IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY KENT BROWN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83397

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is not presumptively assigned to the Nevada Court of Appeals because it is an appeal from a denial for post-conviction relief for a conviction involving Category B felonies following a guilty plea.

STATEMENT OF THE ISSUE(S)

1. Whether the district court correctly concluded that trial counsel was not ineffective in his pretrial investigation of Appellant's self-defense claim.
2. Whether the district court correctly concluded that trial counsel was not ineffective regarding presenting evidence before the grand jury.
3. Whether the district court correctly dismissed Appellant's claim of ineffective assistance of counsel for failing to prepare a sentencing memorandum.
4. Whether the district court correctly denied appellant's petition without an evidentiary hearing.
5. Whether Appellant has demonstrated cumulative error.

STATEMENT OF THE CASE

On October 19, 2016, Appellant Jeffrey Brown ("Appellant") was charged with Aggravated Stalking (Category B Felony – NRS 200.575); Attempt Murder with use of a Deadly Weapon (Category B Felony – NRS 200.010, 200.030, 193.330, 193.165); Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm Constituting Domestic Violence (Category B Felony – NRS 200.481 200.485, 33.018); Battery with use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category B Felony – NRS200.481); Assault with a Deadly Weapon (Category B Felony – NRS200.471); Child Abuse, Neglect, or Endangerment with use of a Deadly Weapon (Category B Felony – NRS 200.508, 193.165); and Discharge of a Firearm from or Within a Structure or Vehicle (Category B Felony – NRS 202.287). Respondent's Appendix ("RA") 76-80.

On January 17, 2018, Appellant pled guilty to Attempt Murder with Use of a Deadly Weapon and Assault with a Deadly Weapon. Appellant's Appendix ("AA")186-93. Pursuant to the negotiations as contained in the Guilty Plea Agreement ("GPA"), the State would retain the full right to argue including for consecutive treatment between counts. RA81-86.

On June 21, 2018, Appellant was sentenced to an aggregate total of 8 to 20 years, with a consecutive 8 to 20 years for the deadly weapon enhancement. AA97.

The Judgment of Conviction was filed on July 2, 2018. AA20-21. A Third Amended Indictment was filed the days day.

On April 11, 2019, Appellant filed a Petition for Writ of Habeas Corpus (Post-Conviction) ("Petition"). AA53-85. On May 10, 2019, Appellant filed an Amended Petition for Writ of Habeas Corpus (Post-Conviction) ("Amended Petition"). AA99-148. The State filed its response June 4, 2019. AA149-59. On June 18, 2019, the district court appointed counsel to Appellant. RA92.

On October 10, 2019, Appellant filed a Supplement to Appellant's Petition. RA93-99. On January 16, 2020, the State filed a response to Appellant's Amended Petition. AA160-170. On February 10, 2020, Appellant filed a Reply to the State's Response to Appellant's Amended Petition. AA170-75. On February 13, 2020, the district court denied Appellant's Petition. AA176. Findings of Fact, Conclusions of Law were filed on July 30, 2020. AA177-83.

On August 13, 2020, Appellant filed a Notice of Appeal from the Findings of Facts, Conclusions of Law. AA185. On August 9, 2021, the Court filed an Amended Findings of Fact, Conclusions of Law and Order. AA194-206. On August 17, 2021, Appellant filed a Notice of Appeal from the Amended Findings of Facts, Conclusions of Law. AA207. On December 15, 2021, Appellant filed an Appeal from Denial of Post-Conviction Habeas Petition ("AOB"). The State's Response follows.

STATEMENT OF THE FACTS

Appellant and Farha Brown ("Farha") have been married twenty-two years and share one child in common. RA23-24. In July of 2016, Farha and Appellant separated, resulting in Farha moving out of their shared residence and into her own apartment in Henderson. RA24-25. Following their separation, Appellant began texting Farha a number of inappropriate messages, which resulted in Farha changing her phone number. RA31. Appellant also had password access to an e-mail account that Farha used (Appellant had his own separate e-mail account from which he would e-mail Farha from time to time). RA28. Also, unbeknownst to Farha, Appellant had access to an OnStar account linked to Farha's 2015 Chevrolet Equinox, which allowed him to locate and access her vehicle - even if it is locked. RA29, 34.

Sometime after Farha had moved out in July, she began dating Monequie Short ("Mo"). RA25. Mo was in the process of separating from his wife when he and Farha met. RA33. While they were dating, Farha asked Mo for information on filing for divorce on-line and Mo emailed Farha copies of his on-line divorce papers for her to look over. RA33. In September of 2016, Mo's sister died and Farha joined Mo and Mekhi (Mo's 15-year-old son) on a trip to Indiana for the funeral. RA26-27, 68. Farha purchased the airline tickets online with her Southwest credit card, which forwarded her travel itinerary - including departure and return dates - to her email account. RA27.

On Wednesday, September 14, 2016, Farha drove Mo and Mekhi in her car to McCarran Airport, where she parked on the sixth floor of the long-term parking garage. RA28-29. Farha did not tell Appellant that she was leaving town with Mo. RA29. On Friday, September 16, while Farha was in Indiana, she talked to Appellant over the phone and Appellant was immediately hostile. RA30-31. Appellant called Farha names, including a liar, and informed her that he knew she was in Indiana with Mo. RA32. When Farha asked Appellant how he knew her location, Appellant told her he had accessed her email and read her flight itinerary. RA32. Appellant then began to ask questions about Mo, including what he looked like and whether he was still married. RA32. Appellant told Farha he knew Mo had been married because he had also accessed the divorce papers Mo had emailed Farha. RA33.

During that same call, Appellant informed Farha that he had broken into her car at McCarran. RA33. Appellant explained that he had located her car both through her email itinerary and by accessing Farha's OnStar account, which he used to locate the vehicle via the GPS location service. RA33-34. Appellant told Farha that once he located the vehicle and found it locked, he again accessed Farha's OnStar account to unlock the vehicle so that he could get into the car. RA34-35. Appellant told Farha that he searched the car and found a pair of keys that he believed belonged to Mo. RA36. Mo had in fact left his keys inside the closed center console of the vehicle. RA36. Appellant told Farha that he had removed Mo's keys from her car, drove to

her Henderson apartment and tried every single key to see if one fit in Farha's door. RA37. Appellant said that one of the keys did fit the lock to Farha's apartment, and Appellant again called Farha a liar and said that she was living with Mo. RA37. Appellant then told Farha "don't make me regret what I am going to do or what I am capable of. Or you don't know- [Mo] doesn't know what I'm capable of." RA39. Immediately after the phone call, Farha, in tears, told Mo about all of her conversation with Appellant. RA54.

Based on that threat and the lengths Appellant had taken to access Farha's car and apartment while she was out of town, Farha testified that she "[a]bsolutely" was in fear for her safety and the safety of Mo. RA39-40. Mo also testified that Appellant's behavior had caused him to concern for both his and Farha's safety. RA54. To protect herself, Farah immediately called OnStar to change her passcode to prevent Appellant from being able to track her movements. RA40. She also immediately called her apartment complex and asked that her locks be changed. RA41.

Farha, Mo and Mekhi returned to Las Vegas on Monday, September 19, 2016. RA41. Notably, their arrival date and time was included in the email itinerary she received from Southwest, which Appellant had already accessed. RA42. Farha testified that as she packed to leave Indiana that morning, she told Mo about her fear that Appellant may meet them at the airport. RA41. She considered calling her son

to relay a message to Appellant that her flight would be delayed an extra day. RA42. When their plane landed in Las Vegas, Farha again told Mo that she was concerned Appellant might be waiting for them and thought they should get airport security to escort them to the car. RA42. Mo responded to Farha that there were a lot of people at the airport and he thought they would be fine without security. RA42-43.

Farha, Mo and Mekhi got their luggage and walked to Farha's car on the sixth floor of the parking lot. RA43. As the elevator door opened, Farha whispered to Mo to look for a red Corvette Appellant is known to drive. RA43. Farha whispered this to Mo so as not to startle or scare Mekhi. RA43. Farha testified that they walked quickly to the car as she was looking "over [her] shoulders" and remotely started her vehicle. RA43-44.

As Farha opened her trunk and began to load the luggage, she saw her son's 2007 Ford Escape pull up with Appellant alone in the driver's seat. RA44. Appellant confronted Farha about Mo, cursing and ranting at her. RA44, 57. Farha told Appellant “we're not going to do this,” then nervously walked away to pack the car so they could “quickly leave” the situation. RA44. While Farha was putting suitcases in her car, Mo attempted to intervene and told Appellant that if Appellant had something to say to Mo he should say it directly to him rather than Farha. RA45, 57-58.

Appellant looked at Mo, reached into his vehicle's center console and pulled out a silver and black revolver. RA58-59. Appellant then pointed the firearm at Mo and, as Mo was backing away, Appellant fired off two shots, with one bullet striking Mo in the hip. RA58-60. Farha began to scream and ran to the passenger side of her vehicle to get away from Appellant. RA45. As she ran, Farha heard tires screeching behind her, then the vehicle come to a stop. RA45. Appellant fired off two shots at Farha. RA46, 60. After the first shot, Farha screamed "Jeff, no," then the second shot struck her in the lower left part of her back. RA45-46.

Mo screamed for his son Mekhi to run. RA61. Mekhi was approximately 7 feet away from Farha when she was shot. RA70. Mekhi recalled hearing the gunshots, watching his father and Farha fall to the ground and seeing blood. RA70-71. Before running away, Mekhi saw Appellant point the gun at him from inside the car, from approximately twenty (20) to thirty (30) feet away. RA71-72. Mekhi ran down an on- ramp to the fifth floor of the garage to hide. RA69-71.

Appellant then sped off down the parking garage ramp. RA45. Farha eventually called 9-1-1 and police and medical assistance arrived. RA62. Detective Verl Conover of the Las Vegas Metropolitan Police Department ("L VMPD") was one of the detectives assigned to investigate the shooting. RA12-14. After responding to McCarran, Detective Conover and his partner Detective Treppis went to Appellant's house. RA15. Appellant was not there, but the detectives were able to

speak to his son and learned that Appellant may be at a veteran's hospital located at 6900 Pecos in North Las Vegas. RA16. Detectives Conover and Treppis arrived at the hospital and found the gray Ford Escape Appellant had been driving during the shooting. RA17. From outside the vehicle, Detective Conover could see the handle of a revolver handgun that was covered by a towel positioned in the center console of the vehicle. RA17-18. As the detectives approached the hospital, they encountered Appellant who was being escorted out in a wheelchair by a VA hospital officer. RA18-19. They then took Appellant into custody. RA20.

Since the shooting, Farha continues to suffer from severe back pain and numbness of her left leg. RA47. The bullet remains in Farha's back to this day. RA46. Mo suffered an entry-exit wound that went through his right hip and exited out of his left buttocks. RA60. Since being shot, Mo suffers from numbness and prolonged pain in his leg, which prevents him from sleeping for more than two hours at a time. RA63. Mo must now walk with the assistance of a cane. RA63. Mekhi has had to see a therapist. RA65.

SUMMARY OF THE ARGUMENT

First, the district court correctly concluded that counsel was not ineffective in investigating Appellant's self-defense claim. Not only did Appellant's guilty plea waive his ability to challenge the sufficiency of counsel's investigation, but

Appellant did not establish that any additional investigation was viable or would have impacted his decision to plead guilty.

Second, the district court correctly concluded that counsel was not ineffective for failing to present exculpatory evidence at the grand jury. Again, Appellant's plea waived his ability to raise this claim. Regardless, Appellant was notified of the grand jury proceedings and of his right to testify before it. However, Appellant did not establish how testifying before the grand jury that he acted in self-defense when he stalked his ex-wife and new boyfriend to the McCarran Airport parking lot and shot both of them as they tried to put luggage in their car and run away from him would have impacted his decision to plead guilty.

Third, the district court correctly concluded that counsel was not ineffective for not filing a sentencing memorandum. At sentencing, counsel made every argument he would have included in a sentencing memorandum, including his belief that a self-defense claim was potentially viable. However, the district court disagreed, and made clear that any claim of self-defense was not viable. Appellant has not established how arguing as much in a sentencing memorandum would have altered the court's opinion.

Fourth, the district court properly denied Appellant's Petition without an evidentiary hearing. Appellant does not argue as much in his Argument section and simply claiming it in his Statement of the Issues or Conclusions is insufficient for

appellate court consideration. Regardless, as all of Appellant's claims lack merit, the district court's conclusion that an evidentiary hearing was unnecessary was proper.

Fifth, Appellant argues cumulative error based on Mulder v. State, however this claim was not presented to the district court, this court should decline to take it into consideration as well. Additionally, Appellant's claim is without merit because a claim of ineffective counsel is not a relevant factor for the court to consider in evaluating a claim of cumulative error. Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Therefore, as Appellant's claim of cumulative error is waived and meritless, this claim should be denied. Therefore, Appellant has failed to make a showing that he was entitled to relief, and his conviction should be affirmed.

ARGUMENT

This Court reviews the district court's application of the law de novo, and gives deference to a district court's factual findings in habeas matters. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). This Court reviews a district court's denial of a habeas petition for abuse of discretion. Rubio v. State, 124 Nev. 1032, 1047, 194 P.3d 1224, 1234 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). This Court must give deference to the factual findings made

by the district court as long as they are supported by the record. Little v. Warden, 117 Nev. 845, 854, 34 Pd. 3d 540, 546 (2001).

A defendant has the Sixth Amendment right to an effective assistance of counsel in criminal proceedings. See Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 5 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Nevada has adopted the standard outlined in Strickland in determining whether a defendant received effective assistance of counsel. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996); Warden v. Lyons, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984). To show that counsel was ineffective, the defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying a two-pronged test. Strickland, 466 U.S. at 686-687, 104 S. Ct. at 2064; see State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993). Under this test, the defendant must show that his counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. See Strickland, 466 U.S. at 687-688, 694, 104 S. Ct. at 2064, 2068.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 1485 (2010). The question is whether an attorney's representations amounted to incompetence under prevailing professional norms, "not whether it deviated from best practices or most common

custom." Harrington v. Richter, 562 U.S. 86, 88, 131 S. Ct. 770, 778 (2011). Furthermore, "[e]ffective 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, Nevada State Prison, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975) (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)).

A court begins with a 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, 1011-12, 103 P.3d 25, 35 (2004). 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 or' the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978) (emphasis added) (citing Cooper v. Fitzharris. 551F.2d1162, 1166 (9th Cir. 1977)). In considering whether trial counsel was effective, the court must determine whether counsel made a "sufficient inquiry into the information . . . pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996)(citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Once this decision is made, the court will consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at

846, 921 P.2d at 280 (citing Strickland, 466 U.S. at 690-691, 104 S. Ct. at 2066). Counsel's strategy decision is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Id. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S. Ct. at 2066.

The Strickland analysis does not mean courts 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." Donovan, 94 Nev. at 675, 584 P.2d at 711 (citing Cooper, 551 F.2d at 1166 (9th Cir. 1977)). Therefore, counsel cannot be deemed ineffective for failing to make futile objections, file futile motions, or raise futile arguments. Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006).

Courts must dismiss a petition if a petitioner plead guilty and the petitioner is not alleging "that the plea was involuntarily or unknowingly entered, or that the plea was entered without effective assistance of counsel." NRS 34.810(1)(a). Although a defendant may attack the validity of a guilty plea by showing that he received ineffective assistance of counsel, the defendant maintains the burden of demonstrating "'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" See Molina v. State,

120 Nev.185, 190, 87 P.3d 533, 537 (2004); Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996) (quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. "Bare" or "naked" allegations are not sufficient to show ineffectiveness of counsel. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have rendered a more favorable outcome. Molina, 120 Nev. at 192, 87 P.3d at 538. Ultimately, while it is counsel's duty to candidly advise a defendant regarding a plea offer, the decision of whether or not to accept a plea offer is the defendant's. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 163 (2002).

Moreover, NRS 34.810(1) reads:

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

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post-conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived

in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646-47, 29 P.3d 498, 523 (2001).

Here, Appellant's claims that the district court erred in denying Appellant's Supplemental Petition without an evidentiary hearing. Specifically, Appellant claims that he established that counsel was ineffective in his pre-plea investigation, for failing to present exculpatory evidence to the grand jury, and for failing to file a sentencing memorandum. Appellant's arguments fail.

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT TRIAL COUNSEL WAS NOT INEFFECTIVE IN HIS PRETRIAL INVESTIGATION OF APPELLANT'S SELF-DEFENSE CLAIM

Appellant argues that trial counsel was ineffective because he did not investigate Appellant's self-defense claim, despite the fact that "[n]umerous indications in the record indicated investigative leads." AOB7. Appellant claims counsel should have consulted ballistics experts to study the trajectory of the bullets as well as the positions of the victim and Appellant. Id. Next, Appellant claims

counsel should have hired an investigator to determine whether witnesses could corroborate his self-defense claim. Id. Appellant's claim fails.

A defendant who contends his attorney was ineffective because he did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. Molina, 120 Nev. at 192, 87 P.3d at 538.

Counsel is expected to conduct legal and factual investigations when developing a defense so they may make informed decisions on their client's behalf. Jackson, 91 Nev. at 433, 537 P.2d at 474 (quoting In re Saunders, 2 Cal.3d 1033, 88 Cal.Rptr. 633, 638, 472 P.2d 921, 926 (1970)). "[D]efense counsel has a duty 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993) (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment.'" Love, 109 Nev. at 1143-44, 865 P.2d at 327 Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Love, 109 Nev. at 1145, 865 P.2d at 328.

Here, the district court properly dismissed Appellant's claim. As an initial matter, Appellant waived his ability to challenge the adequacy to counsel's pretrial investigation when he pled guilty. Appellant's claim does not allege that his plea was involuntary or that counsel was ineffective in the plea process. Accordingly, this claim was inappropriately raised and properly dismissed by the district court.

Next, Appellant's reliance on Wiggins v. Smith,539 U.S. 510, 123 S.Ct. 2527 (2003), is irrelevant. Counsel in Wiggins was deemed ineffective for not investigating additional mitigating evidence for the penalty phase of a capital murder trial. Id. at 510-11, 123 S.Ct. at 2529. In concluding that counsel was ineffective, the court explained that evidence the defendant suffered from severe physical, sexual, and mental abuse as a child; and spent time homeless and mental issues were relevant to assessing the defendant's moral culpability and therefore should have been presented to the jury during penalty phase. Id. at 512-13; 123 S.Ct. at 2531.

Here, unlike Wiggins, Appellant has failed to provide any specific facts that would have impacted his decision to plead guilty. Moreover, as Appellant pled guilty in lieu of a trial, any case dealing with investigation that would have impacted the outcome at trial is irrelevant.

Appellant's claims further failed under Molina because Appellant does not explain what better investigation into those areas would have shown. First, Appellant does not explain how a ballistics expert's conclusion would have shown that he acted

in self-defense. Next, Appellant does not identify any witnesses that would have corroborated his self-defense claim. This Court need not consider issues that are not cogently argued. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 673 (1987). Any unsupported arguments are summarily rejected on appeal. Thomas v. State, 120 Nev. 37, 50 83 P.3d 818, 827 (2004). Despite Appellant's claim that "a self-defense claim would have canceled out the specific intent element for the charge of Attempt Murder with Use of a Deadly Weapon", Appellant nevertheless failed to provide either this Court or the district court specific facts supporting any claim that there were witnesses or evidence supporting any claims of self-defense. AOB8.

Appellant does not explain how investigating Appellant's potential post-traumatic stress disorder ("PTSD") would have contributed to his self-defense claim, nor does Appellant provide any specific facts that "the victim had done something to him [sic] baby." AOB10. Indeed, Appellant has not provided any information that Appellant even suffers from a type of PTSD that would cause a person to stalk his ex-wife to the airport and shot her in the parking lot. Moreover, there is no indication that Appellant had a baby involved in his crimes. As Appellant did not provide any citation to the State or this Court, this Court should summarily reject this unsupported argument.

Further, all of Appellant's claims are belied by his guilty plea. In signing the GPA, Appellant confirmed that he spoke with his attorney about any possible

defenses, defense strategies, and circumstances that were in his favor. RA85. Appellant further confirmed that he believed that pleading guilty was in his best interest. RA85.

Finally, Appellant does not allege that he would not have pled guilty had trial counsel conducted the alleged investigation. It was Appellant's decision plead guilty and that decision belonged to him and not counsel. Rhyne, 118 Nev. at 8, 38 P.3d at 163. As Appellant has not provided specific facts establishing that any un-investigated information would have resulted in him rejecting the plea agreement, the district court correctly dismissed this claim.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT TRIAL COUNSEL WAS NOT INEFFECTIVE REGARDING PRESENTING EVIDENCE BEFORE THE GRAND JURY

Appellant claims that trial counsel was ineffective because he did not offer evidence that he was defending himself at the grand jury. AOB11. Specifically, Appellant claims that counsel did not explain to him that he had a right to testify and that if he had done so, he would have testified that he acted in self-defense. AOB3. In doing so, Appellant relies on Hays v. Farwell, 482 F.Supp.2d 1180 (2010), where the District Court of Nevada concluded that trial counsel was ineffective for failing to discover new and reliable evidence not presented at trial that established that the defendant was innocent. Id. at 1188. Appellant's reliance is misplaced.

Unlike Hays, Appellant's claim deals with testimony before the grand jury before Appellant pled guilty. In Grand Jury proceedings, the State need only show that a crime has been committed and that the accused probably committed it. The finding of probable cause to support a criminal charge may be based on "slight, even 'marginal' evidence ... because it does not involve a determination of the guilt or innocence of the accused." Sheriff v. Hodges, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980); Sheriff v. Potter, 99 Nev. 389, 391 (1983). Therefore, Hays is inapplicable to Appellant's claim here.

Regardless, the district court correctly dismissed Appellant's claim. Like Appellant's other claim, he waived his ability to claim that he would have testified that he acted in self-defense before the grand jury when he pled guilty. Pursuant to NRS 34.810(1), when a defendant pleads guilty, he waives his ability to raise any claim other that the voluntariness of his plea or ineffective assistance of counsel during the plea process. As Appellant's claim is neither, he forfeited his ability to raise this claim on habeas proceedings.

Nevertheless, Appellant's claim that he did not know about the grand jury proceedings is belied by the record. Marcum notice was served to defense counsel on October 5, 2016. AA168-69. In that notice, Appellant was specifically informed of his right to testify before the grand jury. Id.

Further, Appellant cannot show prejudice. Appellant has not articulated how his decision to testify before the grand jury would have influenced his decision to plead guilty. Appellant has not articulated what specific facts or circumstances he would have explained before the grand jury. Simply claiming that he would have claimed that he was acting in self-defense without articulating the specific facts supporting that claim is insufficient for a claim of ineffective assistance of counsel Appellant has not provided any facts that would have established that he shot two victims, whom he stalked to the McCarran airport, out of self-defense. Accordingly, Appellant failed to show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Molina, 120 Nev. at 190-91, 87 P.3d at 537. Thus, Appellant's claim fails and the district court appropriately dismissed his claim.

III. THE DISTRICT COURT CORRECTLY DISMISSED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PREPARE A SENTENCING MEMORANDUM

Appellant complains that counsel was ineffective because he did not file a sentencing memorandum and did not address the prejudicial information in the state's sentencing memorandum. AOB13. As a result, Appellant claims he was sentenced to the maximum sentence. Id. Appellant's claim fails.

Here, the district court correctly dismissed Appellant's claim. As with all of Appellant's other claims, because this argument is not a claim of ineffective

assistance of counsel at plea or a claim that the plea was invalid, this argument was improperly raised in his Petition. NRS 34.810(1).

Regardless, Appellant's claim failed. The decision to file a sentencing memorandum or offer the information orally at a sentencing hearing is a virtually unchallengeable strategic decision. Doleman, 112 Nev. at 846, 921 P.2d at 280. Moreover, at sentencing, defense counsel's argument rebutted arguments made by the state in their sentencing memorandum and orally. Specifically, in the State's sentencing memorandum, the State argued that Appellant should be sentenced to the maximum and regurgitated the facts elicited from the Grand Jury and pointed the court to several calls Appellant made while in custody where he (1) acknowledged that he was trying to kill one of the victims; (2) asked others to get "dirt" on another victim to use at trial; (3) suborn perjury through his son, a witness to the case; and (4) asked his son to destroy what he believed to be incriminating evidence. AA11-17. At sentencing, the State highlighted the key facts, trauma suffered by the victims, Appellant's lack of remorse; and rebutted mitigating factors such as his age, self-defense claim, and lack of criminal history. AA88-92.

In response, Appellant's counsel argued his theory of the case, and explained that given Appellant's age, health, and lack of history, they had a valid argument for self-defense. AA90-92. Appellant fails to explain what additional facts counsel should have included in a sentencing memorandum. However, the district court

disagreed with Appellant's argument, explaining that per the law in Nevada, a person cannot use deadly force in self-defense unless deadly force is first used against them. AA91. Appellant fails to explain what other facts would have changed the district court's position because Appellant is not alleging that deadly force was actually used against Appellant before he shot two people in the back. As such, Appellant's claim fails.

IV. THE DISTRICT COURT CORRECTLY DENIED APPELLANT'S PETITION WITHOUT AN EVIDENTIARY HEARING

Appellant requested an evidentiary hearing before the district court and Appellant claims the district court should have granted this request in his Statement of the Issues and in the Conclusion. AOB v & 15. As an initial matter, Appellant has not argued that the court erred in denying Appellant's Petition without an evidentiary hearing in the Argument section of his Opening Brief. Pursuant to NRAP 28(a)(10), all legal claims for relief are reserved for the argument section. Therefore, it is insufficient to claim that the court erred in denying Appellant's Petition without an evidentiary hearing by merely stating it in the Statement of Issues or Conclusion. This Court need not consider issues that are not cogently argued. Maresca, 103 Nev. at 673, 748 P.2d at 673. Any unsupported arguments are summarily rejected on appeal. Thomas, 120 Nev. 37, 50, 83 P.3d at 827.

Pursuant to NRS 34.770, a petitioner is entitled to an evidentiary hearing when a judge reviews all supporting documents filed and determines that a hearing is

necessary to explore the specific facts alleged in the petition. An evidentiary hearing is unnecessary if a petition can be resolved without expanding the record. 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 petitioner 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, 100 Nev. at 503, 686 P.2d at 225 (holding that "[a] defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record"). 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, 562, U.S. 86, 105, 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, 540 U.S. 1, 124 S. Ct. 1). Strickland calls for an inquiry in the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U.S. at 688, 104 S. Ct. at 2065.

Here, Appellant is not entitled to an evidentiary hearing. All of Appellant's claims are meritless. When Appellant pled guilty, he admitted that he was guilty of a crimes and he cannot now claim that counsel's pre-plea investigation was deficient or that he could have successfully argued that he acted in self-defense. Regardless, all of Appellant's claims were either bare and naked claims unsupported by specific facts or otherwise belied by the record. Moreover, Appellant did not establish that he would have rejected the plea had counsel behaved differently. Therefore, there was no need to expand the record with an evidentiary hearing and the district court properly denied Appellant's Petition without one.

V. APPELLANT'S CLAIM OF CUMULATIVE ERROR RAISED FOR THE FIRST TIME ON APPEAL IS WAIVED FOR FAILURE TO RAISE IT BELOW

On appeal, Appellant attempts to raise a new ground upon which he is allegedly entitled to relief, claiming "the court erred by ignoring the totality of errors and deficiencies of trial counsel." AOB14. Because this claim was not presented to the district court, this court should decline to take it into consideration as well. See

Guy v. State, 108 Nev. 770, 180, 839 P.2d 578, 584 (1992) (stating: "[b]ecause appellant failed to present these hearsay exceptions at trial, the trial court had no opportunity to consider their merit. Consequently, we will not consider them for the first time on appeal."); see also McNelton v. State, 115 Nev. 396, 416, 990 P.2d 1263, 1276 (1999) (declining to address arguments not raised before the district court). Therefore, the district court could not have abused its discretion since it did not have the opportunity to address Appellant's newly raised claim below. Thus, such allegations should be denied. See also Ford v. Warden, 111 Nev. 872, 884, 901 P.2d 123, 130 (1995) (providing that a petitioner cannot raise a new claim on appeal that was not presented to the district court in postconviction proceeding); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that this court need not consider arguments raised on appeal that were not presented to the district court in the first instance), overruled on other grounds by Means v. State, 120 Nev. 1001, 103 P.3d 25 (2004).

Even if Appellant's claim of cumulative error were proper, Appellant asserts a claim of cumulative error in the context of ineffective assistance of counsel, which is meritless. 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 Appellant'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, Appellant's claim is without merit because "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). Any errors that occurred at trial were 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). There was no error in this case which prejudiced the Appellant let alone cumulative error.

While the Nevada Supreme Court has noted that some courts do apply cumulative error in addressing ineffective assistance claims, it has not specifically adopted this approach. See McConnell v. State, 125 Nev. 243, 250 n.17, 212 P.3d 307, 318 n.17 (2009). However, the Eighth Circuit Court of Appeals has concluded that "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denied, 549 U.S. 1134, 127 S.Ct. 980 (2007) (quoting Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002)).

Even if the Court applies cumulative error analysis to Appellant's claims of ineffective assistance, Appellant fails to demonstrate cumulative error warranting reversal. A cumulative error finding in the context of a Strickland claim is extraordinarily rare and requires an extensive aggregation of errors. See, e.g., Harris By and Through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995).

Appellant has not shown any errors that, even if aggregated, would establish a reasonable likelihood of a different, more beneficial result at trial or on appeal. Assuming arguendo that some or all Appellant's allegations have merit, he has failed to establish that, when aggregated, the errors deprived him of a reasonable likelihood of a better outcome. Therefore, for all of the foregoing reasons, Appellant's claim of cumulative error fails.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court AFFIRM the district court's denial of Appellant's Petition for Writ of Habeas Corpus.

Dated this 6th day of January, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. **I hereby certify** that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page and type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points, contains 6,773 words and does not exceed 30 pages.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on January 6, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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