, Ezekiel fell to the ground after being stabbed by Petitioner.

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

Petitioner initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Petitioner throw the first punch. Brittney told police that Petitioner, Brittney's stepdad, threw the first punch. Brittney also stated that she never felt in danger and that Kyriell did not hit her. Moreover, multiple witnesses stated, including Petitioner, that no one but Petitioner had a weapon. Petitioner told police that he stabbed Ezekiel because he did not want to get hit again.

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

Through their actions, Petitioner's family telegraphed that Petitioner did not act in self-defense. Petitioner's family did not call the police; instead, they went back into the house and shut the door. Furthermore, Petitioner's family did not bring out towels or water or ask if the

victim needed any help. Ultimately, Petitioner's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. After Petitioner left the scene, Petitioner spoke with family members while police were outside his home. Petitioner told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead.

ARGUMENT

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF

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).

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).

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.

Appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that 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). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable

probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. 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. The Court also held that, "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. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

A. Petitioner's Claims in his Post-Conviction Writ of Habeas Corpus Should be Denied

1. Ground One: The State used Petitioner's post-arrest silence against him

Petitioner argues that the State impermissibly elicited testimony about Petitioner's post-arrest silence. Petition at 7. Additionally, Petitioner complains that the State called Detective Matthew Gillis as a rebuttal witness without "being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations." Id.

As a preliminary matter, these substantive claims are waived due to Petitioner's failure to raise them 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). Additionally, Petitioner cannot and does not demonstrate good cause because all of the facts and law related to these claims were available at the time Petitioner filed his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because the underlying claims are meritless.

Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612 (emphasis added).

Additionally, "[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona ..." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995), and concluded that the "use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct." However, this Court has also stated that comments made about the defendant's silence during cross-examination are not prohibited if the questions "merely inquire[] into prior inconsistent statements." Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if the references to "the defendant's post-arrest silence are harmless beyond a reasonable doubt." Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290 (1989)). Indeed, this Court has concluded that

> [c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (internal citations omitted).

In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's questions during its cross-examination of the defendant amounted to prosecutorial misconduct. Specifically, the Court evaluated whether the State's comments about the defendant's silence for impeachment purposes resulted in a due process violation. Id. The Court determined that the State's comment on the defendant's silence was harmless error due to the overwhelming evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the case was not based solely on the defendant's testimony and the victim's, but that there was both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664, 895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that the State's comment during closing argument that, "[the defendant] had nine months to think about what his theory would be," was not an attempt to draw attention to the defendant's silence and was merely a passing reference followed by the strong evidence that corroborated the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court affirmed the defendant's conviction. Id.

In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments made by the State on the defendant's post-arrest silence during its case in chief resulted in prosecutorial misconduct. The Court concluded that by making such comments in its case in chief, the defendant is prejudiced because he would feel pressure to testify in order to explain his silence resulting in an infringement on his or right to prevent self-incrimination. Id. Ultimately, the Court determined that the State's comments were not made in passing reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that the defendant's denial of the crime and the other witness's presenting conflicting stories as well as admitting to not getting a good look at the shooter cast enough doubt that the evidence of the defendant's guilt was not overwhelming. Id.

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Although Petitioner offers a span of pages of where he believes the State commented on his post-arrest silence, he does not indicate the exact comments for which he takes issue. Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the State to respond. Regardless, there are two instances in which Petitioner might be taking issue. First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Additionally, during the State's closing argument, the State commented on Petitioner's actions after the altercation. The State utilized the testimony elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even tell the detectives where he was that whole time or why he didn't come home or an opportunity to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner may have had.

As threshold matter, it does not appear that Petitioner invoked his right to remain silent on this issue. It appears that Petitioner just omitted that information to the officers. Moreover, just as in Coleman, the State's comments were merely a passing reference and did not occur with high frequency. Moreover, the case was not based solely on the statements Petitioner made, but there was both physical and testimonial evidence that corroborated the State's theory of the case, including Davis' and Brittney Turner's trial testimony about what they witnessed. Additionally, there was overwhelming evidence of guilt in this case, including Petitioner's very own confession that he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 10. Even absent the jury being apprised that he did not tell police where he was after the altercation, the jury was presented with his other behaviors that established he did not act in self-defense. For example, after Petitioner stabbed Devine, he fled from the scene by jumping two walls, eventually disposed of the murder weapon, called the

house when the police arrived and found out that Devine was deceased and stayed away from the home until he reported himself, after Petitioner's murder the police had to force all of the individuals in Petitioner's residence out of the home because no one would volunteer information. Recorder's Transcript of Proceedings: Jury Trial Day 2, filed December 14, 2018, at 171; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 217; Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 21-23; Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Notwithstanding the overwhelming evidence of guilt in this case, the jury was also provided Jury Instruction No. 32 which stated in relevant part that "the statements, arguments and opinions of counsel are not evidence in the case." Instructions to the Jury, filed June 28, 2018. Accordingly, any error would have been harmless as the jury was instructed to not consider statements made in the State's closing argument as evidence.

Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice of Witnesses and/or Expert Witness filed on April 12, 2018, prior to trial.

Therefore, Petitioner's claims should be denied.

2. Ground Two: Petitioner's sentence is illegal

Petitioner argues that the Court improperly sentenced him under the habitual criminal statute when rendering his sentence. Specifically, he claims that the Court erred by considering his felony conviction in this case as his third felony under the habitual criminal statute. However, Petitioner's claim fails for several reasons.

First, Petitioner's claim is waived because it is a substantive claim that should have been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

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Second, Petitioner does not and cannot demonstrate good cause because all of the facts and law underlying his claim were available for his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because his claim is meritless and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. NRS 207.010 states:

> [A] person convicted in this state of:
>
> (b) *Any felony, who has previously been three times convicted, whether in this state or elsewhere*, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, *is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:*
>
> *(1) For life without the possibility of parole;*
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
>
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Complying with this statute, Petitioner had three (3) felony convictions as an adult that qualified him for habitual treatment pursuant to this statute: (1) a 1989 possession/purchase of cocaine base for sale; (2) a 1991 second-degree robbery with use of a firearm; and (3) two counts of second-degree robbery with use of a firearm from 1997. The State introduced, and the Court admitted, certified copies of the prior Judgments of Convictions for these crimes along with a sentencing memorandum containing such documents. Accordingly, Petitioner's claim that the Court improperly relied on the instant conviction as the conviction qualifying him for habitual criminal treatment is belied by the record.

Notwithstanding this claim's lack of merit, this issue was already litigated on direct appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's claim is barred under the law of case doctrine which states that issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263,

1275 (1999)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim should be denied.

3. Ground Three: Prosecutorial misconduct

Petitioner argues that the State engaged in several instances of prosecutorial misconduct during trial. Petition at 9-10. However, his claim should be denied.

As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot demonstrate good cause because all of the facts underlying this claim were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless.

When resolving claims of prosecutorial misconduct, the Nevada Supreme Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). 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, 165, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. 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, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). When the misconduct is of constitutional dimension, this Court will reverse unless the State

demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Petitioner complains that the State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. Petition at 9. However, there is no indication from the record that the State argued Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

Second, Petitioner claims that the State improperly stated that witness, Flores, could see the altercation, even though Flores testified that she could see the incident when her front door was open and the altercation was nearly over. Petition at 9. Petitioner is mistaken. The State was not summarizing Flores' testimony during the portion of the State's closing argument Petitioner cites (Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 43). Instead, the State was summarizing Tamisha Kinchron's testimony. Id. at 42-43. Kinchron testified that while it was hard to see because it was dark outside, she could see the majority of what was going on outside during the altercation. Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 186-87. Accordingly, the State made a logical inference from her testimony that she could see what happened that night.

Third, Petitioner argues that the State's argument, that Flores heard the victims impact and ran outside, was a fabrication of Flores' testimony. Id. In its full context, the State argued as follows:

> when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's attempting to get Brittney to go somewhere, that's at the point when Kyriell is going to Zek and to the Defendant and Brittney is trying to pull him back

> and hold him back. And how do we know that that's true? Because the very next thing she hears is an impact. And she runs outside and Zek has just fallen.

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 46. The State did not fabricate Flores' testimony as Flores testified that after she heard "a strong impact or noise" that is when she decided to go outside of her home. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 113.

Fourth, Petitioner argues that the State improperly claimed that Flores provided testimony that she saw Petitioner throw the first punch in the altercation. Petition at 9. Once again, Petitioner has mistaken the witnesses to which he is complaining. Petitioner cites to the State's closing argument wherein the State summarized Brittney Turner's and Kyriell Davis' testimony. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 88-94. Indeed, the State argued that Turner was the individual that testified that Petitioner was the first person to throw a punch. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 205-09. Accordingly, the State did not fabricate testimony.

Fifth, Petitioner asserts that the State argued Petitioner stabbed Devine twice when there was no evidence presented to that effect. Petition at 9. Although Petitioner does not provide any reference as to when the State argued Devine was stabbed twice, the State did summarize Dr. Roquero's, the medical examiner, testimony and argued:

> And what the State would ask you to look at is not only the pictures but also the testimony of Dr. Roquero, who was the medical examiner. And what did he say? He said that there were two sharp force injuries to Ezekiel. One of them was a stab wound, that would be from like a jabbing or a plunging type action. And then the second one was an incised wound, meaning that it's longer than it is deep into the body.

Reporter's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 58. Examining the State's argument in its full context reveals that the State did not argue Devine was stabbed twice, but instead was arguing that he faced "two sharp force injuries," which was Dr. Roquero's testimony. Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 201-03. Accordingly, Petitioner cannot demonstrate that the State was misleading in its argument and he faced prejudice as a result.

Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As discussed *supra*, Petitioner's rights were not violated as he did not unambiguously invoke his right to remain silent when he omitted telling law enforcement where he was in the hours after he stabbed and murdered Devine. Moreover, the State's comments were merely a passing reference and the case was not based solely on such comments.

Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

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Here, the State made reference to Petitioner's juvenile history at sentencing. However, Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to support the actions of counsel and the court below). Indeed, the Court merely explained that it would use its discretion and find Petitioner as a habitual criminal, a status he qualified for based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual Criminal was attached to the Information filed on February 7, 2018. Additionally, the State attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument that appellate counsel should have raised a notice issue fails as doing so would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its statutory obligation as discussed *infra*.

Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently prejudicial to warrant ignoring the procedural default since this trial was essentially a credibility contest between Petitioner and the other witnesses and a court will not 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)). Petitioner has failed to establish good cause and prejudice to overcome the procedural default and his claim should be denied.

4. Ground Four: Certain jury instructions violated Petitioner's rights

Petitioner complains that several of the jury instructions provided at trial violated his rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive

claims that he failed to raise on direct appeal, they are also naked assertions and meritless as discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

First, Petitioner argues that Jury Instruction Nos. 1, 17, 20, and 31 were not neutral and unbiased as they informed the jury that they could find Petitioner guilty if certain terms were met and not guilty if they were not met. Petition at 11.

Jury Instruction No. 1 stated,

> It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Jury Instruction No. 17 stated,

> You are instructed that if you find a defendant guilty of murder in the first degree, murder in the second degree, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.
>
> If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."
>
> If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

Jury Instruction No. 20 stated,

> Battery means any willful and unlawful use of force or violence upon the person of another.
>
> Any person who commits a battery upon another with the specific intent to kill is guilty of the offense of Battery With Intent to Kill.

Jury Instruction No. 31 stated,

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you

should so find, even though you may believe one or more persons are also guilty.

As a preliminary matter, Petitioner's claims should be summarily dismissed as he has provided only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner has not attempted to and cannot demonstrate good cause to overcome the procedural default. Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are accurate statements of law, which the Court properly permitted. See Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the jury is properly instructed and is permitted to complete instructions sua sponte).

Second, Petitioner claims that Jury Instruction Nos. 21, 25, and 27 did not instruct the jury that they may find Petitioner not guilty. Petition at 11. Additionally, he claims that Jury Instruction Nos. 22 and 23 conflict with Jury Instruction Nos. 21, 25, and 27. Id. Further, he asserts that Jury Instruction No. 23 failed to provide the definition of "negate" and "disputes fear as insufficient to justify a killing," which attacked the Petitioner's post-arrest silence. Id.

Jury Instruction No. 21 stated,

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury to himself or to another person; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person; for the purpose of avoiding death or great bodily injury to himself or to another person.

Jury Instruction No. 22 stated,

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

Jury instruction No. 23 stated,

> An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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Jury Instruction No. 25 stated,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
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> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another person is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself or another person to be in like danger.
>
> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

Jury Instruction No. 27 stated,

> If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or the life of another person, or to prevent his receiving great bodily harm or to prevent another person from receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

As a preliminary matter, each of these instructions are accurate statements of law. Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200. Moreover, Petitioner's argument that these instructions failed to instruct the jury that they could find Petitioner not guilty is meritless. The jury was provided with multiple instructions that explained the jury could find Petitioner not guilty. Regardless, the jury was given Jury Instruction No. 30, the Reasonable Doubt Instruction, that explicitly provided Petitioner would be presumed innocent until the State proved each element beyond a reasonable doubt. Additionally, Petitioner provides no reason as to why he believes the above jury instructions conflict, which warrants summary dismissal of such claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner argues that the word "negate" was not explained to the jury, his claim should also fail. Negate is not a legal definition that must be defined for the

jury. Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Accordingly, Petitioner has not and cannot demonstrate good cause and prejudice to overcome the procedural default.

Third, Petitioner also challenges the language of Jury Instruction No. 30, which he claims the Nevada Supreme Court has stated cannot be used. Petition at 11.

Jury Instruction No. 30 stated,

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense. 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.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

In addition to his claim being suitable for summary denial, this instruction was an accurate statement of the law complying with NRS 175.211, which mandates the language of this instruction. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fourth, Petitioner asserts that Jury Instruction No. 37 improperly instructed the jury that the penalty phase need not be considered in deliberation, but then "biasly express[ed] first degree murder penalty." Petition at 11. He claims that the first-degree murder penalty instruction should be separate. Id.

Jury Instruction No. 37 stated,

> In arriving at a verdict in this case as to whether the Defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.
>
> If the Juris verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

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In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his claim should also be denied because this instruction was an accurate statement of law. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury not to involve the question of guilt with a consideration of the penalty is proper.").

5. Ground Five: Settling of jury instructions

Petitioner complains that the process used to settle jury instructions at trial precluded his ability to understand the instructions and present objections. Petition at 12. Specifically, he argues that it was improper for the Court to provide the number and the title rather than repeating the instruction word for word. Id.

As a preliminary matter, this is a substantive claim that is waived due to the 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, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to demonstrate good cause because all of the facts and law necessary for such claim were available when he filed his direct appeal.

Petitioner also cannot demonstrate prejudice to ignore his omission because his claim is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make objections to the jury instructions, and, thus, did not have the right to represent himself to object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an accused is not entitled to participate with counsel in the presentation of the defense"); see also, Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871 (10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010);

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People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986). If Petitioner wanted to represent himself, he should have made a request of the Court to canvass pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly, Petitioner's claim should be denied.

Notwithstanding these claims being waived, dismissed, and meritless, any error in these instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default since the jury was properly instructed on the burden of proof and the weighing of witness credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury was also presented with evidence that Petitioner was not justified in doing so. The State introduced credible and sufficient evidence of Petitioner's actions after the crime, which demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call 911—even though he later told police that Davis said that he would shoot up the house after Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by jumping two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00 PM and 2:00 AM the night of the crime, when he turned himself in to police. Therefore, Petitioner's claims should be denied.

6. Ground Six: Trial counsel was ineffective

Under Ground Six, Petitioner argues that trial counsel was ineffective for failing to: (1) investigate Petitioner's case and prepare for trial; (2) establish Petitioner's theory of defense through the jury instructions; (3) object to Kyriell Davis' testimony; (4) protect Petitioner's

post arrest silence; and (5) impeach Kyriell Davis. Petition at 13-17. As will be discussed below, each of these claims should be denied.

a. *Failure to investigate and prepare for trial*

Petitioner argues that counsel was ineffective regarding the investigation of his case for several reasons. Petition at 13-14.

First, Petitioner argues that counsel did nothing, but review the State's open file to prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify for the defense was because he told them to come to court. Id. This claim fails under Molina, 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better investigation would have shown.

Second, he argues that counsel failed to call a pathologist as an expert to discuss the positioning of the victim at the time of his death and other details regarding the stabbing, which he argues would have prevented his conviction. Petition at 13-14. However, this claim also fails under Molina as Petitioner does not and cannot demonstrate that such testimony would have changed the outcome of his trial. Moreover, which witnesses to call is a strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

Third, he argues that counsel failed to canvass his neighbors to determine what they knew. Petition at 14. This claim also fails under Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, Petitioner does not even attempt to indicate what the neighbors' testimony would have been, let alone whether it would have aided in his defense.

Fourth, he claims counsel did not interview Sandi Cash, Defendant's sister. Id. he claims that because counsel failed to obtain Sandi's information, there was no testimony elicited regarding Devine not visiting Petitioner's place of residence, the threats Devine made toward the home and Petitioner, and prior acts related to the case. Id. Even if such testimony had been elicited, Petitioner has also failed to demonstrate, as with his other claims, how the testimony would have changed the outcome of his trial. Indeed, assuming Sandi did testify to such information, that testimony would not have changed the fact that the jury was presented with evidence demonstrating Petitioner did not act in self-defense, including "that [Petitioner]

initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2.

In sum, Petitioner cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claims should be denied.

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

Petitioner complains that counsel failed to present Petitioner's theory of defense and offer jury instructions consistent with his self-defense theory. Petition at 15. Additionally, he argues that counsel was ineffective for failing to establish foundational evidence regarding why Petitioner was carrying a work knife on his person. Id.

Petitioner's complaint that counsel was ineffective because there was no self-defense jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of self-defense. Those jury instructions properly provided the jury with the law to determine whether Petitioner was justified under a theory of self-defense for protecting his daughter, Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to demonstrate what additional instruction he believes should have been given to demonstrate prejudice.

Petitioner's claim that counsel failed to establish foundational evidence regarding why Petitioner carried a work knife is also belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During counsel's opening statement, counsel provided context as to why Petitioner carried a knife:

> Now, this man sitting here, Thomas Cash, he's 52 years old. He works at Sears. *He's an HVAC technician.* He carries a tool belt around his waist. In addition to the tool belt, *he keeps a knife flipped on the inside of his pocket.* That knife really isn't for working. It's for when boxes come in that he has to open. He slices them open.

Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 167-68 (emphasis added). Counsel reiterated this foundation again during his closing argument:

> He went out as quickly as he could because he believed Brittney was in imminent danger. He just so happened, as I said in opening argument, *the man is an HVAC technician.* His daughter testified he fixes machines, fixes the vending machine at McDonald's. He works at Sears. *He always has this little knife clipped right here.*

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 75 (emphasis added). Accordingly, counsel could not have been ineffective as the jury was provided foundation regarding Petitioner carrying a knife. For the same reason, Petitioner cannot and does not demonstrate prejudice. Therefore, Petitioner's claim should be denied.

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

Petitioner argues that counsel was ineffective for failing to object to a portion of Davis' testimony during trial wherein he discussed the altercation he had with Petitioner that ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature of Davis' testimony and when the same information was repeated. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

Petitioner's claim should be denied. As a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the subject matter of Davis' testimony, counsel could have concluded that it would have damaged his credibility with the jury if he made a series of pointless objections that could be perceived as disrespectful to the witness or as achieving nothing more than delaying the process. Also, if the information was going to be presented to the jury regardless, counsel did not need to offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if the State had asked more questions to break up Davis' testimony, the State would have elicited the information as it was pertinent eyewitness evidence of someone who watched Petitioner commit the crimes charged in this case. Accordingly, Petitioner cannot demonstrate he was prejudiced.

Additionally, Petitioner mistakenly claims that counsel should have objected when Davis' testimony was repeated. Any information that was repeated was for the purposes of clarification and asking further questions about what Davis' previous testimony. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of reasonableness, let alone prejudice so his claim should be denied. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64.

d. *Failure to protect post-arrest silence*

Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16. Petitioner claims that counsel should have requested that the rebuttal witness first testify outside the presence of the jury to determine the prejudicial nature of his testimony. Petition at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

e. *Failure to impeach Kyriell Davis' testimony*

Petitioner complains that counsel was ineffective for failing to impeach Davis, who he claims was the sole witness for the state that saw Petitioner with a knife and stab the victim. Petition at 16-17. Specifically, he argues that Davis committed perjury when he testified that Brittney Turner left the scene once the altercation occurred and Petitioner had to call her to come and get the baby. Id. He claims that he could have impeached Davis' testimony through witnesses: Brittney Turner, Tamisha Kinchron, Antoinette White, and Isidra Flores. Id. Petitioner's claim should fail.

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As a preliminary matter, Petitioner has not provided any evidence that Davis did in fact commit perjury when he testified regarding Turner leaving the scene. Even if he had provided the Court with such information, his claim would still fail as Turner's whereabouts once the altercation began would not have changed the outcome of his trial. The defense's theory was that Petitioner was acting in self-defense when he stabbed Devine as he felt like he was facing a two-on-one fight with Devine and Davis. In other words, whether Turner was inside of the home or outside of the home was not an essential factor in the jury determining if Petitioner, at the moment he stabbed Devine, was acting in self-defense. Accordingly, impeaching Davis was not necessary to proving Petitioner was acting in self-defense. Notably, Petitioner even appears to concede this point when he states, "[t]hough the impeach did not strick at the stab incident, such perjury would have gone to insight to the jury that Davis committed perjury." Petition at 17. Indeed, Petitioner cannot demonstrate prejudice because that sole fact would not have changed the outcome of the trial. Therefore, his claim should be denied.

7. Ground Seven: Cumulative error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, as argued in Section I.A.4 *supra*, the issue of guilt in this case was not close.

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Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there is no error to cumulate. Regardless, any errors that occurred at trial, which the State does not concede, would have been minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Third, and finally, Petitioner was convicted of a grave crime. However, because the evidence was more than sufficient and there was no error, it should not weigh heavily in this Court's analysis. Therefore, Petitioner's claim should be denied.

8. Ground Eight: Appellate counsel was ineffective for failing to consult prior to filing Petitioner's direct appeal

Petitioner argues that counsel was ineffective for failing to consult with him before drafting Petitioner's direct appeal and filed it despite Petitioner's request to hold off so he could research counsel's claims as well as add claims to his appeal, including the claims in the instant Petition. Petition at 17-18. However, his claim should fail for several reasons.

First, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the reasons discussed throughout this Petition, Petitioner's claims would not have been effective on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims should be denied.

9. Ground Nine: Petitioner's right to a speedy trial was violated

Petitioner argues that the Court violated his right to a speedy trial. Petition at 18. Specifically, he claims that the Court erroneously continued his trial against the parties' consent. Id. Not only is this claim a bare and naked assertion suitable only for summary dismissal, but also it is waived as a substantive claim that should have been raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved

on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot attempt to demonstrate good cause as these claims were available for direct appeal and he cannot demonstrate prejudice because his claim is meritless.

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992). Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14, 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett,

505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230, 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

Moreover, the reason for the delay was that defense counsel had to attend a federal sentencing outside of the jurisdiction which could not be reset and the State had another trial on that date. Accordingly, Petitioner's argument that his trial was continued over his objection is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Therefore, Petitioner's claim should be denied.

B. Petitioner's Claims in his Memorandum Should be Denied

1. Ground One: Counsel was ineffective for failing to investigate

a. *Failure to consult and communicate*

Petitioner argues that counsel was ineffective for only consulting with Petitioner only four times prior to trial, failing to have the defense's investigator meet with Petitioner, failing to interview and call witnesses that could have helped the defense, and failing to make appropriate objections. Memorandum at 9-13.

Petitioner's claims should be denied as they amount to nothing more substantive than naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his representation. See id. Moreover, Petitioner's failure to investigate allegations fail since Petitioner does not demonstrate what a better investigation would have uncovered. Molina, 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers nothing more than a naked assertion that further proves summary dismissal is warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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b. *Failure to investigate and call witnesses*

Petitioner complains that counsel did not speak to witnesses he wanted to testify at trial and failed to call them as witnesses. Memorandum at 14-19. In particular, Petitioner claims that Sandi Cash Earl and Angel Turner should have been called so they could have provided favorable testimony. Memorandum at 14. Not only are Petitioner's claims naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225, but also these claims should fail under Molina, 120 Nev. at 192, 87 P.3d at 538, for Petitioner failing to demonstrate what a better investigation would have discovered.

Petitioner's argument that counsel failed to call Angel Turner as a witness is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Angel testified for the defense on the sixth day of Petitioner's trial. Additionally, Petitioner attached a statement from Angel which merely stated that counsel did not interview her prior to testifying. However, Petitioner's claim still fails because he did not indicate how her testimony would have differed had counsel interviewed her, let alone whether that unknown testimony would have led to a better outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, in addition to her trial testimony, Angel Turner provided a recorded statement to the police and testified at the preliminary hearing, so it is not clear what additional interviewing would have accomplished.

Petitioner also attached a statement from Sandi Cash who provided what her testimony would have been had she been called to testify at Petitioner's trial. Memorandum, Exhibit 1, at 1. The crux of such statement was that when Brittney Turner was arguing with Davis outside, Sandi heard him tell Turner to get whoever she wanted to fight him, including Petitioner. Id. Sandi explained that she did not tell Petitioner about what was said or express her concerns. Id. However, Sandi's statement is referring to a completely separate incident wherein Davis was dropping off his child, rather than picking his child up. Regardless, Sandi's testimony about this event would not have been admissible at trial because she claims she never told Petitioner about what was said. Accordingly, Petitioner would not have known about the specific incident for it to have had affected his state of mind regarding self-defense. Moreover, such testimony would not have made a difference at Petitioner's trial. There was other

evidence presented that Petitioner did not act in self-defense, including as the Nevada Supreme Court pointed out when it affirmed Petitioner's sentence: "[t]here was evidence and testimony that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2. Accordingly, Petitioner cannot demonstrate he was prejudiced by not having Sandi's alleged testimony.

In sum, Petitioner's allegations of prejudice are long quotations to legal authority but short on actual harm to his case and thus he cannot establish prejudice under Strickland because his claims are governed by Hargrove and Molina. Therefore, Petitioner's claim should be denied.

c. *Failure to meet with Petitioner*

Petitioner complains that appellate counsel was ineffective for only having met with Petitioner once. Memorandum at 20-22. Additionally, he claims that appellate counsel did a poor job in filing his direct appeal. Id. However, Petitioner's claims should be denied for several reasons.

First, as with trial counsel, Petitioner is not entitled to a particular relationship with counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate counsel failed to do a "good job" is a naked assertion that should be denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim raising insufficiency of the evidence, he has not explained how such complaint is relevant or how it would have made a difference on appeal. Notably, appellate counsel is more effective when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim should be denied.

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2. Ground Two: Appellate counsel was ineffective

Petitioner appears to complain that appellate counsel failed to file a direct appeal on his behalf. Memorandum at 23-26. However, no matter how this claim is interpreted, it should fail.

Should Petitioner mean to argue that appellate counsel was ineffective for failing to file a direct appeal because counsel failed to consult with Petitioner, the State incorporates its argument from Section I.B.1.c. In the event Petitioner intended to argue that counsel failed to file a direct appeal on his behalf, his claim is belied by the record and suitable only for summary denial because appellate counsel did in fact file a direct appeal for Petitioner. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

To the extent Petitioner is complaining that counsel did not consult and include his issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claim should be denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States

Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

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

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider whether, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

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

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

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

Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are severe as he is serving a sentence of life without the possibility of parole, that fact alone does not require the appointment of counsel. Indeed, none of the issues Petitioner raises are particularly difficult as his claims are either waived as substantive claims, fail to provide good cause because they are based on information Petitioner had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Moreover, unlike the petitioner in Renteria-Novoa who faced difficulties with understanding the English language, Petitioner does not claim he cannot understand English or cannot comprehend the instant proceedings. It is clear that Petitioner is able to comprehend the instant proceedings based upon his filing of the instant Petition.

Finally, despite Petitioner's argument, counsel is not necessary to proceed with discovery in this case as no additional discovery is necessary. Therefore, Defendant's Motion should be denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

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

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

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. Therefore, Petitioner's request should be denied.

CONCLUSION

Based on the foregoing, the State respectfully requests that Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Motion for Appointment of Counsel, and Request for an Evidentiary Hearing be DENIED.

DATED this 18th day of September, 2020.

Respectfully submitted,

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

BY _____
JONATHAN E. VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF SERVICE

I hereby certify that service of the State's Response to Petitioner's Petition for Writ of habeas corpus (post-conviction), memorandum of points and authorities in support of petition for writ of habeas corpus (post-conviction), motion for appointment of counsel, and request for an evidentiary hearing, was made this 18th day of September, 2020, by mail to:

THOMAS CASH, #1203562
P. O. BOX 1989
ELY, NV 89301

By: _____
Secretary for the District Attorney's Office

17FN2591X/JEV/bg/Appeals

Court Clerk's Courtesy Copy Please

IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA FOR THE COUNTY OF CLARK

Thomas Cash
*1203562
Plaintiff,

Case No. A-20-818971-W
Dept. No. IX

V.

William Gittere,
Warden,
STATE OF NEVADA
Defendant.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Thomas Cash defendant above named, hereby appeals to the Supreme Court of Nevada from the denial of his Petition for Writ of Habeas Corpus (Post-Conviction) and his Motion for Appointment of Counsel entered in this action on the 7 day of Oct. 2020.

Dated this 28 day of Oct. 2020

Thomas Cash
Thomas Cash
Appellant

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED by the UNDERSIGNED that ON 28 DAY of Oct., 2020, I SERVED A TRUE AND CORRECT COPY of the FOREGOING NOTICE OF APPEAL on the PARTIES LISTED ON the ATTACHED SERVICE LIST VIA ONE OR MORE of the METHODS of SERVICE DESCRIBED below AS INDICATED NEXT to the NAME of the SERVED INDIVIDUAL OR ENTITY BY A CHECKED box:

VIA U.S. MAIL: by PLACING A TRUE COPY THEREOF ENCLOSED IN A SCALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID, IN the UNITED STATES MAIL at ELY STATE PRISON, NEVADA

By: Thomas Cash
THOMAS CASH
Appellant

Thomas Cash 1203562*
P.O. Box 1989
Ely, NV. 89301

LAS VEGAS NV 890
29 OCT 2020 PM 4 L

LEGAL MAIL

Steven D. Grierson
Clerk of the Court
200 Lewis Ave. 3rd Floor
Las Vegas, NV. 89155-1160

89101-630000

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ASTA

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

THOMAS CASH,

Plaintiff(s),

vs.

WILLIAM GITTERE,

Defendant(s),

Case No: A-20-818971-W

Dept No: IX

CASE APPEAL STATEMENT

1. Appellant(s): Thomas Cash

2. Judge: Cristina D. Silva

3. Appellant(s): Thomas Cash

Counsel:

Thomas Cash #1203562
P.O. Box 1989
Ely, NV 89301

4. Respondent (s): William Gittere

Counsel:

Steven B. Wolfson, District Attorney
200 Lewis Ave.
Las Vegas, NV 89155-2212

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

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

6. Has Appellant Ever Been Represented by Appointed Counsel In District Court: No

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

8. Appellant Granted Leave to Proceed in Forma Pauperis**: N/A
**Expires 1 year from date filed*
Appellant Filed Application to Proceed in Forma Pauperis: No
Date Application(s) filed: N/A

9. Date Commenced in District Court: August 3, 2020

10. Brief Description of the Nature of the Action: Civil Writ

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

11. Previous Appeal: No

Supreme Court Docket Number(s): N/A

12. Child Custody or Visitation: N/A

13. Possibility of Settlement: Unknown

Dated This 3 day of November 2020.

Steven D. Grierson, Clerk of the Court

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk
200 Lewis Ave
PO Box 551601
Las Vegas, Nevada 89155-1601
(702) 671-0512

cc: Thomas Cash

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH, #7053124

Petitioner,

-vs-

~~THE STATE OF NEVADA~~,
WILLIAM GITTERE,

Respondent.

CASE NO: C-18-329699-1
A-20-818971-W

DEPT NO: IX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 7, 2020
TIME OF HEARING: 1:45 PM

THIS CAUSE having come on for hearing before the Honorable ~~JUDGE NAME~~ Cristina D. Silva, District Judge, on the 7th day of October, 2020, the Petitioner in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN TORRE, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS 207.010(1)(b).

On August 3, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State filed its Response on September 18, 2020. On October 7, 2020, the Court denied these pleadings finding as follows.

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FACTUAL BACKGROUND

On December 11, 2017, a verbal argument led to Petitioner, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. Recorder's Transcript of Proceedings, Jury Trial Day 5, at 229.

The events of this day started when Kyriell Davis, twenty-eight years Petitioner's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their children. Jury Trial Day 5 at 124-25, 132-33, 229. Eventually, Kyriell pushed Brittney away from him with his hands. Jury Trial Day 5 at 133-34. Upon hearing this verbal argument, Petitioner came down to intervene. Jury Trial Day 5 at 135-36. Petitioner asked whether Kyriell hit Brittney—Brittney answered no and told Petitioner to mind his own business. Jury Trial Day 5 at 135.

Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell: multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back turned to Petitioner, without provocation by Kyriell. Jury Trial Day 5 at 135-38, 156-57, 213. Petitioner later admitted that he threw the first punch. Jury Trial Day 7 at 9. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. Jury Trial Day 5 at 124-25, 131, 141, 183. At about that time, two cars drove up the road and separated Ezekiel and Petitioner from Kyriell. Jury Trial Day 5 at 142. Kyriell saw a flash in Petitioner's hand as the cars came by and tried to warn Ezekiel. Jury Trial Day 5 at 142. While Petitioner and Kyriell were separated, Petitioner stabbed Ezekiel straight through the heart. Jury Trial Day 3 at 192; Jury Trial Day 5 at 142. Ezekiel collapsed in the middle of the street and quickly died. Jury Trial Day 3 at 196-97, 224.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. Jury Trial Day 5 at 135. He then observed Brittany yelling at Petitioner. Jury Trial Day 5 at 136. Petitioner took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Petitioner. Jury Trial Day 5 at 136, 138.

After Petitioner tried to punch Kyriell, Kyriell and Petitioner interlocked and Petitioner tried to slam him to the ground. Jury Trial Day 5 at 137. Kyriell never swung his fist at Petitioner. Jury Trial Day 5 at 138-39. Petitioner and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. Jury Trial Day 5 at 139-141. Kyriell saw a flash from Petitioner's hand as a car came drove in between the group, leaving Petitioner and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. Jury Trial Day 5 at 141-43. Soon after, Ezekiel fell to the ground after being stabbed by Petitioner. See Jury Trial Day 5 at 142.

Petitioner's actions after the victim died demonstrated his consciousness of guilt. Petitioner did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. Jury Trial Day 5 at 247; Jury Trial Day 7 at 15. Despite these alleged threats and after he killed Ezekiel, Petitioner locked the door, left his home, and ran from the scene. Jury Trial Day 5 at 146. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. Jury Trial Day 5 at 68-69, 75, 200. Petitioner escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. Jury Trial Day 6 at 21-24. Petitioner also destroyed and hid the murder weapon, a knife. Jury Trial Day 7 at 11. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police. Jury Trial Day 6 at 30; Jury Trial Day 7 at 12.

Petitioner initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Petitioner throw the first punch. Jury Trial Day 5 135-38, 156-57, 213; Jury Trial Day 6 at 83-84, 155. Brittney told police that Petitioner, Brittney's stepdad, threw the first punch. Jury Trial Day 5 at 213. Brittney also stated that she never felt in danger and that Kyriell did not hit her. Jury Trial Day 5 at 222, 225. Moreover, multiple witnesses stated, including Petitioner, that no one but Petitioner had a weapon. Jury Trial Day 5 at 167-68; Jury Trial Day 6 at 137-38; see Jury Trial Day 7 at 9.

Petitioner told police that he stabbed Ezekiel because he did not want to get hit again. Jury Trial Day 7 at 10.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Petitioner came out of the house and tried to punch Kyriell. Jury Trial Day 5 at 208. After Petitioner started this fight with Kyriell, both Petitioner and Kyriell locked together in a bear hug and after Petitioner's first punch, no one threw punches. Jury Trial Day 5 at 208-09. Both men were "equally locked up." Jury Trial Day 5 at 209. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. Jury Trial Day 5 at 212-13. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. Jury Trial Day 5 at 222. She also said that during the argument, Kyriell did not hit her or slam her into a car. Jury Trial Day 5 at 225.

Through their actions, Petitioner's family telegraphed that Petitioner did not act in self-defense. Petitioner's family did not call the police; instead, they went back into the house and shut the door. Jury Trial Day 6 at 137, 140. Furthermore, Petitioner's family did not bring out towels or water or ask if the victim needed any help. Jury Trial Day 5 at 171; Jury Trial Day 6 at 137. Ultimately, Petitioner's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. Jury Trial Day 5 at 66-67, 171; Jury Trial Day 6 at 137. After Petitioner left the scene, Petitioner spoke with family members while police were outside his home. Jury Trial Day 6 at 217. Petitioner told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. Jury Trial Day 6 at 217.

ANALYSIS

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF

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).

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).

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.

Appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that 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). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. 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. The Court also held that, "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. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

A. Petitioner's Claims in his Post-Conviction Writ of Habeas Corpus Are Denied

1. Ground One: The State did not use Petitioner's post-arrest silence against him

Petitioner argues that the State impermissibly elicited testimony about Petitioner's post-arrest silence. Petition at 7. Additionally, Petitioner complains that the State called Detective Matthew Gillis as a rebuttal witness without "being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations." Id.

As a preliminary matter, these substantive claims are waived due to Petitioner's failure to raise them 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). Additionally, Petitioner cannot and does not demonstrate good cause because all of the facts and law related to these claims were available at the time Petitioner filed his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because the underlying claims are meritless.

Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to

the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612 (emphasis added).

Additionally, "[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona ..." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995), and concluded that the "use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct." However, this Court has also stated that comments made about the defendant's silence during cross-examination are not prohibited if the questions "merely inquire[] into prior inconsistent statements." Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if the references to "the defendant's post-arrest silence are harmless beyond a reasonable doubt." Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290 (1989)). Indeed, this Court has concluded that

> [c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (internal citations omitted).

In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's questions during its cross-examination of the defendant amounted to prosecutorial misconduct. Specifically, the Court evaluated whether the State's comments about the defendant's silence for impeachment purposes resulted in a due process violation. Id. The Court determined that the State's comment on the defendant's silence was harmless error due to the overwhelming evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the case was not based solely on the defendant's testimony and the victim's, but that there was both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664,

895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that the State's comment during closing argument that, "[the defendant] had nine months to think about what his theory would be," was not an attempt to draw attention to the defendant's silence and was merely a passing reference followed by the strong evidence that corroborated the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court affirmed the defendant's conviction. Id.

In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments made by the State on the defendant's post-arrest silence during its case in chief resulted in prosecutorial misconduct. The Court concluded that by making such comments in its case in chief, the defendant is prejudiced because he would feel pressure to testify in order to explain his silence resulting in an infringement on his or right to prevent self-incrimination. Id. Ultimately, the Court determined that the State's comments were not made in passing reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that the defendant's denial of the crime and the other witness's presenting conflicting stories as well as admitting to not getting a good look at the shooter cast enough doubt that the evidence of the defendant's guilt was not overwhelming. Id.

Although Petitioner offers a span of pages of where he believes the State commented on his post-arrest silence, he does not indicate the exact comments for which he takes issue. Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the State to respond. Regardless, there are two instances in which Petitioner might be taking issue. First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Additionally, during the State's closing argument, the State commented on Petitioner's actions after the altercation. The State utilized the testimony

elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even tell the detectives where he was that whole time or why he didn't come home or an opportunity to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner may have had.

As a threshold matter, it does not appear that Petitioner invoked his right to remain silent on this issue. It appears that Petitioner just omitted that information to the officers. Moreover, just as in Coleman, the State's comments were merely a passing reference and did not occur with high frequency. Additionally, the case was not based solely on the statements Petitioner made, but there was both physical and testimonial evidence that corroborated the State's theory of the case, including Davis' and Brittney Turner's trial testimony about what they witnessed. Additionally, there was overwhelming evidence of guilt in this case, including Petitioner's very own confession that he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 10. Even absent the jury being apprised that he did not tell police where he was after the altercation, the jury was presented with his other behaviors that established he did not act in self-defense. For example, after Petitioner stabbed Devine, he fled from the scene by jumping two walls, eventually disposed of the murder weapon, called the house when the police arrived and found out that Devine was deceased and stayed away from the home until he reported himself, after Petitioner's murder the police had to force all of the individuals in Petitioner's residence out of the home because no one would volunteer information. Recorder's Transcript of Proceedings: Jury Trial Day 2, filed December 14, 2018, at 171; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 217; Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 21-23; Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Notwithstanding the overwhelming evidence of guilt in this case, the jury was also provided Jury Instruction No. 32 which stated in relevant part that "the statements, arguments and opinions of counsel are not evidence in the case." Instructions to

the Jury, filed June 28, 2018. Accordingly, any error would have been harmless as the jury was instructed to not consider statements made in the State's closing argument as evidence.

Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice of Witnesses And/Or Expert Witness filed on April 12, 2018, prior to trial.

Therefore, Petitioner's claims are denied.

2. Ground Two: Petitioner's sentence is not illegal

Petitioner argues that the Court improperly sentenced him under the habitual criminal statute when rendering his sentence. Specifically, he claims that the Court erred by considering his felony conviction in this case as his third felony under the habitual criminal statute. However, Petitioner's claim fails for several reasons.

First, Petitioner's claim is waived because it is a substantive claim that should have been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Second, Petitioner does not and cannot demonstrate good cause because all of the facts and law underlying his claim were available for his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because his claim is meritless and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. NRS 207.010 states:

> [A] person convicted in this state of:
>
> (b) *Any felony, who has previously been three times convicted, whether in this state or elsewhere*, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, *is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:*

> *(1) For life without the possibility of parole;*
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Complying with this statute, Petitioner had three (3) felony convictions as an adult that qualified him for habitual treatment pursuant to this statute: (1) a 1989 possession/purchase of cocaine base for sale; (2) a 1991 second-degree robbery with use of a firearm; and (3) two counts of second-degree robbery with use of a firearm from 1997. The State introduced, and the Court admitted, certified copies of the prior Judgments of Convictions for these crimes along with a sentencing memorandum containing such documents. Accordingly, Petitioner's claim that the Court improperly relied on the instant conviction as the conviction qualifying him for habitual criminal treatment is belied by the record.

Notwithstanding this claim's lack of merit, this issue was already litigated on direct appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's claim is barred under the law of case doctrine which states that issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim is denied.

3. Ground Three: Prosecutorial misconduct

Petitioner argues that the State engaged in several instances of prosecutorial misconduct during trial. Petition at 9-10. However, his claim is denied.

As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot

demonstrate good cause because all of the facts underlying this claim were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless.

When resolving claims of prosecutorial misconduct, the Nevada Supreme Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). 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, 165, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. 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, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Petitioner complains that the State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. Petition at 9. However, there is no indication from the record that the State argued Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched

Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

Second, Petitioner claims that the State improperly stated that witness, Flores, could see the altercation, even though Flores testified that she could see the incident when her front door was open and the altercation was nearly over. Petition at 9. Petitioner is mistaken. The State was not summarizing Flores' testimony during the portion of the State's closing argument Petitioner cites (Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 43). Instead, the State was summarizing Tamisha Kinchron's testimony. Id. at 42-43. Kinchron testified that while it was hard to see because it was dark outside, she could see the majority of what was going on outside during the altercation. Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 186-87. Accordingly, the State made a logical inference from her testimony that she could see what happened that night.

Third, Petitioner argues that the State's argument, that Flores heard the victims impact and ran outside, was a fabrication of Flores' testimony. Id. In its full context, the State argued as follows:

> when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's attempting to get Brittney to go somewhere, that's at the point when Kyriell is going to Zek and to the Defendant and Brittney is trying to pull him back and hold him back. And how do we know that that's true? Because the very next thing she hears is an impact. And she runs outside and Zek has just fallen.

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 46. The State did not fabricate Flores' testimony as Flores testified that after she heard "a strong impact or noise" that is when she decided to go outside of her home. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 113.

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Fourth, Petitioner argues that the State improperly claimed that Flores provided testimony that she saw Petitioner throw the first punch in the altercation. Petition at 9. Once again, Petitioner has mistaken the witnesses to which he is complaining. Petitioner cites to the State's closing argument wherein the State summarized Brittney Turner's and Kyriell Davis' testimony. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 88-94. Indeed, the State argued that Turner was the individual that testified that Petitioner was the first person to throw a punch. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 205-09. Accordingly, the State did not fabricate testimony.

Fifth, Petitioner asserts that the State argued Petitioner stabbed Devine twice when there was no evidence presented to that effect. Petition at 9. Although Petitioner does not provide any reference as to when the State argued Devine was stabbed twice, the State did summarize Dr. Roquero's, the medical examiner, testimony and argued:

> And what the State would ask you to look at is not only the pictures but also the testimony of Dr. Roquero, who was the medical examiner. And what did he say? He said that there were two sharp force injuries to Ezekiel. One of them was a stab wound, that would be from like a jabbing or a plunging type action. And then the second one was an incised wound, meaning that it's longer than it is deep into the body.

Reporter's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 58. Examining the State's argument in its full context reveals that the State did not argue Devine was stabbed twice, but instead was arguing that he faced "two sharp force injuries," which was Dr. Roquero's testimony. Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 201-03. Accordingly, Petitioner cannot demonstrate that the State was misleading in its argument and he faced prejudice as a result.

Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As discussed *supra*, Petitioner's rights were not violated as he did not unambiguously invoke his right to remain silent when he omitted telling law enforcement where he was in the hours after

he stabbed and murdered Devine. Moreover, the State's comments were merely a passing reference and the case was not based solely on such comments.

Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

Here, the State made reference to Petitioner's juvenile history at sentencing. However, Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to

support the actions of counsel and the court below). Indeed, the Court merely explained that it would use its discretion and find Petitioner as a habitual criminal, a status he qualified for based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual Criminal was attached to the Information filed on February 7, 2018. Additionally, the State attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument that appellate counsel should have raised a notice issue fails as doing so would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its statutory obligation as discussed *infra*.

Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently prejudicial to warrant ignoring the procedural default since this trial was essentially a credibility contest between Petitioner and the other witnesses and a court will not 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)). Petitioner has failed to establish good cause and prejudice to overcome the procedural default and his claim is denied.

4. Ground Four: Certain jury instructions did not violate Petitioner's rights

Petitioner complains that several of the jury instructions provided at trial violated his rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive claims that he failed to raise on direct appeal, they are also naked assertions and meritless as discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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First, Petitioner argues that Jury Instruction Nos. 1, 17, 20, and 31 were not neutral and unbiased as they informed the jury that they could find Petitioner guilty if certain terms were met and not guilty if they were not met. Petition at 11.

Jury Instruction No. 1 stated,

> It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Jury Instruction No. 17 stated,

> You are instructed that if you find a defendant guilty of murder in the first degree, murder in the second degree, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.
>
> If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."
>
> If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

Jury Instruction No. 20 stated,

> Battery means any willful and unlawful use of force or violence upon the person of another.
>
> Any person who commits a battery upon another with the specific intent to kill is guilty of the offense of Battery With Intent to Kill.

Jury Instruction No. 31 stated,

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

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As a preliminary matter, Petitioner's claims are summarily dismissed as he has provided only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner has not attempted to and cannot demonstrate good cause to overcome the procedural default. Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are accurate statements of law, which the Court properly permitted. See Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the jury is properly instructed and is permitted to complete instructions sua sponte).

Second, Petitioner claims that Jury Instruction Nos. 21, 25, and 27 did not instruct the jury that they may find Petitioner not guilty. Petition at 11. Additionally, he claims that Jury Instruction Nos. 22 and 23 conflict with Jury Instruction Nos. 21, 25, and 27. Id. Further, he asserts that Jury Instruction No. 23 failed to provide the definition of "negate" and "disputes fear as insufficient to justify a killing," which attacked the Petitioner's post-arrest silence. Id.

Jury Instruction No. 21 stated,

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury to himself or to another person; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person; for the purpose of avoiding death or great bodily injury to himself or to another person.

Jury Instruction No. 22 stated,

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

Jury instruction No. 23 stated,

> An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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Jury Instruction No. 25 stated,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another person is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself or another person to be in like danger.
>
> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

Jury Instruction No. 27 stated,

> If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or the life of another person, or to prevent his receiving great bodily harm or to prevent another person from receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

As a preliminary matter, each of these instructions are accurate statements of law. Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200. Moreover, Petitioner's argument that these instructions failed to instruct the jury that they could find Petitioner not guilty is meritless. The jury was provided with multiple instructions that explained the jury could find Petitioner not guilty. Regardless, the jury was given Jury Instruction No. 30, the Reasonable Doubt Instruction, that explicitly provided Petitioner would be presumed innocent until the State proved each element beyond a reasonable doubt. Additionally, Petitioner provides no reason as to why he believes the above jury instructions conflict, which warrants summary dismissal of such claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner argues that the word "negate" was not explained to the jury, his claim also fails. Negate is not a legal definition that must be defined for the jury.

Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Accordingly, Petitioner has not and cannot demonstrate good cause and prejudice to overcome the procedural default.

Third, Petitioner also challenges the language of Jury Instruction No. 30, which he claims the Nevada Supreme Court has stated cannot be used. Petition at 11.

Jury Instruction No. 30 stated,

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense. 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.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

In addition to his claim being suitable for summary denial, this instruction was an accurate statement of the law complying with NRS 175.211, which mandates the language of this instruction. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fourth, Petitioner asserts that Jury Instruction No. 37 improperly instructed the jury that the penalty phase need not be considered in deliberation, but then "biasly express[ed] first degree murder penalty." Petition at 11. He claims that the first degree murder penalty instruction should be separate. Id.

Jury Instruction No. 37 stated,

> In arriving at a verdict in this case as to whether the Defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Juris verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his claim is also denied because this instruction was an accurate statement of law. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury not to involve the question of guilt with a consideration of the penalty is proper.").

5. Ground Five: Settling of jury instructions

Petitioner complains that the process used to settle jury instructions at trial precluded his ability to understand the instructions and present objections. Petition at 12. Specifically, he argues that it was improper for the Court to provide the number and the title rather than repeating the instruction word for word. Id.

As a preliminary matter, this is a substantive claim that is waived due to the 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, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to demonstrate good cause because all of the facts and law necessary for such claim were available when he filed his direct appeal.

Petitioner also cannot demonstrate prejudice to ignore his omission because his claim is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make objections to the jury instructions, and, thus, did not have the right to represent himself to object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an accused is not entitled to participate with counsel in the presentation of the defense"); see also, Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871

(10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010); People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986). If Petitioner wanted to represent himself, he should have made a request of the Court to canvass pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly, Petitioner's claim is denied.

Notwithstanding these claims being waived, dismissed, and meritless, any error in these instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default since the jury was properly instructed on the burden of proof and the weighing of witness credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury was also presented with evidence that Petitioner was not justified in doing so. The State introduced credible and sufficient evidence of Petitioner's actions after the crime, which demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call 911—even though he later told police that Davis said that he would shoot up the house after Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by jumping two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00 PM and 2:00 AM the night of the crime, when he turned himself in to police. Therefore, Petitioner's claims are denied.

6. Ground Six: Trial counsel was not ineffective

Under Ground Six, Petitioner argues that trial counsel was ineffective for failing to: (1) investigate Petitioner's case and prepare for trial; (2) establish Petitioner's theory of defense

through the jury instructions; (3) object to Kyriell Davis' testimony; (4) protect Petitioner's post arrest silence; and (5) impeach Kyriell Davis. Petition at 13-17. As will be discussed below, each of these claims are denied.

a. *Failure to investigate and prepare for trial*

Petitioner argues that counsel was ineffective regarding the investigation of his case for several reasons. Petition at 13-14.

First, Petitioner argues that counsel did nothing, but review the State's open file to prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify for the defense was because he told them to come to court. Id. This claim fails under Molina, 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better investigation would have shown.

Second, he argues that counsel failed to call a pathologist as an expert to discuss the positioning of the victim at the time of his death and other details regarding the stabbing, which he argues would have prevented his conviction. Petition at 13-14. However, this claim also fails under Molina as Petitioner does not and cannot demonstrate that such testimony would have changed the outcome of his trial. Moreover, which witnesses to call is a strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

Third, he argues that counsel failed to canvass his neighbors to determine what they knew. Petition at 14. This claim also fails under Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, Petitioner does not even attempt to indicate what the neighbors' testimony would have been, let alone whether it would have aided in his defense.

Fourth, he claims counsel did not interview Sandi Cash, Defendant's sister. Id. he claims that because counsel failed to obtain Sandi's information, there was no testimony elicited regarding Devine not visiting Petitioner's place of residence, the threats Devine made toward the home and Petitioner, and prior acts related to the case. Id. Even if such testimony had been elicited, Petitioner has also failed to demonstrate, as with his other claims, how the testimony would have changed the outcome of his trial. Indeed, assuming Sandi did testify to such information, that testimony would not have changed the fact that the jury was presented

with evidence demonstrating Petitioner did not act in self-defense, including "that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2.

In sum, Petitioner cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claims are denied.

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

Petitioner complains that counsel failed to present Petitioner's theory of defense and offer jury instructions consistent with his self-defense theory. Petition at 15. Additionally, he argues that counsel was ineffective for failing to establish foundational evidence regarding why Petitioner was carrying a work knife on his person. Id.

Petitioner's complaint that counsel was ineffective because there was no self-defense jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of self-defense. Those jury instructions properly provided the jury with the law to determine whether Petitioner was justified under a theory of self-defense for protecting his daughter, Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to demonstrate what additional instruction he believes should have been given to demonstrate prejudice.

Petitioner's claim that counsel failed to establish foundational evidence regarding why Petitioner carried a work knife is also belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During counsel's opening statement, counsel provided context as to why Petitioner carried a knife:

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> Now, this man sitting here, Thomas Cash, he's 52 years old. He works at Sears. *He's an HVAC technician.* He carries a tool belt around his waist. In addition to the tool belt, *he keeps a knife flipped on the inside of his pocket.* That knife really isn't for working. It's for when boxes come in that he has to open. He slices them open.

Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 167-68 (emphasis added). Counsel reiterated this foundation again during his closing argument:

> He went out as quickly as he could because he believed Brittney was in imminent danger. He just so happened, as I said in opening argument, *the man is an HVAC technician.* His daughter testified he fixes machines, fixes the vending machine at McDonald's. He works at Sears. *He always has this little knife clipped right here.*

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 75 (emphasis added). Accordingly, counsel could not have been ineffective as the jury was provided foundation regarding Petitioner carrying a knife. For the same reason, Petitioner cannot and does not demonstrate prejudice. Therefore, Petitioner's claim is denied.

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

Petitioner argues that counsel was ineffective for failing to object to a portion of Davis' testimony during trial wherein he discussed the altercation he had with Petitioner that ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature of Davis' testimony and when the same information was repeated. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

Petitioner's claim is denied. As a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the subject matter of Davis' testimony, counsel could have concluded that it would have damaged his credibility with the jury if he made a series of pointless objections that could be perceived as

disrespectful to the witness or as achieving nothing more than delaying the process. Also, if the information was going to be presented to the jury regardless, counsel did not need to offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if the State had asked more questions to break up Davis' testimony, the State would have elicited the information as it was pertinent eyewitness evidence of someone who watched Petitioner commit the crimes charged in this case. Accordingly, Petitioner cannot demonstrate he was prejudiced.

Additionally, Petitioner mistakenly claims that counsel should have objected when Davis' testimony was repeated. Any information that was repeated was for the purposes of clarification and asking further questions about what Davis' previous testimony. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of reasonableness, let alone prejudice so his claim is denied. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64.

d. *Failure to protect post-arrest silence*

Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16. Petitioner claims that counsel should have requested that the rebuttal witness first testify outside the presence of the jury to determine the prejudicial nature of his testimony. Petition at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

e. *Failure to impeach Kyriell Davis' testimony*

Petitioner complains that counsel was ineffective for failing to impeach Davis, who he claims was the sole witness for the state that saw Petitioner with a knife and stab the victim. Petition at 16-17. Specifically, he argues that Davis committed perjury when he testified that Brittney Turner left the scene once the altercation occurred and Petitioner had to call her to come and get the baby. Id. He claims that he could have impeached Davis' testimony through witnesses: Brittney Turner, Tamisha Kinchron, Antoinette White, and Isidra Flores. Id. Petitioner's claim fails.

As a preliminary matter, Petitioner has not provided any evidence that Davis did in fact commit perjury when he testified regarding Turner leaving the scene. Even if he had provided the Court with such information, his claim would still fail as Turner's whereabouts once the altercation began would not have changed the outcome of his trial. The defense's theory was that Petitioner was acting in self-defense when he stabbed Devine as he felt like he was facing a two-on-one fight with Devine and Davis. In other words, whether Turner was inside of the home or outside of the home was not an essential factor in the jury determining if Petitioner, at the moment he stabbed Devine, was acting in self-defense. Accordingly, impeaching Davis was not necessary to proving Petitioner was acting in self-defense. Notably, Petitioner even appears to concede this point when he states, "[t]hough the impeach did not strick at the stab incident, such perjury would have gone to insight to the jury that Davis committed perjury." Petition at 17. Indeed, Petitioner cannot demonstrate prejudice because that sole fact would not have changed the outcome of the trial. Therefore, his claim is denied.

7. Ground Seven: Cumulative error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, as argued in Section I.A.4 *supra*, the issue of guilt in this case was not close.

Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there is no error to cumulate. Regardless, any errors that occurred at trial would have been minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Third, and finally, Petitioner was convicted of a grave crime. However, because the evidence was more than sufficient and there was no error, it does not weigh heavily in this Court's analysis. Therefore, Petitioner's claim is denied.

8. Ground Eight: Appellate counsel was not ineffective for failing to consult prior to filing Petitioner's direct appeal

Petitioner argues that counsel was ineffective for failing to consult with him before drafting Petitioner's direct appeal and filed it despite Petitioner's request to hold off so he could research counsel's claims as well as add claims to his appeal, including the claims in the instant Petition. Petition at 17-18. However, his claim fails for several reasons.

First, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the reasons discussed throughout this Petition, Petitioner's claims would not have been effective on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims are denied.

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9. Ground Nine: Petitioner's right to a speedy trial was not violated

Petitioner argues that the Court violated his right to a speedy trial. Petition at 18. Specifically, he claims that the Court erroneously continued his trial against the parties' consent. Id. Not only is this claim a bare and naked assertion suitable only for summary dismissal, but also it is waived as a substantive claim that should have been raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot attempt to demonstrate good cause as these claims were available for direct appeal and he cannot demonstrate prejudice because his claim is meritless.

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992). Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414

U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14, 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230, 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

Moreover, the reason for the delay was that defense counsel had to attend a federal sentencing outside of the jurisdiction which could not be reset and the State had another trial on that date. Accordingly, Petitioner's argument that his trial was continued over his objection is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Therefore, Petitioner's claim is denied.

B. Petitioner's Claims in his Memorandum Should be Denied

1. Ground One: Counsel was not ineffective for failing to investigate

a. Failure to consult and communicate

Petitioner argues that counsel was ineffective for only consulting with Petitioner only four times prior to trial, failing to have the defense's investigator meet with Petitioner, failing to interview and call witnesses that could have helped the defense, and failing to make appropriate objections. Memorandum at 9-13.

Petitioner's claims are denied as they amount to nothing more substantive than naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his

representation. See id. Moreover, Petitioner's failure to investigate allegations fail since Petitioner does not demonstrate what a better investigation would have uncovered. Molina, 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers nothing more than a naked assertion that further proves summary dismissal is warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

b. *Failure to investigate and call witnesses*

Petitioner complains that counsel did not speak to witnesses he wanted to testify at trial and failed to call them as witnesses. Memorandum at 14-19. In particular, Petitioner claims that Sandi Cash Earl and Angel Turner should have been called so they could have provided favorable testimony. Memorandum at 14. Not only are Petitioner's claims naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225, but also these claims fail under Molina, 120 Nev. at 192, 87 P.3d at 538, for Petitioner failing to demonstrate what a better investigation would have discovered.

Petitioner's argument that counsel failed to call Angel Turner as a witness is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Angel testified for the defense on the sixth day of Petitioner's trial. Additionally, Petitioner attached a statement from Angel which merely stated that counsel did not interview her prior to testifying. However, Petitioner's claim still fails because he did not indicate how her testimony would have differed had counsel interviewed her, let alone whether that unknown testimony would have led to a better outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, in addition to her trial testimony, Angel Turner provided a recorded statement to the police and testified at the preliminary hearing, so it is not clear what additional interviewing would have accomplished.

Petitioner also attached a statement from Sandi Cash who provided what her testimony would have been had she been called to testify at Petitioner's trial. Memorandum, Exhibit 1, at 1. The crux of such statement was that when Brittney Turner was arguing with Davis outside, Sandi heard him tell Turner to get whoever she wanted to fight him, including Petitioner. Id. Sandi explained that she did not tell Petitioner about what was said or express her concerns. Id. However, Sandi's statement is referring to a completely separate incident wherein Davis

was dropping off his child, rather than picking his child up. Regardless, Sandi's testimony about this event would not have been admissible at trial because she claims she never told Petitioner about what was said. Accordingly, Petitioner would not have known about the specific incident for it to have had affected his state of mind regarding self-defense. Moreover, such testimony would not have made a difference at Petitioner's trial. There was other evidence presented that Petitioner did not act in self-defense, including as the Nevada Supreme Court pointed out when it affirmed Petitioner's sentence: "[t]here was evidence and testimony that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2. Accordingly, Petitioner cannot demonstrate he was prejudiced by not having Sandi's alleged testimony.

In sum, Petitioner's allegations of prejudice are long quotations to legal authority but short on actual harm to his case and thus he cannot establish prejudice under Strickland because his claims are governed by Hargrove and Molina. Therefore, Petitioner's claim is denied.

c. *Failure to meet with Petitioner*

Petitioner complains that appellate counsel was ineffective for only having met with Petitioner once. Memorandum at 20-22. Additionally, he claims that appellate counsel did a poor job in filing his direct appeal. Id. However, Petitioner's claims are denied for several reasons.

First, as with trial counsel, Petitioner is not entitled to a particular relationship with counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate counsel failed to do a "good job" is a naked assertion that is denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim raising insufficiency of the evidence, he has not explained how such complaint is relevant or how it would have made a difference on appeal. Notably, appellate counsel is more effective when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.

3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

2. Ground Two: Appellate counsel was not ineffective

Petitioner appears to complain that appellate counsel failed to file a direct appeal on his behalf. Memorandum at 23-26. However, no matter how this claim is interpreted, it fails.

Should Petitioner mean to argue that appellate counsel was ineffective for failing to file a direct appeal because counsel failed to consult with Petitioner, the State incorporates its argument from Section I.B.1.c. In the event Petitioner intended to argue that counsel failed to file a direct appeal on his behalf, his claim is belied by the record and suitable only for summary denial because appellate counsel did in fact file a direct appeal for Petitioner. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

To the extent Petitioner is complaining that counsel did not consult and include his issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claim is denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right

to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

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

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider whether, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

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

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se post-conviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's

decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are severe as he is serving a sentence of life without the possibility of parole, that fact alone does not require the appointment of counsel. Indeed, none of the issues Petitioner raises are particularly difficult as his claims are either waived as substantive claims, fail to provide good cause because they are based on information Petitioner had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Moreover, unlike the petitioner in Renteria-Novoa who faced difficulties with understanding the English language, Petitioner does not claim he cannot understand English or cannot comprehend the instant proceedings. It is clear that Petitioner is able to comprehend the instant proceedings based upon his filing of the instant Petition.

Finally, despite Petitioner's argument, counsel is not necessary to proceed with discovery in this case as no additional discovery is necessary. Therefore, Petitioner's Motion is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain

issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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. Therefore, Petitioner's request is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and associated pleadings shall be, and are, hereby denied.

Dated this 4th day of November, 2020

DATED this _____ day of October, 2020.

DISTRICT JUDGE

EC

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

21A 498 D2C0 0B90
Cristina D. Silva
District Court Judge

BY /s/JONATHAN VANBOSKERCK
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 27th day of October, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

THOMAS CASH, BAC #1203562
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

BY _____
CELINA LOPEZ
Secretary for the District Attorney's Office

JVB/bg/Appeals

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Cash, Plaintiff(s)	CASE NO: A-20-818971-W
vs.	DEPT. NO. Department 9
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

FILED
NOV - 9 2020
CLERK OF COURT

27

District Court
Clark County, Nevada

Thomas Cash
Appellant

Case No: A-20-818971-W
Dept. No: IX

v

William Gitter
Respondent

Motion to extend time for Petitioners Response to Respondents Answer for (Post-Conviction) Writ of Habeas Corpus

Comes Now, Thomas Cash, and moves this Honorable Court to extend time for Appellant to Respond/Reply to Respondent's Answer of opposition to Appellant's Post-Conviction Writ of Habeas Corpus.

This motion base upon all papers, pleandings and documents on file. Factual Statements are set forth in the Points and Authorities contain therein.

Dated this 29th day of October 2020.

POINTS AND AUTHORITIES

It is respectfully requested of this Court to grant this motion to extend time for Appellant Thomas Cash #1203562 to respond answer to State

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CLERK OF THE COURT

opposition for (Post-Conviction) Writ of Habeas Corpus for the reasons below:

1. Ely State Prison has been on lock-down going on for over (2) two months, due to a stabbing.
2. Mr. Cash has not have access to the Law Library since August of 2020.
3. Ely State Prison Law Library computers has been down including the Lexus Nexus system.
4. There has been no Law Library assistance until the week of October 19th to the 23rd.
5. Ely State Prison employee's in the Law Library has had a case load of requests backed up since July 2020, Appellant unable to research case laws.

II ARGUMENT

Courts must apply considerable leeway when assessing whether a pro se has shown "good cause," "especially when that litigant is incarcerated. McGuckin v. Smith, 974 F.2d 1050, 1058 (9th Cir 1992), overruled on other grounds by WMX Techs., Inc v. Miller, 104 F.3d 1133 (9th Cir. 1997). Appellant is on locked down 23 hours a day, does not have access to the Law Library, fault not of his own, due to Ely State Prison safety and security measures. Wherefore, the Appellant motion to extend time to reply an answer to State's opposition

For (Post-Conviction) Writ of Habeas Corpus. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjuy that the foregoing is true and correct. Signed this 29th day of October 2020

Thomas Cash

I hereby certify that a copy of the foregoing document Motion to Extend Time was mailed to

Steven D. Grierson
Clerk of the Court
200 Lewis Ave. 3rd Floor
Las Vegas, NV. 89155-1160

Thomas Cash
Pro se

Thomas Cash #1203562
P.O. Box 1989
Ely, NV. 89301

LAS VEGAS NV 890
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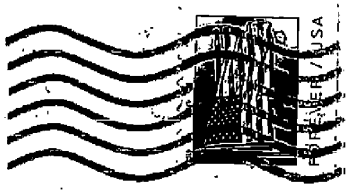

LEGAL MAIL

Steven D. Grierson
Clerk of the Court
200 Lewis Ave. 3rd Floor
Las Vegas, NV. 89155-1160

89101-630000

ELY STATE PRISON
NOV 01 2020

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Steven D. Grierson
CLERK OF THE COURT

NEFF

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH,

Petitioner,

vs.

WILLIAM GITTERE,

Respondent,

Case No: A-20-818971-W

Dept No: IX

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

PLEASE TAKE NOTICE that on November 4, 2020, the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within thirty-three (33) days after the date this notice is mailed to you. This notice was mailed on November 17, 2020.

STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

CERTIFICATE OF E-SERVICE / MAILING

I hereby certify that on this 17 day of November 2020, I served a copy of this Notice of Entry on the following:

☑ By e-mail:
Clark County District Attorney's Office
Attorney General's Office – Appellate Division-

☑ The United States mail addressed as follows:
Thomas Cash # 1203562
P.O. Box 1989
Ely, NV 89301

/s/ Amanda Hampton
Amanda Hampton, Deputy Clerk

FCL
STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #06528
200 Lewis Avenue
Las Vegas, Nevada 89155-2212
(702) 671-2500
Attorney for Respondent

DISTRICT COURT
CLARK COUNTY, NEVADA

THOMAS CASH, #7053124

Petitioner,

-vs-

~~THE STATE OF NEVADA~~,
WILLIAM GITTERE,

Respondent.

CASE NO: C-18-329699-1
A-20-818971-W

DEPT NO: IX

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

DATE OF HEARING: OCTOBER 7, 2020
TIME OF HEARING: 1:45 PM

THIS CAUSE having come on for hearing before the Honorable ~~JUDGE NAME~~ Cristina D. Silva, District Judge, on the 7th day of October, 2020, the Petitioner in proper person, the Respondent being represented by STEVEN B. WOLFSON, Clark County District Attorney, by and through JOHN TORRE, Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT, CONCLUSIONS OF LAW

PROCEDURAL HISTORY

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

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

On September 19, 2018, Petitioner filed a Notice of Appeal. On September 12, 2019, the Nevada Supreme Court affirmed Petitioner's Judgment of Conviction, but remanded for the Court to correct the habitual criminal statute citation. On October 31, 2019, the Court filed an Amended Judgment of Conviction replacing that citation from NRS 207.012 to NRS 207.010(1)(b).

On August 3, 2020, Petitioner filed the instant Petition for Writ of Habeas Corpus (Post-Conviction) (hereinafter "Petition"), a Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus (hereinafter "Memorandum"), and an Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing (hereinafter "Motion"). The State filed its Response on September 18, 2020. On October 7, 2020, the Court denied these pleadings finding as follows.

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FACTUAL BACKGROUND

On December 11, 2017, a verbal argument led to Petitioner, a fifty-two-year-old man, stabbing and killing Ezekiel Devine, thirty-one years his junior, in the middle of the street. Recorder's Transcript of Proceedings, Jury Trial Day 5, at 229.

The events of this day started when Kyriell Davis, twenty-eight years Petitioner's junior, and his girlfriend Brittney had a heated verbal argument while exchanging their children. Jury Trial Day 5 at 124-25, 132-33, 229. Eventually, Kyriell pushed Brittney away from him with his hands. Jury Trial Day 5 at 133-34. Upon hearing this verbal argument, Petitioner came down to intervene. Jury Trial Day 5 at 135-36. Petitioner asked whether Kyriell hit Brittney—Brittney answered no and told Petitioner to mind his own business. Jury Trial Day 5 at 135.

Thereafter, Petitioner and Kyriell tussled. Petitioner started this fight with Kyriell: multiple witnesses observed Petitioner punch towards Kyriell when Kyriell had his back turned to Petitioner, without provocation by Kyriell. Jury Trial Day 5 at 135-38, 156-57, 213. Petitioner later admitted that he threw the first punch. Jury Trial Day 7 at 9. Ezekiel, who had been sitting in the car having a video chat and who only came to help with the child exchange, was alerted to the fight and attempted to break it up. Jury Trial Day 5 at 124-25, 131, 141, 183. At about that time, two cars drove up the road and separated Ezekiel and Petitioner from Kyriell. Jury Trial Day 5 at 142. Kyriell saw a flash in Petitioner's hand as the cars came by and tried to warn Ezekiel. Jury Trial Day 5 at 142. While Petitioner and Kyriell were separated, Petitioner stabbed Ezekiel straight through the heart. Jury Trial Day 3 at 192; Jury Trial Day 5 at 142. Ezekiel collapsed in the middle of the street and quickly died. Jury Trial Day 3 at 196-97, 224.

Kyriell testified about his recollection of the fight and the events leading up to it. Kyriell remembered the verbal argument between Britany and himself starting when Brittany began ranting and calling Kyriell names. Jury Trial Day 5 at 135. He then observed Brittany yelling at Petitioner. Jury Trial Day 5 at 136. Petitioner took a swing at Kyriell as he attempted to put his baby in his car seat, when his back was towards Petitioner. Jury Trial Day 5 at 136, 138.

After Petitioner tried to punch Kyriell, Kyriell and Petitioner interlocked and Petitioner tried to slam him to the ground. Jury Trial Day 5 at 137. Kyriell never swung his fist at Petitioner. Jury Trial Day 5 at 138-39. Petitioner and Kyriell wrestled for a while until they ended up in the street and Ezekiel intervened to break up the fight by pushing his hand through the middle of the two. Jury Trial Day 5 at 139-141. Kyriell saw a flash from Petitioner's hand as a car came drove in between the group, leaving Petitioner and Ezekiel on one side of the street and Kyriell on the other side of the street—far apart. Jury Trial Day 5 at 141-43. Soon after, Ezekiel fell to the ground after being stabbed by Petitioner. See Jury Trial Day 5 at 142.

Petitioner's actions after the victim died demonstrated his consciousness of guilt. Petitioner did not call 911—even though he later told police that Kyriell said that he would shoot up the house after Kyriell and Brittany verbally fought. Jury Trial Day 5 at 247; Jury Trial Day 7 at 15. Despite these alleged threats and after he killed Ezekiel, Petitioner locked the door, left his home, and ran from the scene. Jury Trial Day 5 at 146. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home. Jury Trial Day 5 at 68-69, 75, 200. Petitioner escaped the scene by climbing over two walls and jumping down from a high point of one of the walls. Jury Trial Day 6 at 21-24. Petitioner also destroyed and hid the murder weapon, a knife. Jury Trial Day 7 at 11. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00pm and 2:00am the night of the crime, when he finally turned himself in to police. Jury Trial Day 6 at 30; Jury Trial Day 7 at 12.

Petitioner initially denied killing the victim, but then later argued that he killed the victim in self-defense, despite multiple witnesses seeing Petitioner throw the first punch. Jury Trial Day 5 135-38, 156-57, 213; Jury Trial Day 6 at 83-84, 155. Brittney told police that Petitioner, Brittney's stepdad, threw the first punch. Jury Trial Day 5 at 213. Brittney also stated that she never felt in danger and that Kyriell did not hit her. Jury Trial Day 5 at 222, 225. Moreover, multiple witnesses stated, including Petitioner, that no one but Petitioner had a weapon. Jury Trial Day 5 at 167-68; Jury Trial Day 6 at 137-38; see Jury Trial Day 7 at 9.

Petitioner told police that he stabbed Ezekiel because he did not want to get hit again. Jury Trial Day 7 at 10.

Brittany also testified about her recollection of the fight. After she argued with Kyriell, Petitioner came out of the house and tried to punch Kyriell. Jury Trial Day 5 at 208. After Petitioner started this fight with Kyriell, both Petitioner and Kyriell locked together in a bear hug and after Petitioner's first punch, no one threw punches. Jury Trial Day 5 at 208-09. Both men were "equally locked up." Jury Trial Day 5 at 209. Brittany also testified that she held Kyriell after Ezekiel attempted to break up the fight. Jury Trial Day 5 at 212-13. Brittany told police that she did not feel scared or threatened during her verbal argument with Kyriell. Jury Trial Day 5 at 222. She also said that during the argument, Kyriell did not hit her or slam her into a car. Jury Trial Day 5 at 225.

Through their actions, Petitioner's family telegraphed that Petitioner did not act in self-defense. Petitioner's family did not call the police; instead, they went back into the house and shut the door. Jury Trial Day 6 at 137, 140. Furthermore, Petitioner's family did not bring out towels or water or ask if the victim needed any help. Jury Trial Day 5 at 171; Jury Trial Day 6 at 137. Ultimately, Petitioner's family did not come out of the house until police made them, through use of a bullhorn, about forty minutes later. Jury Trial Day 5 at 66-67, 171; Jury Trial Day 6 at 137. After Petitioner left the scene, Petitioner spoke with family members while police were outside his home. Jury Trial Day 6 at 217. Petitioner told his family that he did not kill Ezekiel and did not even touch him—and his family informed him that Ezekiel was dead. Jury Trial Day 6 at 217.

ANALYSIS

I. PETITIONER IS NOT ENTITLED TO POST-CONVICTION RELIEF

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).

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).

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.

Appellate counsel is not required to raise every issue that Defendant felt was pertinent to the case. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). The federal courts have held that in order to claim ineffective assistance of appellate counsel, the defendant must satisfy the two-prong test of deficient performance and prejudice set forth by Strickland. Williams v. Collins, 16 F.3d 626, 635 (5th Cir. 1994); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Heath v. Jones, 941 F.2d 1126, 1130 (11th Cir. 1991).

There is a strong presumption that 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). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268. Finally, in order to prove that appellate counsel's alleged error was prejudicial, a defendant must show that the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983). However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id. In reaching this conclusion the United States Supreme Court has recognized the "importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Id. at 751-752, 103 S. Ct. at 3313. 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. The Court also held that, "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. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989).

A. Petitioner's Claims in his Post-Conviction Writ of Habeas Corpus Are Denied

1. Ground One: The State did not use Petitioner's post-arrest silence against him

Petitioner argues that the State impermissibly elicited testimony about Petitioner's post-arrest silence. Petition at 7. Additionally, Petitioner complains that the State called Detective Matthew Gillis as a rebuttal witness without "being required to state who the witness was to rebuttal, what the rebuttal was to attack, and no hearing was set to establish limitations." Id.

As a preliminary matter, these substantive claims are waived due to Petitioner's failure to raise them 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). Additionally, Petitioner cannot and does not demonstrate good cause because all of the facts and law related to these claims were available at the time Petitioner filed his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because the underlying claims are meritless.

Miranda v. Arizona, 384 U.S. 436, 444-45, 86 S.Ct. 1602, 1612 (1966), established requirements to assure protection of the Fifth Amendment right against self-incrimination under "inherently coercive" circumstances. Pursuant to Miranda, a suspect may not be subjected to an interrogation in official custody unless that person has previously been advised of, and has knowingly and intelligently waived, the following: *the right to silence*, the right to

the presence of an attorney, and the right to appointed counsel if that person is indigent. Id. at 444, 86 S.Ct. at 1612 (emphasis added).

Additionally, "[i]t is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by Miranda v. Arizona ..." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (citing McGee v. State, 102 Nev. 458, 461, 725 P.2d 1215, 1217 (1986)). The Court expanded this doctrine in Coleman v. State, 111 Nev. 657, 664, 895 P.2d 653, 657 (1995), and concluded that the "use of a defendant's post-arrest silence for impeachment purposes may constitute prosecutorial misconduct." However, this Court has also stated that comments made about the defendant's silence during cross-examination are not prohibited if the questions "merely inquire[] into prior inconsistent statements." Gaxiola v. State, 121 Nev. 638, 655, 119 P.3d 1225, 1237 (2005). Further, reversal is not required if the references to "the defendant's post-arrest silence are harmless beyond a reasonable doubt." Id. at 264, 913 P.2d at 1267 (citing Murray v. State, 105 Nev. 579, 584, 781 P.2d 288, 290 (1989)). Indeed, this Court has concluded that

> [c]omments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (internal citations omitted).

In Coleman, 111 Nev. at 661, 895 P.2d at 656, this Court considered whether the State's questions during its cross-examination of the defendant amounted to prosecutorial misconduct. Specifically, the Court evaluated whether the State's comments about the defendant's silence for impeachment purposes resulted in a due process violation. Id. The Court determined that the State's comment on the defendant's silence was harmless error due to the overwhelming evidence of the defendant's guilt. Id. at 664, 895 P.2d at 653. The Court explained that the case was not based solely on the defendant's testimony and the victim's, but that there was both physical and testimonial evidence that corroborated the victim's testimony. Id. at 664,

895 P.2d at 657-58. Additionally, it concluded the frequency and intensity of the State's comments did not warrant reversal. Id. at 664, 895 P.2d at 658. The Court also concluded that the State's comment during closing argument that, "[the defendant] had nine months to think about what his theory would be," was not an attempt to draw attention to the defendant's silence and was merely a passing reference followed by the strong evidence that corroborated the victim's explanation of the events. Id. (internal quotations omitted). Thus, the Court affirmed the defendant's conviction. Id.

In Morris, 112 Nev. at 263, 913 P.2d at 1267, this Court evaluated whether comments made by the State on the defendant's post-arrest silence during its case in chief resulted in prosecutorial misconduct. The Court concluded that by making such comments in its case in chief, the defendant is prejudiced because he would feel pressure to testify in order to explain his silence resulting in an infringement on his or right to prevent self-incrimination. Id. Ultimately, the Court determined that the State's comments were not made in passing reference, but instead were "deliberate and drew inferences of guilt." Id. at 265, 913 P.2d at 1268. Further, there was not overwhelming evidence of guilt. Id. Indeed, the Court found that the defendant's denial of the crime and the other witness's presenting conflicting stories as well as admitting to not getting a good look at the shooter cast enough doubt that the evidence of the defendant's guilt was not overwhelming. Id.

Although Petitioner offers a span of pages of where he believes the State commented on his post-arrest silence, he does not indicate the exact comments for which he takes issue. Thus, it is a naked assertion so devoid of factual mooring that it is nearly impossible for the State to respond. Regardless, there are two instances in which Petitioner might be taking issue. First, while questioning Detective Gillis, the State asked him about Petitioner's voluntary statement. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Detective Gillis testified that Petitioner did not share where he was for the eight or nine hours after he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Additionally, during the State's closing argument, the State commented on Petitioner's actions after the altercation. The State utilized the testimony

elicited at trial and argued that Petitioner did not call 911 after the altercation, he did not tell police where he was "between 7 o'clock and 2 o'clock in the morning," and "he didn't even tell the detectives where he was that whole time or why he didn't come home or an opportunity to come home." Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 84-85, 90. Beyond that, the State did not comment on any post-arrest silence Petitioner may have had.

As a threshold matter, it does not appear that Petitioner invoked his right to remain silent on this issue. It appears that Petitioner just omitted that information to the officers. Moreover, just as in Coleman, the State's comments were merely a passing reference and did not occur with high frequency. Additionally, the case was not based solely on the statements Petitioner made, but there was both physical and testimonial evidence that corroborated the State's theory of the case, including Davis' and Brittney Turner's trial testimony about what they witnessed. Additionally, there was overwhelming evidence of guilt in this case, including Petitioner's very own confession that he stabbed Devine. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 10. Even absent the jury being apprised that he did not tell police where he was after the altercation, the jury was presented with his other behaviors that established he did not act in self-defense. For example, after Petitioner stabbed Devine, he fled from the scene by jumping two walls, eventually disposed of the murder weapon, called the house when the police arrived and found out that Devine was deceased and stayed away from the home until he reported himself, after Petitioner's murder the police had to force all of the individuals in Petitioner's residence out of the home because no one would volunteer information. Recorder's Transcript of Proceedings: Jury Trial Day 2, filed December 14, 2018, at 171; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 217; Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 21-23; Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 11. Notwithstanding the overwhelming evidence of guilt in this case, the jury was also provided Jury Instruction No. 32 which stated in relevant part that "the statements, arguments and opinions of counsel are not evidence in the case." Instructions to

the Jury, filed June 28, 2018. Accordingly, any error would have been harmless as the jury was instructed to not consider statements made in the State's closing argument as evidence.

Additionally, Petitioner's claim that Detective Gillis improperly testified as a rebuttal witness without notice is meritless because it is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225 (stating that "bare" and "naked" allegations are not sufficient, nor are those belied and repelled by the record). Indeed, the State included Detective Gills in its Notice of Witnesses And/Or Expert Witness filed on April 12, 2018, prior to trial.

Therefore, Petitioner's claims are denied.

2. Ground Two: Petitioner's sentence is not illegal

Petitioner argues that the Court improperly sentenced him under the habitual criminal statute when rendering his sentence. Specifically, he claims that the Court erred by considering his felony conviction in this case as his third felony under the habitual criminal statute. However, Petitioner's claim fails for several reasons.

First, Petitioner's claim is waived because it is a substantive claim that should have been raised on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Second, Petitioner does not and cannot demonstrate good cause because all of the facts and law underlying his claim were available for his direct appeal. Similarly, Petitioner cannot demonstrate prejudice to ignore his procedural default because his claim is meritless and belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. NRS 207.010 states:

> [A] person convicted in this state of:
>
> (b) *Any felony, who has previously been three times convicted, whether in this state or elsewhere*, of any crime which under the laws of the situs of the crime or of this state would amount to a felony, or who has previously been five times convicted, whether in this state or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, *is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:*

> *(1) For life without the possibility of parole;*
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or
> (3) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

Complying with this statute, Petitioner had three (3) felony convictions as an adult that qualified him for habitual treatment pursuant to this statute: (1) a 1989 possession/purchase of cocaine base for sale; (2) a 1991 second-degree robbery with use of a firearm; and (3) two counts of second-degree robbery with use of a firearm from 1997. The State introduced, and the Court admitted, certified copies of the prior Judgments of Convictions for these crimes along with a sentencing memorandum containing such documents. Accordingly, Petitioner's claim that the Court improperly relied on the instant conviction as the conviction qualifying him for habitual criminal treatment is belied by the record.

Notwithstanding this claim's lack of merit, this issue was already litigated on direct appeal and the Nevada Supreme Court concluded that Petitioner was appropriately adjudicated a habitual criminal. Order of Affirmance, filed September 12, 2019, at 3-4. Thus, Petitioner's claim is barred under the law of case doctrine which states that issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v. State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Indeed, this Court cannot overrule the Nevada Supreme Court or Court of Appeals. NEV. CONST. Art. VI § 6. Therefore, Petitioner's claim is denied.

3. Ground Three: Prosecutorial misconduct

Petitioner argues that the State engaged in several instances of prosecutorial misconduct during trial. Petition at 9-10. However, his claim is denied.

As a threshold matter, each of Petitioner's claims are waived due to Petitioner's failure to present them on direct appeal. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner does not and cannot

demonstrate good cause because all of the facts underlying this claim were available when he filed his direct appeal. Petitioner also cannot demonstrate prejudice to ignore his procedural default since his underlying claims are meritless.

When resolving claims of prosecutorial misconduct, the Nevada Supreme Court undertakes a two-step analysis: determining whether the comments were improper; and deciding whether the comments were sufficient to deny the defendant a fair trial. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). 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, 165, 336 P.3d 939, 950–51 (2014). Normally, the defendant must show that an error was prejudicial in order to establish that it affected substantial rights. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

With respect to the second step, the Court will not reverse if the misconduct was harmless error. Valdez, 124 Nev. at 1188, 196 P.3d at 476. The proper standard of harmless-error review depends on whether the prosecutorial misconduct is of a constitutional dimension. Id. at 1188–89, 196 P.3d at 476. 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, 196 P.3d 476–77 (quoting Darden v. Wainright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). When the misconduct is of constitutional dimension, this Court will reverse unless the State demonstrates that the error did not contribute to the verdict. Id. 124 Nev. at 1189, 196 P.3d 476–77. When the misconduct is not of constitutional dimension, this Court "will reverse only if the error substantially affects the jury's verdict." Id.

First, Petitioner complains that the State expressed its personal opinion that Davis punched Petitioner in the nose to get Devine away, which in turn diluted Petitioner's theory of self-defense. Petition at 9. However, there is no indication from the record that the State argued Petitioner was punched for such purpose. Indeed, the page span Petitioner provided does not reflect such argument. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 38-39. Regardless, Davis testified that after Petitioner stabbed Devine, he punched

Petitioner in the face. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 180. Angel Turner testified that Davis punched Petitioner in the nose. Reporter's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 133.

Second, Petitioner claims that the State improperly stated that witness, Flores, could see the altercation, even though Flores testified that she could see the incident when her front door was open and the altercation was nearly over. Petition at 9. Petitioner is mistaken. The State was not summarizing Flores' testimony during the portion of the State's closing argument Petitioner cites (Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 43). Instead, the State was summarizing Tamisha Kinchron's testimony. Id. at 42-43. Kinchron testified that while it was hard to see because it was dark outside, she could see the majority of what was going on outside during the altercation. Recorder's Transcript of Proceedings: Jury Trial Day 6, filed December 14, 2018, at 186-87. Accordingly, the State made a logical inference from her testimony that she could see what happened that night.

Third, Petitioner argues that the State's argument, that Flores heard the victims impact and ran outside, was a fabrication of Flores' testimony. Id. In its full context, the State argued as follows:

> when [Flores] looks out and she sees Kyriell, and she thinks Kyriell's attempting to get Brittney to go somewhere, that's at the point when Kyriell is going to Zek and to the Defendant and Brittney is trying to pull him back and hold him back. And how do we know that that's true? Because the very next thing she hears is an impact. And she runs outside and Zek has just fallen.

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 46. The State did not fabricate Flores' testimony as Flores testified that after she heard "a strong impact or noise" that is when she decided to go outside of her home. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 113.

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Fourth, Petitioner argues that the State improperly claimed that Flores provided testimony that she saw Petitioner throw the first punch in the altercation. Petition at 9. Once again, Petitioner has mistaken the witnesses to which he is complaining. Petitioner cites to the State's closing argument wherein the State summarized Brittney Turner's and Kyriell Davis' testimony. Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 88-94. Indeed, the State argued that Turner was the individual that testified that Petitioner was the first person to throw a punch. Recorder's Transcript of Proceedings: Jury Trial Day 5, filed December 14, 2018, at 205-09. Accordingly, the State did not fabricate testimony.

Fifth, Petitioner asserts that the State argued Petitioner stabbed Devine twice when there was no evidence presented to that effect. Petition at 9. Although Petitioner does not provide any reference as to when the State argued Devine was stabbed twice, the State did summarize Dr. Roquero's, the medical examiner, testimony and argued:

> And what the State would ask you to look at is not only the pictures but also the testimony of Dr. Roquero, who was the medical examiner. And what did he say? He said that there were two sharp force injuries to Ezekiel. One of them was a stab wound, that would be from like a jabbing or a plunging type action. And then the second one was an incised wound, meaning that it's longer than it is deep into the body.

Reporter's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 58. Examining the State's argument in its full context reveals that the State did not argue Devine was stabbed twice, but instead was arguing that he faced "two sharp force injuries," which was Dr. Roquero's testimony. Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 201-03. Accordingly, Petitioner cannot demonstrate that the State was misleading in its argument and he faced prejudice as a result.

Sixth, referring to his first ground of the instant Petition, Petitioner reiterates that the State violated his post-arrest silence, which violated his right to a fair trial. Petition at 9. As discussed *supra*, Petitioner's rights were not violated as he did not unambiguously invoke his right to remain silent when he omitted telling law enforcement where he was in the hours after

he stabbed and murdered Devine. Moreover, the State's comments were merely a passing reference and the case was not based solely on such comments.

Seventh, Petitioner complains that the State improperly argued Petitioner's juvenile criminal history at his sentencing hearing. Petition at 9. A sentencing judge is permitted broad discretion in imposing a sentence, and absent an abuse of discretion, the court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 8 (1993) (citing Deveroux v. State, 96 Nev. 388 (1980)). The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, which are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred v. State, 120 Nev. 410, 413, 92 P.3d 1246, 1253 (2004) (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d, 1159, 1161 (1976)). Instead, the Nevada Supreme Court will only reverse sentences "supported solely by impalpable and highly suspect evidence." Silks, 92 Nev. at 94, 545 P.2d at 1161 (emphasis in original).

A sentencing judge may consider a variety of information to ensure "the punishment fits not only the crime, but also the individual defendant." Martinez v. State, 114 Nev. 735, 738 (1998). If there is a sufficient factual basis for the information considered in sentencing a defendant, a district court may rely on that information. Gomez v. State, 130 Nev. 404, 406 (2014). A court may consider information that would be inadmissible at trial as well as information extraneous to a PSI. See Silks, 92 Nev. at 93-94, 545 P.2d at 1161-62; Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996). Further, a court "may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence." U.S. v. Watts, 519 U.S. 148, 156 (1997).

Here, the State made reference to Petitioner's juvenile history at sentencing. However, Petitioner's criminal record does not constitute highly suspect or impalpable evidence. Silks, 92 Nev. at 94, 545 P.2d at 1161. Regardless, it is not clear from the record that the Court relied on Petitioner's juvenile history when rendering Petitioner's sentence. Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996) (explaining that a silent record is presumed to

support the actions of counsel and the court below). Indeed, the Court merely explained that it would use its discretion and find Petitioner as a habitual criminal, a status he qualified for based on his adult convictions. Accordingly, Petitioner cannot establish prejudice.

Eighth, Petitioner claims that the State failed to file a Notice of Habitual Criminal Treatment. Petition at 9. However, his claim is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, the State's Notice of Intent to Seek Punishment as a Habitual Criminal was attached to the Information filed on February 7, 2018. Additionally, the State attached an Amended Notice of Intent to Seek Punishment as a Habitual Criminal when it filed its Amended Information on April 19, 2018. Accordingly, Petitioner's additional argument that appellate counsel should have raised a notice issue fails as doing so would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, to the extent Petitioner argues that the State erred in the Judgment of Convictions it filed, his claim fails as the State met its statutory obligation as discussed *infra*.

Notwithstanding the lack of merit in Petitioner's claims, any error was insufficiently prejudicial to warrant ignoring the procedural default since this trial was essentially a credibility contest between Petitioner and the other witnesses and a court will not 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)). Petitioner has failed to establish good cause and prejudice to overcome the procedural default and his claim is denied.

4. Ground Four: Certain jury instructions did not violate Petitioner's rights

Petitioner complains that several of the jury instructions provided at trial violated his rights. Petition at 11. Not only are Petitioner's claims waived because they are substantive claims that he failed to raise on direct appeal, they are also naked assertions and meritless as discussed below. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222; Hargrove, 100 Nev. at 502, 686 P.2d at 225.

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First, Petitioner argues that Jury Instruction Nos. 1, 17, 20, and 31 were not neutral and unbiased as they informed the jury that they could find Petitioner guilty if certain terms were met and not guilty if they were not met. Petition at 11.

Jury Instruction No. 1 stated,

> It is now my duty as judge to instruct you in the law that applies to this case. It is your duty as jurors to follow these instructions and to apply the rules of law to the facts as you find them from the evidence.
>
> You must not be concerned with the wisdom of any rule of law stated in these instructions. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your oath to base a verdict upon any other view of the law than that given in the instructions of the Court.

Jury Instruction No. 17 stated,

> You are instructed that if you find a defendant guilty of murder in the first degree, murder in the second degree, or voluntary manslaughter, you must also determine whether or not a deadly weapon was used in the commission of this crime.
>
> If you find beyond a reasonable doubt that a deadly weapon was used in the commission of such an offense, then you shall return the appropriate guilty verdict reflecting "With Use of a Deadly Weapon."
>
> If, however, you find that a deadly weapon was not used in the commission of such an offense, but you find that it was committed, then you shall return the appropriate guilty verdict reflecting that a deadly weapon was not used.

Jury Instruction No. 20 stated,

> Battery means any willful and unlawful use of force or violence upon the person of another.
>
> Any person who commits a battery upon another with the specific intent to kill is guilty of the offense of Battery With Intent to Kill.

Jury Instruction No. 31 stated,

> You are here to determine the guilt or innocence of the Defendant from the evidence in the case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

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As a preliminary matter, Petitioner's claims are summarily dismissed as he has provided only naked assertions. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, Petitioner has not attempted to and cannot demonstrate good cause to overcome the procedural default. Moreover, he cannot demonstrate prejudice as each of the jury instructions enumerated are accurate statements of law, which the Court properly permitted. See Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (stating that it is the Court's duty to ensure the jury is properly instructed and is permitted to complete instructions sua sponte).

Second, Petitioner claims that Jury Instruction Nos. 21, 25, and 27 did not instruct the jury that they may find Petitioner not guilty. Petition at 11. Additionally, he claims that Jury Instruction Nos. 22 and 23 conflict with Jury Instruction Nos. 21, 25, and 27. Id. Further, he asserts that Jury Instruction No. 23 failed to provide the definition of "negate" and "disputes fear as insufficient to justify a killing," which attacked the Petitioner's post-arrest silence. Id.

Jury Instruction No. 21 stated,

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who does the killing actually and reasonably believes:
>
> 1. That there is imminent danger that the assailant will either kill him or cause him great bodily injury to himself or to another person; and
> 2. That it is absolutely necessary under the circumstances for him to use in self-defense force or means that might cause the death of the other person; for the purpose of avoiding death or great bodily injury to himself or to another person.

Jury Instruction No. 22 stated,

> A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

Jury instruction No. 23 stated,

> An honest but unreasonable belief in the necessity for self-defense does not negate malice and does not reduce the offense from murder to manslaughter.

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Jury Instruction No. 25 stated,

> Actual danger is not necessary to justify a killing in self-defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he or another person is about to be killed or suffer great bodily injury; and
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
> 3. A reasonable person in a similar situation would believe himself or another person to be in like danger.
>
> The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

Jury Instruction No. 27 stated,

> If a person kills another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life or the life of another person, or to prevent his receiving great bodily harm or to prevent another person from receiving great bodily harm, the killing of the other was absolutely necessary; and the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given.

As a preliminary matter, each of these instructions are accurate statements of law. Indeed, Jury Instruction Nos. 21, 22, 23, and 25 were adopted from Runion v. State, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000), wherein the Nevada Supreme Court provided stock self-defense instructions. Additionally, Jury Instruction No. 27 was taken from NRS 200.200. Moreover, Petitioner's argument that these instructions failed to instruct the jury that they could find Petitioner not guilty is meritless. The jury was provided with multiple instructions that explained the jury could find Petitioner not guilty. Regardless, the jury was given Jury Instruction No. 30, the Reasonable Doubt Instruction, that explicitly provided Petitioner would be presumed innocent until the State proved each element beyond a reasonable doubt. Additionally, Petitioner provides no reason as to why he believes the above jury instructions conflict, which warrants summary dismissal of such claim. Hargrove, 100 Nev. at 502, 686 P.2d at 225. To the extent Petitioner argues that the word "negate" was not explained to the jury, his claim also fails. Negate is not a legal definition that must be defined for the jury.

Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994) ("Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions."). Accordingly, Petitioner has not and cannot demonstrate good cause and prejudice to overcome the procedural default.

Third, Petitioner also challenges the language of Jury Instruction No. 30, which he claims the Nevada Supreme Court has stated cannot be used. Petition at 11.

Jury Instruction No. 30 stated,

> The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every element of the crime charged and that the Defendant is the person who committed the offense. 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.
>
> If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

In addition to his claim being suitable for summary denial, this instruction was an accurate statement of the law complying with NRS 175.211, which mandates the language of this instruction. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Fourth, Petitioner asserts that Jury Instruction No. 37 improperly instructed the jury that the penalty phase need not be considered in deliberation, but then "biasly express[ed] first degree murder penalty." Petition at 11. He claims that the first degree murder penalty instruction should be separate. Id.

Jury Instruction No. 37 stated,

> In arriving at a verdict in this case as to whether the Defendant is guilty or not guilty, the subject of penalty or punishment is not to be discussed or considered by you and should in no way influence your verdict.

If the Juris verdict is Murder in the First Degree, you will, at a later hearing, consider the subject of penalty or punishment.

In addition to Petitioner's claim being a naked assertion suitable only for summary denial, his claim is also denied because this instruction was an accurate statement of law. Hargrove, 100 Nev. at 502, 686 P.2d at 225; Moore v. State, 88 Nev. 74, 75-76, 493 P.2d 1035, 1036 (1972) (stating that an instruction "directing the jury not to involve the question of guilt with a consideration of the penalty is proper."); Valdez v. State, 124 Nev. 1172, 1187, 196 P.3d 465, 476 (2008) (explaining that "[i]n a first-degree murder case, an instruction directing the jury not to involve the question of guilt with a consideration of the penalty is proper.").

5. Ground Five: Settling of jury instructions

Petitioner complains that the process used to settle jury instructions at trial precluded his ability to understand the instructions and present objections. Petition at 12. Specifically, he argues that it was improper for the Court to provide the number and the title rather than repeating the instruction word for word. Id.

As a preliminary matter, this is a substantive claim that is waived due to the 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, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot and does not attempt to demonstrate good cause because all of the facts and law necessary for such claim were available when he filed his direct appeal.

Petitioner also cannot demonstrate prejudice to ignore his omission because his claim is meritless. Indeed, Petitioner was represented by counsel at the time he wished to make objections to the jury instructions, and, thus, did not have the right to represent himself to object on his own. See § 9:3 The Assistance of Counsel for the Pro Se Defendant, 3 Constitutional Rights of the Accused 3d § 9:3 (3d. ed.) ("courts have held uniformly that an accused is not entitled to participate with counsel in the presentation of the defense"); see also, Watson v. State, 130 Nev. 764, 782, n. 3, 335 P.3d 157,170 (2014) (citing United States v. Kienenberger, 13 F.3d 1354, 1356 (9th Cir. 1994)); United States v. Lucas, 619 F.2d 870, 871

(10th Cir. 1980); People v. D'Arcy, 48 Cal. 4th 257, 281-83, 226 P.3d 949, 966-67 (2010); People v. Arguello, 772 P.2d 87, 92 (Colo. 1989); Parren v. State, 309 Md. 260, 264-65, 523 A.2d 597, 599 (1987); State v. Rickman, 148 Ariz. 499, 503-04, 715 P.2d 752, 756-57 (1986). If Petitioner wanted to represent himself, he should have made a request of the Court to canvass pursuant to Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). Accordingly, Petitioner's claim is denied.

Notwithstanding these claims being waived, dismissed, and meritless, any error in these instructions is insufficiently prejudicial to warrant ignoring Petitioner's procedural default since the jury was properly instructed on the burden of proof and the weighing of witness credibility via Jury Instruction Nos. 30 and 34 respectively. Moreover, any error would have been harmless as there was overwhelming evidence of Petitioner's guilt. Indeed, in addition to the jury being presented with the evidence that Petitioner admitted to stabbing Devine, the jury was also presented with evidence that Petitioner was not justified in doing so. The State introduced credible and sufficient evidence of Petitioner's actions after the crime, which demonstrated that Petitioner did not have a reasonable fear of death. Petitioner did not call 911—even though he later told police that Davis said that he would shoot up the house after Davis and Brittney Turner verbally fought. Despite these alleged threats and after he killed Devine, Petitioner locked the door, left his home, and ran from the scene. In his haste to leave, Petitioner left an older crippled woman, a three-year-old, a seventeen-year-old, and his niece in the home while claiming that Davis would shoot up his home. Petitioner fled the scene by jumping two walls and jumping down from a high point of one of the walls. Petitioner also destroyed and hid the murder weapon, a knife. Petitioner did not go back to his home until just after the police left and did not account for where he went between 7:00 PM and 2:00 AM the night of the crime, when he turned himself in to police. Therefore, Petitioner's claims are denied.

6. Ground Six: Trial counsel was not ineffective

Under Ground Six, Petitioner argues that trial counsel was ineffective for failing to: (1) investigate Petitioner's case and prepare for trial; (2) establish Petitioner's theory of defense

through the jury instructions; (3) object to Kyriell Davis' testimony; (4) protect Petitioner's post arrest silence; and (5) impeach Kyriell Davis. Petition at 13-17. As will be discussed below, each of these claims are denied.

a. *Failure to investigate and prepare for trial*

Petitioner argues that counsel was ineffective regarding the investigation of his case for several reasons. Petition at 13-14.

First, Petitioner argues that counsel did nothing, but review the State's open file to prepare the case. Petition at 13. Petitioner claims that the only reason he had witnesses testify for the defense was because he told them to come to court. Id. This claim fails under Molina, 120 Nev. at 192, 87 P.3d at 538, since Petitioner does not demonstrate what a better investigation would have shown.

Second, he argues that counsel failed to call a pathologist as an expert to discuss the positioning of the victim at the time of his death and other details regarding the stabbing, which he argues would have prevented his conviction. Petition at 13-14. However, this claim also fails under Molina as Petitioner does not and cannot demonstrate that such testimony would have changed the outcome of his trial. Moreover, which witnesses to call is a strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

Third, he argues that counsel failed to canvass his neighbors to determine what they knew. Petition at 14. This claim also fails under Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, Petitioner does not even attempt to indicate what the neighbors' testimony would have been, let alone whether it would have aided in his defense.

Fourth, he claims counsel did not interview Sandi Cash, Defendant's sister. Id. he claims that because counsel failed to obtain Sandi's information, there was no testimony elicited regarding Devine not visiting Petitioner's place of residence, the threats Devine made toward the home and Petitioner, and prior acts related to the case. Id. Even if such testimony had been elicited, Petitioner has also failed to demonstrate, as with his other claims, how the testimony would have changed the outcome of his trial. Indeed, assuming Sandi did testify to such information, that testimony would not have changed the fact that the jury was presented

with evidence demonstrating Petitioner did not act in self-defense, including "that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2.

In sum, Petitioner cannot demonstrate he was prejudiced by counsel's actions, let alone that counsel fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claims are denied.

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

Petitioner complains that counsel failed to present Petitioner's theory of defense and offer jury instructions consistent with his self-defense theory. Petition at 15. Additionally, he argues that counsel was ineffective for failing to establish foundational evidence regarding why Petitioner was carrying a work knife on his person. Id.

Petitioner's complaint that counsel was ineffective because there was no self-defense jury instruction provided is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Jury Instruction Nos. 21 through 27 demonstrate that the jury was instructed on the theory of self-defense. Those jury instructions properly provided the jury with the law to determine whether Petitioner was justified under a theory of self-defense for protecting his daughter, Brittney Turner. Requesting an additional instruction would have therefore been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Moreover, counsel argued the self-defense theory throughout his closing argument. Regardless, Petitioner cannot and does not even attempt to demonstrate what additional instruction he believes should have been given to demonstrate prejudice.

Petitioner's claim that counsel failed to establish foundational evidence regarding why Petitioner carried a work knife is also belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. During counsel's opening statement, counsel provided context as to why Petitioner carried a knife:

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> Now, this man sitting here, Thomas Cash, he's 52 years old. He works at Sears. *He's an HVAC technician.* He carries a tool belt around his waist. In addition to the tool belt, *he keeps a knife flipped on the inside of his pocket.* That knife really isn't for working. It's for when boxes come in that he has to open. He slices them open.

Recorder's Transcript of Proceedings: Jury Trial Day 3, filed December 14, 2018, at 167-68 (emphasis added). Counsel reiterated this foundation again during his closing argument:

> He went out as quickly as he could because he believed Brittney was in imminent danger. He just so happened, as I said in opening argument, *the man is an HVAC technician.* His daughter testified he fixes machines, fixes the vending machine at McDonald's. He works at Sears. *He always has this little knife clipped right here.*

Recorder's Transcript of Proceedings: Jury Trial Day 7, filed December 14, 2018, at 75 (emphasis added). Accordingly, counsel could not have been ineffective as the jury was provided foundation regarding Petitioner carrying a knife. For the same reason, Petitioner cannot and does not demonstrate prejudice. Therefore, Petitioner's claim is denied.

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

Petitioner argues that counsel was ineffective for failing to object to a portion of Davis' testimony during trial wherein he discussed the altercation he had with Petitioner that ultimately led to Devine's death after Devine had stepped in to break up the fight. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 142-46, 169. Specifically, he claims that counsel should have objected to the narrative nature of Davis' testimony and when the same information was repeated. Petition at 15-16; Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-192.

Petitioner's claim is denied. As a preliminary matter, when to object is a strategic decision left to counsel to make. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Based on the subject matter of Davis' testimony, counsel could have concluded that it would have damaged his credibility with the jury if he made a series of pointless objections that could be perceived as

disrespectful to the witness or as achieving nothing more than delaying the process. Also, if the information was going to be presented to the jury regardless, counsel did not need to offer any futile objections. Ennis, 122 Nev. at 706, 137 P.3d at 1103. In other words, even if the State had asked more questions to break up Davis' testimony, the State would have elicited the information as it was pertinent eyewitness evidence of someone who watched Petitioner commit the crimes charged in this case. Accordingly, Petitioner cannot demonstrate he was prejudiced.

Additionally, Petitioner mistakenly claims that counsel should have objected when Davis' testimony was repeated. Any information that was repeated was for the purposes of clarification and asking further questions about what Davis' previous testimony. Recorder's Transcript of Proceedings: Jury Trial Day 4, filed December 14, 2018, at 146-174. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Thus, Petitioner cannot demonstrate that counsel below an objective standard of reasonableness, let alone prejudice so his claim is denied. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64.

d. *Failure to protect post-arrest silence*

Petitioner argues that counsel failed to protect Petitioner's post-arrest silence because he should have objected to the State's rebuttal witness, Detective Gillis. Petition at 16. Petitioner claims that counsel should have requested that the rebuttal witness first testify outside the presence of the jury to determine the prejudicial nature of his testimony. Petition at 17. Not only has Petitioner failed to indicate the prejudicial testimony to which he is referring, but as discussed *supra*, his claim is meritless. Indeed, Detective Gillis was noticed as a witness prior to trial and Petitioner did not unambiguously invoke his right to silence regarding where he was or what he was doing after stabbing Devine. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Accordingly, any objection by counsel would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

e. *Failure to impeach Kyriell Davis' testimony*

Petitioner complains that counsel was ineffective for failing to impeach Davis, who he claims was the sole witness for the state that saw Petitioner with a knife and stab the victim. Petition at 16-17. Specifically, he argues that Davis committed perjury when he testified that Brittney Turner left the scene once the altercation occurred and Petitioner had to call her to come and get the baby. Id. He claims that he could have impeached Davis' testimony through witnesses: Brittney Turner, Tamisha Kinchron, Antoinette White, and Isidra Flores. Id. Petitioner's claim fails.

As a preliminary matter, Petitioner has not provided any evidence that Davis did in fact commit perjury when he testified regarding Turner leaving the scene. Even if he had provided the Court with such information, his claim would still fail as Turner's whereabouts once the altercation began would not have changed the outcome of his trial. The defense's theory was that Petitioner was acting in self-defense when he stabbed Devine as he felt like he was facing a two-on-one fight with Devine and Davis. In other words, whether Turner was inside of the home or outside of the home was not an essential factor in the jury determining if Petitioner, at the moment he stabbed Devine, was acting in self-defense. Accordingly, impeaching Davis was not necessary to proving Petitioner was acting in self-defense. Notably, Petitioner even appears to concede this point when he states, "[t]hough the impeach did not strick at the stab incident, such perjury would have gone to insight to the jury that Davis committed perjury." Petition at 17. Indeed, Petitioner cannot demonstrate prejudice because that sole fact would not have changed the outcome of the trial. Therefore, his claim is denied.

7. Ground Seven: Cumulative error

Petitioner asserts a claim of cumulative error in the context of ineffective assistance of counsel. Supplemental Petition at 68-69. The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it is the State's position that they cannot. However, even if they could be, it would be of no consequence as there was no single instance of ineffective assistance in Petitioner's case. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

Furthermore, Petitioner's claim is without merit. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000).

In the instant case, as argued in Section I.A.4 *supra*, the issue of guilt in this case was not close.

Additionally, Petitioner has not asserted any meritorious claims of error, and thus, there is no error to cumulate. Regardless, any errors that occurred at trial would have been minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975).

Third, and finally, Petitioner was convicted of a grave crime. However, because the evidence was more than sufficient and there was no error, it does not weigh heavily in this Court's analysis. Therefore, Petitioner's claim is denied.

8. Ground Eight: Appellate counsel was not ineffective for failing to consult prior to filing Petitioner's direct appeal

Petitioner argues that counsel was ineffective for failing to consult with him before drafting Petitioner's direct appeal and filed it despite Petitioner's request to hold off so he could research counsel's claims as well as add claims to his appeal, including the claims in the instant Petition. Petition at 17-18. However, his claim fails for several reasons.

First, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Second, appellate counsel is in fact more effective when limiting appellate arguments to only the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct. 3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Third, for the reasons discussed throughout this Petition, Petitioner's claims would not have been effective on direct appeal and, thus, raising such issues would have been futile. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claims are denied.

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9. Ground Nine: Petitioner's right to a speedy trial was not violated

Petitioner argues that the Court violated his right to a speedy trial. Petition at 18. Specifically, he claims that the Court erroneously continued his trial against the parties' consent. Id. Not only is this claim a bare and naked assertion suitable only for summary dismissal, but also it is waived as a substantive claim that should have been raised on appeal. Hargrove, 100 Nev. at 502, 686 P.2d at 225; NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222. Additionally, Petitioner cannot attempt to demonstrate good cause as these claims were available for direct appeal and he cannot demonstrate prejudice because his claim is meritless.

NRS 178.556(1) grants the district court discretion to dismiss a case if it is not brought to trial within sixty days due to unreasonable delay. Dismissal is only mandatory where there is not good cause for delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970). "Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S.Ct. 2686, 2690-2691 (1992). Delays are not presumptively prejudicial until one year or more has passed. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford v. State, 116 Nev. 215, 230, 994 P.2d 700, 711 (2000). The Doggett Court justified the imposition of this threshold requirement noting that "by definition he cannot complain that the government has denied him a 'speedy trial' if it has, in fact, prosecuted the case with customary promptness." Id. at 651-52, 112 S.Ct. at 2690-91.

If this hurdle is overcome, a court determines if a constitutional speedy trial violation has occurred by applying the four-part test laid out in Barker v. Wingo, which examines the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002) (quoting Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972)). The Barker factors must be considered collectively as no single element is necessary or sufficient. Moore v. Arizona, 414

U.S. 25, 26, 94 S.Ct. 188, 189 (1973) (quoting Barker, 407 U.S. at 533, 92 S.Ct. at 2193). However, to warrant relief the prejudice shown must be attributable to the delay. Anderson v. State, 86 Nev. 829, 833, 477 P.2d 595, 598 (1970).

While Petitioner did invoke his right to a speedy trial, his claim is meritless. Defendant was arrested on December 12, 2017 and a Criminal Complaint was filed on December 14, 2017. Petitioner's jury trial commenced on June 18, 2018. Accordingly, Petitioner suffered at most an approximate six-month delay, which is not a presumptively prejudicial delay. Doggett, 505 U.S. at 651-652, fn. 1, 112 S.Ct. at 2690-2691, fn. 1; see also Byford, 116 Nev. at 230, 994 P.2d at 711. Also, Petitioner has failed to demonstrate how he was harmed by such delay.

Moreover, the reason for the delay was that defense counsel had to attend a federal sentencing outside of the jurisdiction which could not be reset and the State had another trial on that date. Accordingly, Petitioner's argument that his trial was continued over his objection is belied by the record as his counsel requested the continuance. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, there is no indication from the record that this was a strategy on the State's part to delay in order to hamper the defense. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. Therefore, Petitioner's claim is denied.

B. Petitioner's Claims in his Memorandum Should be Denied

1. Ground One: Counsel was not ineffective for failing to investigate

a. Failure to consult and communicate

Petitioner argues that counsel was ineffective for only consulting with Petitioner only four times prior to trial, failing to have the defense's investigator meet with Petitioner, failing to interview and call witnesses that could have helped the defense, and failing to make appropriate objections. Memorandum at 9-13.

Petitioner's claims are denied as they amount to nothing more substantive than naked allegations unsupported by specific factual allegations. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Additionally, Petitioner is not entitled to a particular relationship with counsel. Morris v. Slappy, 461 U.S. 1, 14, 103 S. Ct. 1610, 1617 (1983). There is no requirement for any specific amount of communication as long as counsel is reasonably effective in his

representation. See id. Moreover, Petitioner's failure to investigate allegations fail since Petitioner does not demonstrate what a better investigation would have uncovered. Molina, 120 Nev. at 192, 87 P.3d at 538. To the extent Petitioner attempts to argue prejudice, he offers nothing more than a naked assertion that further proves summary dismissal is warranted. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

b. *Failure to investigate and call witnesses*

Petitioner complains that counsel did not speak to witnesses he wanted to testify at trial and failed to call them as witnesses. Memorandum at 14-19. In particular, Petitioner claims that Sandi Cash Earl and Angel Turner should have been called so they could have provided favorable testimony. Memorandum at 14. Not only are Petitioner's claims naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225, but also these claims fail under Molina, 120 Nev. at 192, 87 P.3d at 538, for Petitioner failing to demonstrate what a better investigation would have discovered.

Petitioner's argument that counsel failed to call Angel Turner as a witness is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Indeed, Angel testified for the defense on the sixth day of Petitioner's trial. Additionally, Petitioner attached a statement from Angel which merely stated that counsel did not interview her prior to testifying. However, Petitioner's claim still fails because he did not indicate how her testimony would have differed had counsel interviewed her, let alone whether that unknown testimony would have led to a better outcome at trial. Molina, 120 Nev. at 192, 87 P.3d at 538. Indeed, in addition to her trial testimony, Angel Turner provided a recorded statement to the police and testified at the preliminary hearing, so it is not clear what additional interviewing would have accomplished.

Petitioner also attached a statement from Sandi Cash who provided what her testimony would have been had she been called to testify at Petitioner's trial. Memorandum, Exhibit 1, at 1. The crux of such statement was that when Brittney Turner was arguing with Davis outside, Sandi heard him tell Turner to get whoever she wanted to fight him, including Petitioner. Id. Sandi explained that she did not tell Petitioner about what was said or express her concerns. Id. However, Sandi's statement is referring to a completely separate incident wherein Davis

was dropping off his child, rather than picking his child up. Regardless, Sandi's testimony about this event would not have been admissible at trial because she claims she never told Petitioner about what was said. Accordingly, Petitioner would not have known about the specific incident for it to have had affected his state of mind regarding self-defense. Moreover, such testimony would not have made a difference at Petitioner's trial. There was other evidence presented that Petitioner did not act in self-defense, including as the Nevada Supreme Court pointed out when it affirmed Petitioner's sentence: "[t]here was evidence and testimony that [Petitioner] initiated the conflict, only he had a weapon, he fled from the scene, and he disposed of the murder weapon." Order of Affirmance, filed September 12, 2019, at 2. Accordingly, Petitioner cannot demonstrate he was prejudiced by not having Sandi's alleged testimony.

In sum, Petitioner's allegations of prejudice are long quotations to legal authority but short on actual harm to his case and thus he cannot establish prejudice under Strickland because his claims are governed by Hargrove and Molina. Therefore, Petitioner's claim is denied.

c. Failure to meet with Petitioner

Petitioner complains that appellate counsel was ineffective for only having met with Petitioner once. Memorandum at 20-22. Additionally, he claims that appellate counsel did a poor job in filing his direct appeal. Id. However, Petitioner's claims are denied for several reasons.

First, as with trial counsel, Petitioner is not entitled to a particular relationship with counsel. Morris, 461 U.S. at 14, 103 S. Ct. at 1617. Second, Petitioner's claim that appellate counsel failed to do a "good job" is a naked assertion that is denied. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Third, to the extent Petitioner claims that appellate counsel ineffectively failed to include citations and prosecutorial misconduct law in his appellate claim raising insufficiency of the evidence, he has not explained how such complaint is relevant or how it would have made a difference on appeal. Notably, appellate counsel is more effective when limiting appellate arguments only to the best issues. Jones v. Barnes, 463 745, 751, 103 S.Ct.

3308, 3312 (1983); Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Moreover, which claims to raise is a strategic decision left to the discretion of counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellate counsel need not make futile arguments. Ennis, 122 Nev. at 706, 137 P.3d at 1103. Therefore, Petitioner's claim is denied.

2. Ground Two: Appellate counsel was not ineffective

Petitioner appears to complain that appellate counsel failed to file a direct appeal on his behalf. Memorandum at 23-26. However, no matter how this claim is interpreted, it fails.

Should Petitioner mean to argue that appellate counsel was ineffective for failing to file a direct appeal because counsel failed to consult with Petitioner, the State incorporates its argument from Section I.B.1.c. In the event Petitioner intended to argue that counsel failed to file a direct appeal on his behalf, his claim is belied by the record and suitable only for summary denial because appellate counsel did in fact file a direct appeal for Petitioner. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

To the extent Petitioner is complaining that counsel did not consult and include his issues in this direct appeal brief, petitioner offers nothing more than naked assertions suitable only for summary denial under Hargrove, 100 Nev. at 502, 686 P.2d at 225. As discussed in the previous Section I.B.1.c, appellate counsel can be more effective by narrowing the issues and need not raise futile arguments. Jones, 463 at 751, 103 S.Ct. at 3312; Ford v. State, 105 Nev. at 853, 784 P.2d at 953; Ennis, 122 Nev. at 706, 137 P.3d at 1103. Additionally, the decision on what to argue is strategic decision left to counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Nor has Petitioner demonstrated that any of his concerns would have made a difference and thus he cannot demonstrate prejudice sufficient to satisfy Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. Therefore, Petitioner's claim is denied.

II. PETITIONER IS NOT ENTITLED TO THE APPOINTMENT OF COUNSEL

Under the U.S. Constitution, the Sixth Amendment provides no right to counsel in post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566 (1991). In McKague v. Warden, 112 Nev. 159, 163, 912 P.2d 255, 258 (1996), the Nevada Supreme Court similarly observed that "[t]he Nevada Constitution...does not guarantee a right

to counsel in post-conviction proceedings, as we interpret the Nevada Constitution's right to counsel provision as being coextensive with the Sixth Amendment to the United States Constitution." The McKague Court specifically held that with the exception of NRS 34.820(1)(a) (entitling appointed counsel when petitioner is under a sentence of death), one does not have "any constitutional or statutory right to counsel at all" in post-conviction proceedings. Id. at 164, 912 P.2d at 258.

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

> A petition may allege that the Defendant is unable to pay the costs of the proceedings or employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider whether, among other things, the severity of the consequences facing the petitioner and whether:
> (a) The issues are difficult;
> (b) The petitioner is unable to comprehend the proceedings; or
> (c) Counsel is necessary to proceed with discovery.

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

More recently, the Nevada Supreme Court examined whether a district court appropriately denied a defendant's request for appointment of counsel based upon the factors listed in NRS 34.750. Renteria-Novoa v. State, 133 Nev. 75, 391 P.3d 760 (2017). In Renteria-Novoa, the petitioner had been serving a prison term of eighty-five (85) years to life. Id. at 75, 391 P.3d at 760. After his judgment of conviction was affirmed on direct appeal, the defendant filed a pro se post-conviction petition for writ of habeas corpus and requested counsel be appointed. Id. The district court ultimately denied the petitioner's petition and his appointment of counsel request. Id. In reviewing the district court's decision, the Nevada Supreme Court examined the statutory factors listed under NRS 34.750 and concluded that the district court's

decision should be reversed and remanded. Id. The Court explained that the petitioner was indigent, his petition could not be summarily dismissed, and he had in fact satisfied the statutory factors. Id. at 76, 391 P.3d 760-61. As for the first factor, the Court concluded that because petitioner had represented he had issues with understanding the English language which was corroborated by his use of an interpreter at his trial, that was enough to indicate that the petitioner could not comprehend the proceedings. Id. Moreover, the petitioner had demonstrated that the consequences he faced—a minimum eighty-five (85) year sentence—were severe and his petition may have been the only vehicle for which he could raise his claims. Id. at 76-77, 391 P.3d at 761-62. Finally, his ineffective assistance of counsel claims may have required additional discovery and investigation beyond the record. Id.

Unlike the petitioner in Renteria-Novoa, Petitioner has not satisfied the statutory factors for appointment of counsel. NRS 34.750. First, although the consequences Petitioner faces are severe as he is serving a sentence of life without the possibility of parole, that fact alone does not require the appointment of counsel. Indeed, none of the issues Petitioner raises are particularly difficult as his claims are either waived as substantive claims, fail to provide good cause because they are based on information Petitioner had for his direct appeal, or are meritless. NRS 34.724(2)(a); NRS 34.810(1)(b)(2); Evans, 117 Nev. at 646-47, 29 P.3d at 523; Franklin, 110 Nev. at 752, 877 P.2d at 1059, disapproved on other grounds, Thomas, 115 Nev. 148, 979 P.2d 222.

Moreover, unlike the petitioner in Renteria-Novoa who faced difficulties with understanding the English language, Petitioner does not claim he cannot understand English or cannot comprehend the instant proceedings. It is clear that Petitioner is able to comprehend the instant proceedings based upon his filing of the instant Petition.

Finally, despite Petitioner's argument, counsel is not necessary to proceed with discovery in this case as no additional discovery is necessary. Therefore, Petitioner's Motion is denied.

III. PETITIONER IS NOT ENTITLED TO AN EVIDENTIARY HEARING

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

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

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

Further, the United States Supreme Court has held that an evidentiary hearing is not required simply because counsel's actions are challenged as being unreasonable strategic decisions. Harrington v. Richter, 131 S. Ct. 770, 788 (2011). Although courts may not indulge post hoc rationalization for counsel's decision making that contradicts the available evidence of counsel's actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. Id. There is a "strong presumption" that counsel's attention to certain

issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Id. (citing Yarborough v. Gentry, 540 U.S. 1, 124 S. Ct. 1 (2003)). Strickland calls for an inquiry in the *objective* reasonableness of counsel's performance, not counsel's *subjective* state of mind. 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1994).

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. Therefore, Petitioner's request is denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief and associated pleadings shall be, and are, hereby denied.

Dated this 4th day of November, 2020

DATED this _____ day of October, 2020.

DISTRICT JUDGE

EC

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

21A 498 D2C0 0B90
Cristina D. Silva
District Court Judge

BY /s/JONATHAN VANBOSKERCK
JONATHAN VANBOSKERCK
Chief Deputy District Attorney
Nevada Bar #006528

CERTIFICATE OF MAILING

I hereby certify that service of the above and foregoing was made this 27th day of October, 2020, by depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

THOMAS CASH, BAC #1203562
ELY STATE PRISON
P.O. BOX 1989
ELY, NV 89301

BY _____
CELINA LOPEZ
Secretary for the District Attorney's Office

JVB/bg/Appeals

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Thomas Cash, Plaintiff(s)	CASE NO: A-20-818971-W
vs.	DEPT. NO. Department 9
William Gittere, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

DISTRICT COURT
CLARK COUNTY, NEVADA

Writ of Habeas Corpus	**COURT MINUTES**	**October 07, 2020**

A-20-818971-W Thomas Cash, Plaintiff(s)
vs.
William Gittere, Defendant(s)

October 07, 2020 **1:45 PM** **All Pending Motions**

HEARD BY: Silva, Cristina D. **COURTROOM:** RJC Courtroom 11B

COURT CLERK: Kory Schlitz

RECORDER: Gina Villani

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- PETITION FOR WRIT OF HABEAS CORPUS... PLAINTIFF'S EX PARTE MOTION FOR APPOINTMENT OF COUNSEL AND REQUEST FOR EVIDENTIARY HEARING.. PLAINTIFF'S EX PARTE MOTION FOR ORDER TO TRANSPORT PRISONER...

Defendant not present and in custody in the Nevada Department of Corrections; Deputy District Attorney John Torre present on behalf of the State.

COURT ORDERED the Motion for Transport Prisoner is DENIED; there was no basis to transport the Defendant, as the Court can make a ruling based on the pleadings, and ORDERED Defendant's presence WAIVED. COURT FURTHER ORDERED, Request for Evidentiary Hearing and Appointment of Counsel DENIED, adding the Court has already reviewed the Petition for Writ of Habeas Corpus, which is ORDERED DENIED, and FINDS there was no particular complexity that would have necessitated appointment of counsel, and nothing in the Petition meets the threshold for setting an evidentiary hearing. COURT FURTHER FINDS the Petition is DENIED as for the reasons set forth in the State's Opposition, and the COURT does not find the State improperly used his post arrest silence against him, the Court also properly deemed the Defendant to Habitual Offender, and there is nothing that precludes the Judge from reviewing a Juvenile record when preparing for sentencing; and FINDS the allegation that the Jury Instructions used in his case were unfair, and

appear there is nothing beyond what is set forth in the Petition that they are standard Jury Instructions, adding the Defendant argues without support or argument the instructions were unfair, and COURT DENIES the Petition on that basis. COURT ADDITIONALLY FINDS the Defendant fails to meet the required burden under Strickland v. Washington, to demonstrate ineffectiveness of counsel, which applies to trial counsel, and appellate counsel; Defendant also claims he was prejudiced since he did not have a meeting with appellate counsel, which is not a basis to grant in a Petition for Writ of Habeas Corpus, appellate counsel has a broad description to raise issues they feel is necessary. COURT FURTHER FINDS many of the allegations set forth in this Petition, should have ben waived on Direct Appeal, and to the point they were not raise, the Defendant waives his right to raise those allegations in a Petition. COURT DIRECTED the State to prepare and submit an Order within thirty days.

NDC

CLERK'S NOTE: A copy of this Minute Order has been mailed to: Thomas Cash #1203562, PO BOX 1989, Ely, Nevada 89301. (10-12-2020)

Certification of Copy and Transmittal of Record

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

Pursuant to the Supreme Court order dated November 25, 2020, I, Steven D. Grierson, the Clerk of the Court of the Eighth Judicial District Court, Clark County, State of Nevada, do hereby certify that the foregoing is a true, full and correct copy of the complete trial court record for the case referenced below. The record comprises one volume with pages numbered 1 through 215.

THOMAS CASH,

Plaintiff(s),

vs.

WILLIAM GITTERE,

Defendant(s),

Case No: A-20-818971-W

Dept. No: IX

now on file and of record in this office.

IN WITNESS THEREOF, I have hereunto Set my hand and Affixed the seal of the Court at my office, Las Vegas, Nevada This 15 day of December 2020.

Steven D. Grierson, Clerk of the Court

Amanda Hampton, Deputy Clerk