

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERMAINE HAMPTON,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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Case No. 84360

RESPONDENT'S ANSWERING BRIEF

**Appeal From the Denial of a Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

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**Appeal from the Denial of a Petition for Writ of Habeas Corpus
Eighth Judicial District Court, Clark County**

ROUTING STATEMENT

This appeal is presumptively assigned to the court of appeals pursuant to NRAP 17(b)(3) because it is a direct appeal from the denial of a Petition for Writ of Habeas Corpus.

STATEMENT OF THE ISSUES

- I. The District Court Properly Denied Hampton’s Meritless Claims
- II. There Were No Errors to Accumulate
- III. The District Court did not Err When it Denied Hampton an Evidentiary Hearing

IV. The District Court did not Err by Forwarding his Pro Per Motions to Counsel

STATEMENT OF THE CASE

On January 10, 2017, Germaine Hampton aka Jermaine Hampton (hereinafter “Hampton”) was charged by way of Amended Information as follows: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 200.380, 199.480); Count 2 – Robbery With Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.165); and Count 3 – Stop Required on Signal of Police Officer (Category B Felony – NRS 484B.550.3b). 1 Record on Appeal (“ROA”) at 32-34.

On June 17, 2019, Hampton’s jury trial began before the Honorable Mary Kay Holthus. 4 ROA at 821. On June 20, 2019, the jury returned a verdict and found Hampton guilty of Conspiracy to Commit Robbery, Robbery, and Stop Required on Signal of Police Officer. 4 ROA at 827-828.

Hampton was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – a maximum of 72 months and a minimum of 24 months; County 2 – a maximum of 180 months and a minimum of 72 months, to run concurrent with Count 1; and Count 3 – a maximum of 72 months and a minimum of 24 months, to run consecutive to Counts 1 and 2. 4 ROA at 829-830. Hampton was sentenced to an aggregate of 8 to 21 years with 271 days of credit for time

served. Id. The Judgment of Conviction was filed on August 20, 2019. 1 ROA at 187-188.

On September 18, 2019, Hampton filed a Notice of Appeal. 1 ROA at 194-195. The Court of Appeals affirmed Hampton's Judgment of Conviction with a written opinion filed on November 25, 2020. 3 ROA at 626-639. Remittitur was issued on December 21, 2020. Id.

Hampton filed Hampton's Motion to Reconsider Sentence on March 2, 2021. 3 ROA at 649-675. On March 30, 2021, the District Court filed its Order Denying Hampton's Motion to Reconsider. 3 ROA at 697-699. Hampton filed a Notice of Appeal to the Nevada Supreme Court from the Order Denying Hampton's Motion to Reconsider Sentence on April 28, 2021. 3 ROA at 700-701.

On September 13, 2021, Hampton filed an appeal from the denial of a motion to reconsider sentence. On January 25, 2022, the Nevada Supreme Court affirmed Hampton's Judgment of Conviction and issued Remittitur on January 24, 2022.

On November 22, 2021, Hampton filed a Petition for Writ of Habeas Corpus ("Petition"). The State's Response was filed on January 13, 2022. The district court denied Hampton's Petition on January 20, 2022. The court issued its Findings of Fact, Conclusions of Law and Order on February 3, 2022. 4 ROA at 742-764.

Hampton filed the instant Appellant's Opening Brief ("AOB") on April 20, 2022. The State's Answering Brief now follows.

STATEMENT OF THE FACTS

On November 30, 2016, officers were dispatched to a local address in regards to an armed robbery. Upon arrival, the victim reported that a vehicle pulled up to his vehicle, the co-defendant Robert Russell (“Russel”) approached the driver side window holding up a gun to him and ordered him to hand over his property, and the defendant Germaine Hampton, aka, Jermaine Hampton approached the passenger side and ransacked the vehicle, taking a gray backpack with clothing, a tablet, wallet with contents, cell phone, bag of recycling, car jack, broken cell phone, vehicle keys and paperwork. Upon locating the defendant’s vehicle, officers attempted to do a vehicle stop; however, the defendant refused to stop. Once officers were able to stop the vehicle, Mr. Hampton stayed in the vehicle, and Mr. Russell ran. Upon retrieving the co-defendant, a 9mm Beretta was found. Inside the vehicle, officers found the victim’s driver’s license, bag of recycling, gray backpack with clothing, tablet, wallet with contents, car jack, broken cell phone and paperwork, along with latex gloves.

Mr. Hampton and Mr. Russell were arrested, transported to the Clark County Detention Center and booked accordingly.

Hampton’s Presentence Investigation Report (“PSI”) at 6-7.

SUMMARY OF THE ARGUMENT

The district court did not err in denying Hampton’s various claims in his Petition because every claim he raised in his Petition was meritless. All of Hampton’s claims were bare and naked without specific factual allegations, belied by the record, or outside the scope of a petition for writ of habeas corpus. Most of Hampton’s claims were bare and naked, and the court correctly summarily denied

them. Accordingly, there was no reason for the court to grant an evidentiary hearing. While Hampton claims the court erred in not allowing him to file a Reply brief, he was not entitled to file a Reply per statute. Additionally, the district court did not err in forwarding his pro per motions to his assigned counsel because they were required to do so by statute and there is no evidence the district court was biased when it denied his Motion to Reconsider Sentence.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED HAMPTON'S MERITLESS CLAIMS

Hampton alleges the district court erred by ruling his trial counsel was not ineffective. AOB 1-21. The district court correctly found counsel was not and in doing so, the district court did not err.

This Court gives deference to a district court's factual findings in habeas matters but reviews the court's application of the law to those facts de novo. State v. Huebler, 128 Nev. 192, 197, 275 P.3d 91, 95 (2012), cert. denied, 133 S. Ct. 988 (2013). "The question of whether a [criminal] defendant has received ineffective assistance of counsel at trial in violation of the Sixth Amendment is a mixed question of law and fact and is thus subject to independent [appellate] review." Lara v. State, 120 Nev. 177, 179, 87 P.3d 528, 529-530 (2004).

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 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).

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. Cronin, 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).

A defendant is not entitled to a particular “relationship” with his attorney. 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. Id.

A party seeking review bears the responsibility “to cogently argue, and present relevant authority” to support his assertions. Edwards v. Emperor’s Garden Restaurant, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); Dept. of Motor Vehicles and Public Safety v. Rowland, 107 Nev. 475, 479, 814 P.2d 80, 83 (1991) (defendant’s failure to present legal authority resulted in no reason for the district court to consider defendant’s claim); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (an arguing party must support his arguments with relevant authority and cogent argument; “issues not so presented need not be addressed”); Randall v. Salvation Army, 100 Nev. 466, 470-71, 686 P.2d 241, 244 (1984) (court may decline consideration of issues lacking citation to relevant legal authority); Holland Livestock v. B & C Enterprises, 92 Nev. 473, 533 P.2d 950 (1976) (issues lacking citation to relevant legal authority do not warrant review on the merits).

A “habeas corpus petitioner must prove the disputed factual allegations underlying his ineffective-assistance claim by a preponderance of the evidence.” Means, 120 Nev. at 1012, 103 P.3d at 33. 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. “[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.” NRS 34.735(6).

A. Hampton’s claims were bare and naked and the district court correctly found them as such

Hampton claims the district court erred by only “partial[ly]” reviewing his claims because the court did not review his claims on the merits. AOB at 24-25. He claims the his claims were “all reviewed as bare and naked.” Id. This claim is belied by the findings of the court. 4 ROA at 742-764. While Hampton is correct that the court reviewed found some of his claims as bare and naked, some of his claims were denied as outside the scope and some were denied on the merits. See id. Moreover, even the claims the district court denied as bare and naked were additionally denied on the merits. See i.e. 4 ROA 748-749 (the court denied Hampton’s claim his counsel advised him to lie under oath because the claim was bare and naked and he failed to show prejudice).

Regardless, the district court correctly denied all of his claims in his Petition. As to the claims that the district court found bare and naked, the district court did

not find that Hampton's claims were bare and naked for failure to cite law. See id. The district court found that Hampton's claims were bare and naked because he did not support his claims with any evidence or adequate factual support. Id. Simply put, Hampton provided no basis for the district court to grant relief for any of his claims.

Hampton claims he included a proposed amended petition, where his claims are "sufficiently pled." AOB at 24. However, he never filed an amended habeas petition, nor was he entitled to. NRS 34.810(2), Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994). Further, an appellate court only reviews a district court's decision based on the record that was in front of the court at the time the court made its decision. Nevada Gold & Casinos, Inc., 121 Nev. at 89, 110 P.3d at 484.

Therefore, his claims were correctly denied by the district court. His present claim must be denied.

B. Claim One¹: There was no evidence of the trial judge's alleged mannerisms

Hampton claims the district court erred when it denied his claim that counsel was ineffective for failing to object to the trial judge's alleged mannerisms and gestures during his testimony. AOB at 1-2, Respondent's Appendix ("RA") at 11-

¹ The claim numbers in the headings reference the claims as Hampton numbers them in his Appellant's Opening Brief. Those claim numbers are different than the corresponding claim numbers for the same arguments in his Petition.

12. However, Hampton's claim should be denied because the district court's ruling was correct.

The district court found that the claim was "bare and naked, and there [was] no evidence the Court made improper prejudicial remarks or mannerisms." 4 ROA at 751. This ruling was correct because this claim was bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Hampton only speculated as to what the mannerisms or remarks were in reference to. See AOB at 1-2, RA at 11-12. Moreover, Hampton failed to show that they occurred at all. Therefore, his claim was correctly summarily denied by the district court and Hampton fails to prove error. His claim must be denied accordingly.

C. Claim Two: Hampton's claim failed on the merits

Hampton claims the district court erred in denying his claim that his counsel was ineffective for failing to object to the repeated reference to his co-defendant as his "co-conspirator" at trial. AOB at 2-3, RA at 11, 18-19. However, this claim was correctly decided by both the district court and Court of Appeals and Hampton failed to show error.

The district court found that "the Prosecutor's reference to Petitioner as a co-conspirator was not improper" and "Petitioner did not suffer any prejudice." 4 ROA at 750-751. The district court's rulings were correct.

First, the Prosecutor's reference to Hampton as a co-conspirator was not improper and the Nevada Court of Appeals ruled as such. The Court of Appeals ruled that at trial, Hampton was charged with and convicted of Conspiracy to Commit Robbery. There, the Court concluded the State's reference to Russell as Hampton's co-conspirator was proper because "that was the very question that the trial was intended to answer." Hampton v. State, 476 P.3d 927 (2020) (unpublished). The Court further held the reference was proper because "[t]he State's assertion that Russell and Hampton conspired to commit the crime together was logically based upon the evidence introduced at trial...the State's references to Russell as a 'co-conspirator' were reasonably based upon evidence and do not amount to prosecutorial misconduct under any circumstances because of the way the case was charged." Id. Therefore, the Court of Appeals ruling and the record supports the district court's ruling that any reference to his co-defendant as a co-conspirator was not improper because he was convicted of Conspiracy to Commit Robbery based on the evidence that was presented at trial.

Second, Hampton failed to show prejudice in his Petition. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. Hampton did not allege nor demonstrate that he suffered any prejudice as a result of his counsel's failure to object. Hampton only presented a bare and naked assertion that the Prosecutor's reference to Russell as a

co-conspirator was somehow improper. Hargrove, 100 Nev. at 502, 686 P.2d at 225. Hampton did not provide any facts or evidence to support his claim.

Therefore, Hampton's claim of ineffective assistance of counsel was without merit and the district court did not err in denying it. This Court should affirm the district court's ruling accordingly.

D. Claim Three: Hampton's claim regarding the district court's ruling that he had a gun is without merit

Hampton claims the district court erred by not finding ineffective assistance of counsel because his counsel failed to object when the State and sentencing judge referenced his use of a firearm, even though he was found not guilty of the use of a deadly weapon at trial. AOB at 3-4, RA at 13-14. However, the district court did not err because his ineffective assistance claim was without merit.

The district court found there was evidence presented at trial that Hampton had a gun, which he used to rob the victim at gunpoint and the State's arguments that he had a gun during their Opening and Closing arguments were proper. 2 ROA at 359-360.

At trial, the victim testified that both Hampton and his co-defendant had guns that they used to rob him. 2 ROA 359-360, 4 RA 752-753. Therefore, there was evidence adduced at trial that Hampton had a gun. Even though Hampton was ultimately found not guilty of using a deadly weapon, the State's Opening and

Closing arguments were prior to the jury's verdict. Therefore, there was no basis to object to the reference and Hampton did not demonstrate any prejudice based on counsel's failure to object.

Next, Hampton claimed his counsel was ineffective for failing to object to the judge's comment at sentencing that he used a gun during the robbery. RA at 13-14, 3 ROA at 622. While Hampton was correct that the sentencing judge referenced his use of a gun at sentencing, the district court denied his claim because he failed to show prejudice. 4 ROA at 753.

The district court's ruling was correct because at trial, the victim testified Hampton used a gun during the robbery and the sentencing judge was the same judge who heard the trial. 2 ROA 359-360, 4 RA 752-753. Therefore, he was aware of the testimony. Even though the judge made the comment that Hampton robbed the victim at gunpoint during sentencing, it is unlikely Hampton received a harsher sentence as a result. See 3 ROA at 622. Moreover, he failed to show he received a harsher sentence to his extreme detriment. Hampton was sentenced to robbery, and he was not sentenced to a deadly weapon enhancement. 3 ROA at 623. The judge was clear that he sentenced Hampton based on the totality of his conduct, including threatening the victim's life, running red lights, and evading from police. See 3 ROA at 622-623. Hampton put the entire community at risk. Therefore, Hampton cannot

demonstrate he was prejudiced by the judge's comment or that counsel was deficient for failing to object. Strickland, 466 U.S. at 687-88, 694, 104 S. Ct. at 2065, 2068.

Hampton was not convicted of, or sentenced for, a deadly weapon enhancement and he has not demonstrated that any other portion of his sentence was increased as a result of counsel's failure to object. Therefore, the district court correctly denied his claim.

E. Claim Four: The district court did not err because Hampton failed to prove his counsel's alleged failure to investigate

Hampton claims the district court erred in denying his claim that his counsel was ineffective for failing to communicate with him and for giving his phone number to his co-defendant's counsel to coerce him to plead guilty. AOB at 6-7, RA at 9-10, However, the district court did not err because the claims were without merit.

The district court denied Hampton's claims one (1) and three (3) in his Petition. In claim one (1), Hampton claimed his counsel failed to conduct a thorough pre-trial investigation because they did not discuss a pre-trial strategy with him. RA at 9. The district court denied his claim because it was bare and naked, and Hampton failed to show prejudice. 4 ROA at 748, 751.

The district court did not err in denying Hampton's claim. A defendant is not entitled to a particular "relationship" with his attorney. 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. Hampton's claim was bare and naked because he did not identify what defenses he wanted to discuss, what motions they should have filed, or how those motions and defenses would have affected the outcome. Furthermore, he failed to allege how a better pre-trial investigation would have changed the outcome of the trial.

In claim three (3), Hampton claimed his trial counsel was ineffective for giving his phone number to his co-defendant's attorney to coerce him to accept a guilty plea. RA at 10. The district court ruled that this claim did not amount to ineffective assistance of counsel, even if true, and regardless, was a bare and naked claim. 4 ROA at 749, Hargrove, 100 Nev. at 502, 686 P.2d at 225.

The district court's ruling was correct. Hampton did not provide any evidence to support his claim that this conduct violated the rule he cited, let alone that it is actually true. RA at 10. Additionally, Hampton did not demonstrate prejudice. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063-64. Hampton did not show, or even allege, he suffered any prejudice from his counsel giving his phone number to his co-defendant's counsel. Further, Hampton did not accept the plea offer and went to trial. Thus, there was no prejudice because he clearly was not coerced into taking the plea offer. Therefore, there was no evidence of ineffective assistance of counsel and the district court did not err in denying Hampton's claim.

Therefore, his alleged lack of communication and his claim counsel gave his phone number to his co-defendant's counsel, both of which he provided no evidence of, did not constitute ineffective assistance by themselves. Therefore, the district court's ruling should be affirmed.

F. Claim Five: There was no evidence his counsel advised him to lie under oath and his failure to investigate the claim was bare and naked

Hampton claims the district court erred in denying his claims that counsel was ineffective because counsel advised him to lie under oath, failed to investigate and failed to find witnesses to support his alibi. AOB at 9-13, RA at 9, 12, 13-14. However, both claims were meritless, thus the district court did not err.

In claim two (2), Hampton alleged his counsel advised him to lie under oath that his co-defendant held him at gunpoint and forced him to participate in the alleged crimes. RA at 9. The district court found that "there [was] no evidence his counsel ever advised him to lie and [his] claim is belied by the record." 4 ROA at 748-749.

The district court's ruling was correct because his assertion was bare and naked. Hargrove, 100 Nev. at 502, 686 P.2d at 225. There was no evidence his counsel ever advised him to testify that his co-defendant held him at gunpoint and ultimately, Hampton did not testify that he was held at gunpoint. See ROA at 748-749. Hampton testified at trial that on the day of the crime when he was about to be

pulled over by police, his co-defendant “pulled out the gun and tried to put it underneath [Hampton’s] seat.” 2 ROA at 471. Hampton has never claimed that he lied under oath at the direction of counsel. Thus, even if Hampton’s claim was true, he failed to demonstrate that he suffered prejudice as a result of the alleged advisement. The district court’s denial of his claim was correct and the denial should be affirmed.

In claim seven (7), Hampton claimed his counsel failed to conduct a thorough pre-trial investigation and “appeared to join the Prosecutor in his effort to obtain a conviction.” RA at 12. The district court denied this claim because “it [was] bare and naked,” “Petitioner [did] not claim his counsel’s failure to conduct a pre-trial investigation caused him undue prejudice,” and counsel clearly had and employed a reasonable defense at trial. 4 ROA at 751-752.

This claim was correctly summarily denied because he failed to demonstrate either deficiency or prejudice. In his Petition, he did not argue, and still does not argue, what counsel should have investigated or what that investigation would have revealed. See AOB at 9-13, RA at 12, 4 ROA at 752-753. He did not demonstrate deficiency because he did not specifically state what counsel did wrong or failed to do. Hampton did not demonstrate prejudice because he did not show that whatever counsel allegedly did wrong affected the outcome of the trial. Therefore, the district court correctly ruled his claim was bare and naked.

Additionally, his claim is that his trial counsel attempted to obtain a conviction, rather than defend him, was belied by the record. At trial, counsel strategized a defense. Counsel's strategy and defense was that his co-defendant had the gun and conducted the entire robbery while Hampton was the innocent driver. Trial counsel attempted to show through cross-examination of multiple witnesses that his co-defendant primarily committed the robbery because there was no evidence Hampton had a gun, and the victim remembered his co-defendant as the person who pointed the gun at him, forced him to open the door, and took his bag. 2 ROA at 371-373, 399-401.

Therefore, his claim that counsel was ineffective for failing to investigate was correctly denied because it was bare and naked, and his claim his counsel chose not to defend him was belied by the record.

In claim eight (8), Hampton claimed that his counsel failed to prepare a reasonable defense and interview alibi or character witnesses. AOB at 9-13, RA at 13-14. Hampton claimed these witnesses would have testified he had more money than what he attempted to steal. Id. The district court held that "counsel's failure to investigate and interview these witnesses did not cause Petition any undue prejudice" and regardless, his claim was irrelevant to the issue of whether he committed the robbery. RA at 752. Therefore, counsel was not ineffective for failing to interview witness that would not have supported his claim of innocence. Id.

The district court correctly denied Hampton's claim that his counsel was ineffective for failing to interview alibi witnesses. According to his Petition, these witnesses would have testified Hampton had access to more money than what he attempted to steal through other people, thus potentially contradicting his motive for the robbery. RA at 13-14. First, counsel's failure to investigate and interview these witnesses did not cause Hampton any undue prejudice. Even if what Hampton claimed was true, his potential access to money elsewhere was irrelevant to whether he committed the robbery. Hampton's capability to commit other robberies did not support his innocence in this case. Second, Hampton's claim was belied by the record. Antonio Quintanar, the victim, testified Hampton robbed him at gunpoint after him and his co-defendant forced him to open his car doors by pointing guns at him. 2 ROA 360-361, 364. Hampton was identified by the victim as one of the attackers and Hampton's other opportunities to rob or make money did not contradict his motive to rob the victim in this case. Therefore, his claim was correctly denied by the district court and his claim of error must be denied.

G. Claim Seven: There was no evidence of a conflict of interest

Hampton claims the district court erred when it denied his claim that his counsel had a conflict of interest. AOB at 15-18, RA at 14-15, 25-26. In claim ten (10), he alleged his counsel's conduct and performance was unprofessional and deficient.

The district court found that this claim was bare and naked because Hampton never argued how this alleged conflict of interest prejudiced him or provided evidence that there was a conflict. 4 ROA at 754. The district court's ruling was correct and should be affirmed on appeal.

This claim failed on the merits. The American Bar Association, District Court, and Nevada Court of Appeals all found that there was no conflict. RA at 15, 26, Hampton, 476 P.3d 972. Hampton did not explain how this alleged conflict, assuming it even existed, affected the trial, or led to any deficiency whatsoever. Furthermore, Hampton did not provide any evidence that his counsel had any conflict of interest other than generally claiming there was one. Hampton did not allege nor demonstrate how this conflict prejudiced him at trial. These claims were bare and naked, and correctly summarily denied by the district court. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

Accordingly, Hampton fails to demonstrate error and the district court's denial should be affirmed.

H. Claim Eight: Hampton's claim ineffective assistance of appellate counsel claim was without merit

Hampton claims the court erred when it denied his claim that his appellate counsel was ineffective for failing to include a transcript of the sealed hearing on appeal. AOB at 17-19, RA at 17. However, the district court did not err because this

claim was without merit. The district court found that Hampton “failed to satisfy the first prong of Lyons, and the Court [of Appeals] had sufficient grounds to affirm the District Court’s decision without the sealed hearing transcript.” 4 ROA at 755.

The district court’s ruling was correct because, while the Court of Appeals did cite Hampton’s failure to provide the transcript in their affirmance, the Court did not deny the claim solely for that reason. Hampton, 476 P.3d 927. The Court also stated Hampton failed to satisfy the first prong of Lyons because the request was untimely. 106 Nev. 438, 445-46, 796 P.2d 210, 214 (1990); id. Hampton made his request after multiple dates of calendar call during which both parties announced ready for trial and made the request only days before the trial was scheduled to begin. Hampton, 476 P.3d 927. Further, Hampton told the court he would need more time to prepare. Thus, Hampton failed to satisfy the first prong of Lyons, and the Court had sufficient grounds to affirm the district court’s decision without the sealed hearing transcript. Hampton did not demonstrate his appellate counsel was ineffective for failing to include the sealed hearing transcript.

Therefore, the district court’s decision should be affirmed.

I. Claims Eight(a) and Nine: These claims were never reviewed by the district court

Hampton claims his appellate counsel was ineffective for failing to raise his claims that he was sentenced on incorrect facts, and that the State and court

committed prosecutorial and judicial misconduct. AOB at 19-22. However, these arguments are not properly before this Court as they were never presented below. This Court should not adjudicate an issue that was never presented to or ruled upon below.

“[A]n appeal ... may be taken only by filing a notice of appeal with the district court clerk[.]”); NRAP 4(a)(1). A notice of appeal “shall ... designate the judgment, order or part thereof being appealed[.]” NRAP 3(c)(1)(b). The failure to indicate the portion of the judgment appealed from in the notice of appeal precludes appellate review of the omitted order. Collins v. Union Fed. Sav. & Loan Ass’n, 97 Nev. 88, 89-90, 624 P.2d 496, 497 (1981); Charmicor, Inc. v. Bradshaw Fin. Co., 92 Nev. 310, 312-13, 550 P.2d 413, 415 (1976); Reno Newspapers v. Bibb, 76 Nev. 332, 335, 353 P.2d 458, 459 (1960). Indeed, this Court will not address an issue that has not been presented to and ruled upon by the lower court. Dermody v. City of Reno, 113 Nev. 207, 210-11, 931 P.2d 1354, 1357 (1997); Guy v. State, 108 Nev. 770, 780 839 P.2d 578, 584 (1992), cert. denied, 507 U.S. 1009, 113 S. Ct. 1656 (1993); Davis v. State, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991); Buck v. Greyhound Lines, Inc., 105 Nev. 756, 766, 783 P.2d 437, 443 (1989).

Hampton’s Notice of Appeal states that he is appealing the district court’s findings denying his Petition for Writ of Habeas Corpus. RA at 76. These claims

were not raised in his petition. Therefore, this Court should decline to review these claims as the district court never ruled on them.

II. THERE WERE NO ERRORS TO ACCUMULATE

Hampton claims there was cumulative error by the district court in its denial of his many claims. AOB at 13-14, RA at 17-18. However, there were no errors to accumulate and Hampton fails to prove one cognizable claim of error. Thus, his claim must be denied.

The Nevada Supreme Court has never held that instances of ineffective assistance of counsel can be cumulated; it was and still currently 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 Hampton'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, Hampton's claims were without merit. 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 let alone cumulative error. Therefore, the district court was correct in denying Hampton's cumulative error claim.

III. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED HAMPTON AN EVIDENTIARY HEARING

Hampton claims the district court erred when it denied his request for an evidentiary hearing based on the claims he made in his post-conviction Petition for Writ of Habeas Corpus. AOB at 23-24. However, the district court did not err because all of his claims were without merit, thus there was no reason to grant an evidentiary hearing. Accordingly, his claim must be denied.

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). “A petitioner for post-conviction relief cannot rely on conclusory claims for relief but must make specific factual allegations that if true would entitle him to relief. The petitioner is not entitled to an evidentiary hearing if the record belies or repels the allegations.” Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463, 467 (2002) (citing Evans v. State, 117 Nev. 609, 621, 28 P.3d 498, 507 (2001)).

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).

Hampton has failed to demonstrate that he was entitled to an evidentiary hearing because he failed to demonstrate that he received ineffective assistance of counsel. Hampton's claims were correctly resolved without expanding the record as they were bare, naked, and unsupported by evidence.

Hampton has failed to demonstrate that he was entitled to an evidentiary hearing because he failed to demonstrate that he received ineffective assistance of counsel. Hampton's claims were correctly resolved without expanding the record as they were bare, naked, outside the scope and unsupported by evidence.

Claims 4, 11, 12, 13, 17, 18, 23, and 24 in the petition below are not challenged on appeal, claims 1, 2, 3, 5, 6, 7, 8, 9, 10, 14, 15, 16, 19, 20, 21, 22, 25, and 26 were challenged in Hampton's AOB. However, every claim in Hampton's petition was without merit.

Claims 1, 2, 3, 6, 7, 10, 12, 13, 18, 21, 25, and 26 were denied as bare and naked because Hampton did not assert specific facts that would entitle him to relief if true and, therefore, there was no need for an evidentiary hearing on those claims. RA at 10-12, 15-17, 19, 21-22, 24-25.

Claims 4, 5, 7, 8, 9, 14, 15, 16, 17, 19, 20, 23, 24, and 25 either failed on the merits because Hampton failed to meet his burden under Strickland or were belied by the existing record and there was no need to create an additional record. RA at 10-14, 17-21, 23-25. Thus, there was no reason to grant an evidentiary hearing on those claims.

Claim 11, and the claims regarding judicial misconduct, prosecutorial misconduct, and error by the Nevada Supreme Court in the petition below were denied without an evidentiary hearing because they were outside the scope of a Petition for Writ of Habeas Corpus and were, therefore, summarily denied. RA at 15-16, 27-37.

Claims 8(a) and 9 in appellant's opening brief were not presented in Hampton's petition below, thus the district court did not consider that claim and could not have considered whether to hold an evidentiary hearing on it. AOB at 19-22.

As stated above, claims 4, 11, 12, 13, 17, 18, 23, and 24 in the petition below are not challenged on appeal, so Hampton is not challenging the denial of those

claims without an evidentiary hearing. RA at 10-11, 15-17, 19, 23-24. Regardless, these claims were correctly denied by the district court.

Hampton presented no cognizable claim in his Petition, thus there was no reason for the district court to grant an evidentiary hearing and his present claim must be denied accordingly.

IV. THE DISTRICT COURT DID NOT ERR BY FORWARDING HIS PRO PER MOTIONS TO COUNSEL

A. Hampton's claims are outside of the jurisdiction of the instant appeal

Hampton's claims that the district court erred by forwarding his Pro Per motions to his retained counsel and that it denied his Motion to Reconsider Sentence due to bias are not properly before this Court as neither issue was noticed in his Notice of Appeal. See RA at 76. Moreover, Hampton's claim regarding the district court's denial of his Motion to Reconsider Sentence has already been reviewed and denied by the Court of Appeals. See Hampton v. State, 501 P.3d 469 (2021) (unpublished). As such, this Court should decline to address either issue, as neither relate to the issue outlined in his Notice of Appeal, the denial of his Petition for Writ of Habeas Corpus filed on February 3, 2022. However, should this Court review the claims, the claims should still be denied, as they fail on the merits (addressed below).

B. The district court did not err by forwarding his pro per motions to counsel

Hampton claims the district court erred by accepting Hampton's Pro Per Petition but forwarding "all additional motions to retained counsel assigned to a separate matter." AOB at 22-23. Hampton claims the district court should not have forwarded his motions. Id. However, Hampton's claim fails because he was not allowed to file the motions pro per since he had assigned counsel.

At the time Hampton filed his Motion for Recusal of Judge and Motion for Change of Venue, Hampton had Kristina Wildeveld as assigned counsel. 4 ROA at 157. As it says in the court order, Hampton could not file the motions without the motions being forwarded to his assigned counsel.

Except as may be required by the provisions of NRS 34.730 to 34.830, inclusive, all motions, petitions, pleadings or other papers delivered to the clerk of the court by a defendant who has counsel of record will not be filed but **must be marked with the date received and a copy forwarded to the attorney for such consideration as counsel deems appropriate.**

Nevada Rules of Practice Rule 3.70 (emphasis added).

As evidenced by Rule 3.70, the court was required to forward the motions to his appointed counsel. The rule is clear that Hampton was allowed to file a Pro Per Petition for Writ of Habeas Corpus but was not allowed to file post-conviction motions without the approval of his assigned counsel. Id. Therefore, Hampton's claim does not entitle him to relief because the district court was required to forward his motions to counsel.

Furthermore, Hampton does not allege and cannot show that he suffered any prejudice as a result of the court forwarding his motions to counsel. He does not claim that the motions were meritorious, let alone so meritorious that counsel's failure to file them caused him prejudice. Moreover, he does not even claim that his motions would have been successful, much less provide evidence of it. He does not allege and does not show that he suffered any prejudice and as a result, his claim must be denied.

C. There is no evidence the district court was biased

Hampton claims the district court was biased during sentencing and when it denied his Motion to Reconsider Sentence, thus he is entitled to relief. AOB at 25-26. However, there was no evidence the court was biased.

There is no evidence the district court was biased against Hampton when it decided Hampton's motion and petition. Hampton only supports his claim with his own self-serving statements. Hampton does not state how the district court was biased other than that the deciding judge stated she would give him either the same sentence received or a more stringent one. AOB at 25. Yet, Hampton claims this one statement constitutes such "implied" bias and prejudice that his motion and petition were denied in error. AOB at 25-26. There is no evidence or cogent argument to support his claim. Thus, his claim must be denied.

CONCLUSION

For the foregoing reasons, this Court should AFFIRM Hampton's Judgement of Conviction.

Dated this 1st day of August, 2022.

Respectfully submitted,

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BY */s/ John T. Afshar*

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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 2003 in 14 point font of the Times New Roman style.
2. **I further certify** that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, contains 7,591 words.
3. **Finally, I hereby certify** that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 1st day of August, 2022.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on 1st day of August, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

AARON D. FORD
Nevada Attorney General

JOHN T. AFSHAR
Deputy District Attorney

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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/s/ J. Hall

Employee, Clark County
District Attorney's Office

JA/John Taylor/jh