IN THE SUPREME COURT OF THE STATE OF NEVADA

DARION COLEMAN,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 82915

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 matter should be retained by the Nevada Supreme Court as it is a postconviction appeal that involves a challenge to a judgment of conviction that is a Category A felony and is thus not within the Nevada Court of Appeal's listed jurisdiction. 3 AA 625.

STATEMENT OF THE ISSUES

1. The district court did not abuse its discretion when it did not find deficient conduct for failure to obtain a timely PTSD evaluation, nor did it abuse its discretion when it denied Appellant's request for the evaluation prior to the evidentiary hearing.

2. The district court did not abuse its discretion when it did not find Detective Miller's testimony improper expert witness testimony for which she was not noticed.

3. The district court did not abuse its discretion when it found that the sentencing court did not rely on evidence in violation of Silks.

4. The district court did not abuse its discretion when it failed to find that the State impermissibly impugned Appellant's right to silence.

5. The district court did not abuse its discretion when it failed to deem the State's closing argument as impermissible tailoring.

6. The district court did not abuse its discretion when it failed to find deficient conduct and prejudice from a failure to impeach or argue at closing.

7. The district court did not err by not reversing Appellant's conviction based upon cumulative error.

STATEMENT OF THE CASE

On October 11, 2013 the State filed an Indictment charging Darion Muhammad-Coleman (hereinafter "Appellant") with the following: Count 1 – Conspiracy to Commit Robbery (Category B Felony – NRS 199.480, 200.380); Count 2 – Attempt Robbery with Use of a Deadly Weapon (Category B Felony – NRS 200.380, 193.330, 193.165); Count 3 – Murder with Use of a Deadly Weapon

(Category A Felony NRS 200.010, 200.030, 193.165); Count 4 – Battery with Use of a Deadly Weapon (Category B Felony – NRS 200.481); Count 5 – Assault with Use of a Deadly Weapon (Category B Felony – NRS 200.471); Count 6 – Conspiracy to Violate the Uniform Controlled Substances Act (Category C Felony – NRS 453.401); and Count 7 – Attempt to Possess Controlled Substance (Category E Felony/Gross Misdemeanor – NRS 453.336, 193.330). 1 AA 1.

On October 18, 2013, Appellant's initial arraignment was continued for a competency evaluation at defense counsel's request. 1 RA 1. Subsequently, Appellant was found competent to stand trial on November 8, 2013. 1 RA 2. Appellant was then arraigned on November 18, 2013, and pled not guilty. 1 RA 3.

On November 26, 2013, Appellant filed a pre-trial Petition for Writ of Habeas Corpus. 1 RA 4. On March 18, 2014, the State filed its Return. 1 RA 17. On April 2, 2014, the district court denied Appellant's pre-trial Petition for Writ of Habeas Corpus and set a trial date. 4 AA 763.

On April 27, 2014, Appellant filed a Motion Seeking Dismissal of Court-Appointed Attorney, which was denied on May 12, 2014. 1 RA 207.

On September 26, 2014, Appellant filed a Motion in Limine to Bar Improper Prosecutorial Argument, a Motion in Limine to Preclude References to the Deceased as the "Victim," a Motion in Limine to Preclude Admission of Photographs, a Motion to Admit Evidence of the Deceased's Violent Propensity, a Motion to

Exclude Other Bad Acts, Character Evidence, and Irrelevant Prior Criminal Activity, a Motion to Federalize All Motions, Objections, Requests and Other Applications for the Proceedings in the Above Entitled Case, and a Motion to Allow Jury Questionnaire. 1 RA 209–250. The State filed Oppositions on January 2, 2015. 2 RA 253–290. On July 27, 2015, Appellant's Motion in Limine to Preclude Admission of Photographs was denied, Appellant's Motion in Limine to Bar Improper Prosecutorial Argument was granted, Appellant's Motion in Limine to Preclude References to the Deceased as the "Victim" was denied, Appellant's Motion in Limine to Admit Evidence of the Deceased's Violent Propensity was reserved for calendar call, Appellant's Motion to Exclude Other Bad Acts, Character Evidence, and Irrelevant Prior Criminal Activity was denied, and Appellant's Motion to Federalize All Motions, Objections, Requests and Other Applications for the Proceedings in the Above Entitled Case was denied. 2 RA 291–92. Trial counsel indicated that negotiations had fallen through and the matter was not resolved and would go to trial. 2 RA 292.

On November 19, 2014, defense counsel filed a Motion to Withdraw as Counsel and Motion to Appoint New Counsel, which was granted on December 1, 2014. 2 RA 252.

On January 5, 2015, the district court was notified that Appellant was in competency court in Case No. C299066. Id. On March 27, 2015, Appellant was once

again found competent and the matter was referred back to the originating district court department for further proceedings. 2 RA 293.

On February 9, 2016, Appellant filed a Pro Per Motion to Withdraw Counsel and for a Faretta Canvass. 2 RA 287. On March 9, 2016, the district court conducted a Faretta canvass and, at the conclusion, Appellant advised the court that he wanted to remain with his attorney. 2 RA 302.

On November 28, 2016, the State announced ready for trial; however, Appellant again orally requested a continuance of the trial date. 4 AA 884. The district court directed counsel to file a written motion. Id. On December 19, 2016, Appellant filed a Motion to Continue Trial Date, alleging that Appellant has only just recently informed him that he believes that he has been suffering from Post-Traumatic Stress Disorder (hereinafter "PTSD") as a result of being the victim of a shooting when he was sixteen (16) years of age. 4 AA 858. The State advised the court that Appellant had been evaluated by five (5) different doctors and they all agreed upon one thing that Appellant malingers, not that he had PSTD. 2 RA 306. The State provided the district court with copies of Appellant's competency evaluations. 2 RA 308. The court marked the competency evaluations as a court's exhibit and ordered them sealed. 2 RA 310. The court denied Appellant's Motion to Continue Trial Date. Id.

Trial was set to begin on January 3, 2017; however, the presiding judge fell ill and the trial was transferred to a different district court department and began the next day on January 4, 2017. 2 RA 313. The trial lasted six (6) days and on January 11, 2017, the jury returned the following verdict: Count 1 - not guilty of Conspiracy to Commit Robbery; Count 2 - not guilty of Attempt Robbery With Use of a Deadly Weapon; Count 3 - guilty of First Degree Murder With Use of a Deadly Weapon; Count 4 - guilty of Battery With Use of a Deadly Weapon; Count 5 - not guilty of Assault With a Deadly Weapon; Count 6 - guilty of Conspiracy to Violate Uniform Controlled Substances Act; and Count 7 - guilty of Attempt to Possess Controlled Substance. 2 RA 314.

On March 28, 2017, Appellant was sentenced as follows: Count 3 – Life with a minimum of two hundred forty (240) months in the Nevada Department of Corrections (hereinafter "NDOC"), plus a consecutive sentence of a minimum of sixty (60) months and a maximum of two hundred and forty (240) months for the deadly weapon enhancement, for a total aggregate sentence of Life with the possibility of parole after a minimum of three hundred (300) months has been served in the NDOC; Count 4 - a minimum of forty-eight (48) months and a maximum of one hundred twenty (120) months in the NDOC, concurrent with Count 3; Count 6 - a minimum of twenty-four (24) months and a maximum of sixty (60) months in the NDOC, concurrent with Count 3; and Count 7 - a minimum of nineteen (19) months

and a maximum of forty-eight (48) months in the NDOC, concurrent with Count 3, consecutive to Case No. C299066, with seven hundred twenty (720) days credit for time served. 2 RA 332.

The Judgment of Conviction was filed on March 29, 2017. Id.

On April 14, 2017, Appellant filed a Notice of Appeal. 4 AA 788. On July 3, 2018, the Supreme Court of Nevada affirmed Appellant's conviction. Remittitur was issued on July 30, 2018. 4 AA 848.

An Amended Judgment of Conviction was filed on August 29, 2018, solely to administratively clarify that Count 3 is to reflect the charge of First Degree Murder With Use of a Deadly Weapon. 2 RA 335.

On August 1, 2019, Appellant filed a Motion to Extend Time for Petition for Post-Conviction Writ of Habeas Corpus. 4 AA 765. Appellant requested an additional sixty (60) days to file his Petition. Id. On August 27, 2019, Appellant and the State entered into a Stipulation and Order to Extend Time. Appellant and the State stipulated to extend the time for filing Appellant's Petition from August 2, 2019 to October 1, 2019. Id.

On December 6, 2019, Appellant filed his Petition for Writ of Habeas Corpus (hereinafter "Petition"). 1 AA 10. On March 5, 2020, the State filed its Opposition to Appellant's Petition for Writ of Habeas Corpus. 3 AA 724. On April 17, 2020,

Appellant filed his Reply. 4 AA 751. On October 12, 2020, the district court heard oral arguments on the briefs from both parties. 4 AA 790.

On October 13, 2020, the district court filed a minute order denying Appellant's Petition in part, but finding that an evidentiary hearing was needed prior to ruling on Appellant's claim that counsel was ineffective in investigating Appellant's PTSD prior to trial. 2 RA 338. Specifically, the court found that the Petition was not procedurally barred under NRS 34.726 and found good cause for the delay. Id. The court also found that none of Appellant's claims were waived pursuant to NRS 34.810. Id. The court further found that the sentencing court did not rely on improper evidence as there was no language in the sentencing transcript to indicate that the court specifically relied on Detective Miller's testimony. Id. The sentencing court specifically stated that it had presided over the entire trial and that it was considering the evidence that was presented at trial to determine that Appellant was the first person to fire his weapon. Id. The court found that Detective Miller's testimony did not amount to comment on Appellant's post-arrest silence. Id. The court further found that under Strickland v. Washington, Appellant did not receive ineffective assistance of counsel in counsel's cross-examination and failure to object to the testimony of Detective Miller. Id. Finally, the district court found that Appellant's PTSD self-defense theory claim warranted an evidentiary hearing. Id.

On October 21, 2020, Appellant requested to expand the record to get an evaluation done by an independent doctor. 2 RA 340. The district court denied his request and noted what the court is interested in is the limited issue as to what trial counsel knew at the time, so any evaluation that occurs at this point, trial counsel would have had no knowledge of that at the time he would have argued the PTSD claim. Id.

On December 18, 2020, the district court held an evidentiary hearing on the limited issue of Appellant's PTSD claim. 4 AA 811. The court withheld its ruling on the matter so that counsel could investigate a possible phone call between Appellant and his previous counsel in March of 2016, which may have contained information regarding the PTSD issue. 4 AA 812. On February 22, 2021, Appellant represented that he submitted call logs between trial counsel and Appellant, but was not able to get a recording of those calls to submit to the court. 4 AA 837. The district court reviewed the call logs and heard the arguments of counsel. 4 AA 838. The district court found that it was very clear that when trial counsel stated he was notified about Appellant's PTSD claim, he filed a Motion to Continue the Trial on an Order Shortening Time, and there was no evidence that prior to that time did trial counsel even attempt to file a motion or act in any way regarding the PTSD claim. 4 AA 846. The district court subsequently denied Appellant's Petition. Id. The

Findings of Fact, Conclusions of Law and Order was filed on April 23, 2021. 4 AA 761.

On May 11, 2021, Appellant filed a Notice of Appeal. 4 AA 788.

STATEMENT OF THE FACTS

The district court recently summarized the facts of this case as follows:

> On April 19, 2013, in the area of the "Naked City," Petitioner met codefendant Dustin "Criminal" Bleak ("Bleak") and Bleak's brother, Travis "Ponytail" Costa ("Costa"). [Petittioner] individually approached Richard "Mechanic" McCampbell ("McCampbell") and asked him for a ride. McCampbell was well-known throughout the area as a fixer of cars and a person who would give people rides to do errands. McCampbell was sitting in his blue Cadillac Coupe DeVille, having just finished a job and purchasing some alcoholic beverages. McCampbell knew Petitioner from prior encounters when McCampbell had given Petitioner rides to do errands.
>
> Petitioner told McCampbell that he wanted to go to the area of Boulder Highway and that the trip would take ten minutes. McCampbell agreed to give Petitioner a ride and they agreed that McCampbell would receive ten dollars in gas money. As this agreement was struck, Bleak and Costa appeared and Petitioner explained that they would be going along for the ride too. Petitioner sat in the front passenger seat, Bleak sat in the rear passenger seat behind Petitioner, and Costa sat in the rear passenger seat behind McCampbell.
>
> As McCampbell drove, he was directed to the area of Charleston and Eastern where there is a large shopping center containing a Lowe's and a 7-11. Costa told McCampbell to park around the side of the 7-11 building because he wanted to buy beers for himself and Bleak. McCampbell started to become nervous that the men might rob the 7-11. The three men told him everything was cool and not to worry. Costa exited the car and entered the

7-11 while Bleak and Petitioner exited the car and engaged in conversation. Their discussion was not audible to McCampbell. Once they were back in the car, McCampbell told Bleak and Petitioner that he did not like the conversation outside the car or how the ride was turning into driving to several different places without any explanation. Petitioner and Bleak again reassured McCampbell.

McCampbell was then directed, primarily by Petitioner, to drive through the Lowe's parking lot and to the parking lot of the nearby Traveler's Inn. The Traveler's Inn had video surveillance in place, which recorded the events described below. Once in the parking lot, although numerous parking spots were open, the men directed McCampbell to back into a parking space directly adjacent to a set of stairs that led up to the second floor of the motel. Backing into the narrow parking spot proved difficult resulting in McCampbell scraping the car against several surfaces; McCampbell became quite upset, repeatedly asking the men why he was being required to back into the parking spot and telling them he did not feel good about the situation.

Once parked, Petitioner and Bleak exited the vehicle while Costa stayed seated in the back of the vehicle. Video surveillance depicted Bleak on a cell phone appearing to call someone while Petitioner leaned against the rear of the parked Cadillac. After a short time, the victim, Dale "Spooky" Borero ("Borero"), walked down the stairs to meet Bleak.

Borero was a dealer of methamphetamine and was staying at the Traveler's Inn. Video surveillance showed Bleak engaged in conversation with Borero off to the side of the Cadillac. Eventually, Petitioner, who had been leaning against the rear of the vehicle, slowly walked over to the two men and casually pulled out a Ruger LC9 9mm pistol and pointed it in Borero's face. Petitioner reached toward Borero as if to grasp something. Petitioner then struck Borero in the face with the pistol.

After being held at gunpoint and struck in the face, Borero eventually produced his own pistol, however, Petitioner

shot Borero in the abdomen; Petitioner moved toward the front of the Cadillac and continued to fire. In total, Petitioner fired four times, striking Borero twice, once in the upper abdomen (inflicting a fatal wound) and once in the leg. As the shooting began, McCampbell almost immediately began to drive out of the parking lot while Bleak and Petitioner struggled to get back into the car. Mortally wounded, Borero fell to the ground, firing and striking the Cadillac once in the rear post but missing Petitioner, Bleak, Costa, and McCampbell. As Bleak struggled to get back into the car, the magazine of the black Umarex BB gun pistol he was carrying fell to the ground. Petitioner and Bleak managed to get back into the Cadillac, and it drove off at great speed.

Once out of the Traveler's Inn parking lot, Petitioner directed McCampbell to drive away from the scene. McCampbell, who was distraught by being caught up in the shooting, told Petitioner that he would report what happened. Petitioner responded by gesturing toward his pistol and threatening McCampbell. McCampbell cooperated with Petitioner after being threatened and returned the men to "Naked City" where Petitioner, Bleak, and Costa went their separate ways. Detectives and a Crime Scene Analyst responded to the crime scene at the Traveler's Inn and recovered a BB gun magazine, multiple cartridge casings from both Borero's and Petitioner's pistols, bullet fragments, a bag of methamphetamine, and U.S. currency. Borero was transported to UMC where he died from his injuries.

The following day, McCampbell learned that Borero died as a result of the shooting and he contacted the police to report the events leading to Borero's death. McCampbell drove the Cadillac to the Clark County Detention Center and surrendered himself to the first police officer he came into contact with. Homicide detectives responded, impounded the Cadillac, and conducted a recorded interview with McCampbell. McCampbell later positively identified Petitioner, Bleak, and Costa in photo-ID lineups.

> Through McCampbell's statements and additional investigative work, detectives identified Petitioner and Bleak as suspects in Borero's death. On April 22, 2013, detectives eventually located Bleak and Costa during a vehicle stop and discovered a BB gun, which was missing its magazine and located partially wedged into the seat cushion where Bleak had been seated. Detectives took Bleak into custody and impounded the BB gun.
>
> On April 29, 2013, detectives arrived at 1712 Fairfield, Apt. 7, in response to the discovery of a Ruger LC9 9mm pistol inside the property. The absentee-landlord/owner of the property had discovered a black handgun inside of a black holster, which had been placed in a toaster oven. Inside the residence, detectives discovered paperwork with Petitioner's name on it. A forensic tool-mark analysis would later positively match bullets test-fired form that Ruger LC9 pistol to the two bullets extracted from Borero's body during the autopsy. On July 3, 2013, detectives located Petitioner and took him into custody.

4 AA 765–68.

SUMMARY OF THE ARGUMENT

First, the district court erred when it failed to apply the mandatory procedural bars to Coleman's Petition. Appellant's Petition was due by July 30, 2019. Although the State and Appellant stipulated to extend the filing due date to October 1, 2019, this Court has held that such stipulations are improper and that district courts may not disregard the statutory procedural default rules. In addition, Appellant also missed the stipulated extended filing deadline. Thus, even when viewed in the light most favorable to Appellant, the Petition was untimely.

Second, Appellant asserts four (4) claims that should have been raised on direct appeal and these claims are therefore waived: (1) Detective Miller was not properly noticed as an expert witness (Issue 2); (2) the sentencing court relied on improper evidence at sentencing (Issue 3); (3) the State elicited testimony regarding Appellant's post-arrest silence (Issue 4); and (4) the State's closing argument constituted impermissible tailoring (Issue 5). As his Petition was time-barred and four (4) of his claims were waived, Appellant had to show good cause and prejudice for the district court to consider the merits of the Petition.

Appellant failed to demonstrate good cause and prejudice. Appellant's claims were available at the time of the default, and he cannot demonstrate that an impediment external to his defense prevented him from filing his Petition in a timely manner. Because all of Appellant's claims are either time-barred or waived, and Appellant cannot show good cause for the delay, the Appeal must be denied.

Third, the district court properly denied Appellant's ineffective assistance of counsel claim based on his alleged PTSD. Appellant's claim that his counsel either knew or should have known about his alleged PTSD is unsupported by the record. The record shows that as soon as Appellant informed his attorney about his PTSD claim, his attorney filed a Motion to Continue trial requesting time to obtain a PTSD evaluation within a matter of days. The district court properly concluded that this

did not constitute ineffective assistance of counsel. Appellant also fails to demonstrate prejudice.

Fourth, Detective Miller's testimony did not constitute an expert opinion for which she was not properly noticed. Detective Miller merely formed a conclusion based on her own observations of the crime scene and video surveillance. Detective Miller did not testify regarding any conclusions that the jury could not have formed on their own based on the evidence presented at trial. Thus, this claim was properly denied.

Fifth, the sentencing court did not rely on improper evidence. Contrary to Appellant's assertion, there was nothing improper about the district court relying on video surveillance of the shooting or concluding that there was overwhelming evidence in support of Appellant's guilt. This is especially true given that on direct appeal, this Court found that there was sufficient evidence presented at trial to sustain Appellant's conviction. Thus, the district court did not err when it denied this claim.

Sixth, the district court did not err when it found that the State did not impermissibly impugn Appellant's right to silence. When the challenged statement is read in context, it is clear that the State was not commenting on Appellant's post-arrest silence. Rather, the State was commenting on inconsistencies between Appellant's legal, voluntary statement made to police and his testimony at trial.

Thus, the State's closing argument did not implicate his post-arrest silence and this claim was properly denied.

Seventh, the district court did not abuse its discretion when it failed to deem the State's closing argument as impermissible tailoring. Appellant argues that the State impermissibly implied that Appellant tailored his testimony after hearing the State's presentation of the evidence. However, pursuant to the United States Supreme Court's holding in Portuondo v. Agard, 529 U.S. 61, 67, 120 S. Ct. 1119, 1123, 146 L. Ed. 2d 47 (2000), there is nothing improper about the State making such an argument. Thus, this claim was properly denied.

Eighth, Appellant claims that his counsel was ineffective for failure to impeach Detective Miller on her contradictory statements regarding who shot first and for failing to argue the same during closings. However, the record clearly shows that trial counsel did in fact impeach Detective Miller with the exact statements that Appellant points to. As such, this claim is belied by the record and the district court did not err in denying this claim.

Finally, Appellant has not established cumulative error. As the individual claims were properly denied, there is no error to cumulate, and the district court properly denied this claim.

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ARGUMENT

I. STANDARD OF REVIEW

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).

II. THE PETITION WAS PROCEDURALLY BARRED

A. The Petition Was Time Barred Pursuant to NRS 34.726(1)

The Petition was time-barred pursuant to NRS 34.726(1):

> Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year of the entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the Supreme Court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:
> (a) That the delay is not the fault of the petitioner; and

> (b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

The Nevada Supreme Court has held that NRS 34.726 should be construed by its plain meaning. Pellegrini v. State, 117 Nev. 860, 873–74, 34 P.3d 519, 528 (2001). As per the language of the statute, the one-year time bar proscribed by NRS 34.726 begins to run from the date the judgment of conviction is filed or a remittitur from a timely direct appeal is filed. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133–34 (1998).

The one-year time limit for preparing petitions for post-conviction relief under NRS 34.726 is strictly applied. In Gonzales v. State, 118 Nev. 590, 596, 53 P.3d 901, 904 (2002), the Nevada Supreme Court rejected a habeas petition that was filed two (2) days late despite evidence presented by the defendant that he purchased postage through the prison and mailed the petition within the one-year time limit.

Furthermore, the Nevada Supreme Court has held that the district court has a *duty* to consider whether a defendant's post-conviction petition claims are procedurally barred. State v. Eighth Judicial Dist. Court (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005). The Riker Court found that "[a]pplication of the statutory procedural default rules to post-conviction habeas petitions is mandatory," noting:

> Habeas corpus petitions that are filed many years after conviction are an unreasonable burden on the criminal justice system. The necessity for a workable system

> dictates that there must exist a time when a criminal conviction is final.

Id. Additionally, the Court noted that procedural bars "cannot be ignored [by the district court] when properly raised by the State." Id. at 233, 112 P.3d at 1075. The Nevada Supreme Court has granted no discretion to the district courts regarding whether to apply the statutory procedural bars; the rules must be applied.

This position was reaffirmed in State v. Greene, 129 Nev. 559, 307 P.3d 322 (2013). There the Court ruled that the defendant's petition was "untimely, successive, and an abuse of the writ" and that the defendant failed to show good cause and actual prejudice. Id. at 324, 307 P.3d at 326. Accordingly, the Court reversed the district court and ordered the defendant's petition dismissed pursuant to the procedural bars. Id. at 324, 307 P.3d at 322–23. The procedural bars are so fundamental to the post-conviction process that they must be applied by this Court even if not raised by the State. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

In the instant case, the Judgment of Conviction was filed on March 29, 2017. Appellant appealed his conviction, which was affirmed by the Supreme Court of Nevada. Remittitur was issued on July 30, 2018. While an amended Judgment of Conviction was filed on August 29, 2018, an amended Judgment of Conviction does not change the deadline to file a timely post-conviction Petition for Writ of Habeas Corpus. Sullivan v. State, 120 Nev. 537, 541, 96 P.3d 761, 764 (2004). Therefore, Appellant's Petition was due by July 30, 2019.

Approximately one (1) month after the filing due date, the State and Appellant entered into a stipulation to extend the filing due date to October 1, 2019. Such a stipulation was improper. The Supreme Court of Nevada has held:

> The parties in a post-conviction habeas proceeding cannot stipulate to disregard the statutory procedural default rules. We direct all counsel in the future not to enter into stipulations like the one in this case and direct the district courts not to adopt such stipulations."

State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 682 (2003). The State maintains that although it conceded this point during the hearing on Appellant's Habeas Petition, it was still improper for the district court to accept the stipulation.[1] 4 AA 803–04.

Further, even if such a stipulation was proper, Appellant filed the underlying Petition on December 6, 2019, over two (2) months after the stipulated extended filing deadline. By any account, the Petition was untimely. Although the district court arrived at the correct result on the merits, the State maintains that these claims

[1] At the hearing, the Court inquired as to why the State was arguing the time-bar given the stipulation:
MR. SCHWARTZER: My understanding with reading the case, it doesn't matter whether I agreed to it or not. I don't feel – I personally don't feel comfortable arguing that it's time barred since I agreed to the --
. . .
MR. SCHWARTZER: -- continuance. Yes.
4 AA 803–04.

are procedurally barred. Barring a showing of good cause and prejudice, the instant Appeal must be denied.

B. Claims 2, 3, 4, and 5 Are Waived Pursuant to NRS 34.810

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.
> (b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:
> . . .
> (2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief.

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).

Appellant brings four (4) claims that are procedurally barred because they were waived: (1) Detective Miller was not properly noticed as an expert witness (Issue 2); (2) the sentencing court relied on improper evidence at sentencing (Issue 3); (3) the State elicited testimony regarding Appellant's post-arrest silence (Issue 4); and (4) the State's closing argument constituted impermissible tailoring (Issue 5). In addition to having no merit, these claims should have been raised when Appellant filed his direct appeal.

The State notes that it did not argue that Issues 2 and 5 were waived before the district court. The State did not argue that Issue 2 was waived because it was presented as an ineffective assistance of counsel claim below, rather than as a freestanding claim as Appellant presents it now in his Opening Brief. 1 AA 31, Opening Brief at 32. Further, the State did not claim that Issue 5 was waived in its Opposition to Defendant's Post-Conviction Petition for Writ of Habeas Corpus because this argument was not raised in the underlying Petition. See 1 AA 10–36. Rather, Appellant raised this issue for the first time at the hearing on Appellant's Petition for Writ of Habeas Corpus. 4 AA 799–801. Absent a showing of good cause and prejudice, these claims were waived pursuant to NRS 34.810 and Franklin v. State. 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994).

III. APPELLANT HAS NOT SHOWN GOOD CAUSE OR PREJUDICE SUFFICIENT TO OVERCOME HIS PROCEDURAL BARS

To avoid procedural default, under NRS 34.726, a defendant has the burden of pleading and proving specific facts that demonstrate good cause for his failure to present his claim in earlier proceedings or to otherwise comply with the statutory requirements, *and* that he will be unduly prejudiced if the petition is dismissed. NRS 34.726(1)(a) (emphasis added); see Hogan v. Warden, 109 Nev. 952, 959–60, 860 P.2d 710, 715–16 (1993); Phelps v. Nevada Dep't of Prisons, 104 Nev. 656, 659, 764 P.2d 1303, 1305 (1988). "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) (emphasis added).

To show good cause for delay under NRS 34.726(1), a petitioner must demonstrate the following: (1) "[t]hat the delay is not the fault of the petitioner" and (2) that the petitioner will be "unduly prejudice[d]" if the petition is dismissed as untimely. NRS 34.726. To meet the first requirement, "a petitioner *must* show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (emphasis added). "A qualifying impediment might be shown where the factual or legal basis for a claim was not reasonably available *at the time of*

default." Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at 526. To find good cause there must be a "substantial reason; one that affords a legal excuse." Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Examples of good cause include interference by State officials and the previous unavailability of a legal or factual basis. See State v. Huebler, 128 Nev. Adv. Op. 19, 275 P.3d 91, 95 (2012). Clearly, any delay in the filing of the petition must not be the fault of the petitioner. NRS 34.726(1)(a).

Further, a petitioner raising good cause to excuse procedural bars must do so within a reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869–70, 34 P.3d at 525–26 (holding that the time bar in NRS 34.726 applies to successive petitions); see generally Hathaway, 119 Nev. at 252–53, 71 P.3d at 506–07 (stating that a claim reasonably available to the petitioner during the statutory time period did not constitute good cause to excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good cause. Riker, 121 Nev. at 235, 112 P.3d at 1077; see also Edwards v. Carpenter, 529 U.S. 446, 453 120 S. Ct. 1587, 1592 (2000).

In order to establish prejudice, the defendant must show "'not merely that the errors of [the proceedings] created possibility of prejudice, but that they worked to

his actual and substantial disadvantage, in affecting the state proceedings with error of constitutional dimensions.'" Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)).

Here, Appellant cannot demonstrate that an impediment external to his defense prevented him from filing his Petition in a timely manner or that his claims were not available at the time of default. Appellant's underlying Petition and Opening Brief do not address good cause, which may be due in part to Appellant's previous stipulation with the State. 4 AA 803–04. However, the State maintains that it was improper for the district court to accept this stipulation and the statutory procedural default rules must be applied.

As such, Appellant cannot establish good cause sufficient to overcome the mandatory procedural bars and his appeal should be denied. In addition, Appellant cannot demonstrate prejudice sufficient to ignore his default because, as explained *infra*, his underlying claims are meritless.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT APPELLANT DID NOT RECEIVE INEFFECIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." The United States Supreme Court has long recognized that

"the right to counsel is the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); see also State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64. See also Love, 109 Nev. at 1138, 865 P.2d at 323. Under the Strickland test, a defendant must show first that his counsel's representation fell below an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. 466 U.S. at 687–88, 694, 104 S. Ct. at 2065, 2068; Warden, Nevada State Prison v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (adopting the Strickland two-part test). "[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

The court begins with the presumption of effectiveness and then must determine whether the defendant has demonstrated by a preponderance of the evidence that counsel was ineffective. Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). "Effective counsel does not mean errorless counsel, but rather counsel whose

assistance is '[w]ithin the range of competence demanded of attorneys in criminal cases.'" Jackson v. Warden, 91 Nev. 430, 432, 537 P.2d 473, 474 (1975). Counsel cannot be ineffective for failing to make futile objections or arguments. See Ennis v. State, 122 Nev. 694, 706, 137 P.3d 1095, 1103 (2006). Trial counsel has the "immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002).

Based on the above law, the role of a court in considering allegations of ineffective assistance of counsel is "not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." Donovan v. State, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978). This analysis does not mean that the court should "second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success." Id. To be effective, the constitution "does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, 466 U.S. 648, 657 n.19, 104 S. Ct. 2039, 2046 n.19 (1984).

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

The decision not to call witnesses is within the discretion of trial counsel, and will not be questioned unless it was a plainly unreasonable decision. See Rhyne v. State, 118 Nev. 1, 38 P.3d 163 (2002); see also Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). Strickland does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense. In many instances cross-examination will be sufficient to expose defects in an expert's presentation. When defense counsel does not have a solid case, the best strategy can be to say that there is too much doubt about the State's theory for a jury to convict. Harrington v. Richter, 131 S.Ct. 770, 791, 578 F.3d. 944 (2011). "Strategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable." Dawson v. State, 108 Nev. 112, 117, 825 P.2d

593, 596 (1992). Even if a defendant can demonstrate that his counsel's representation fell below an objective standard of reasonableness, he must still demonstrate prejudice and show a reasonable probability that, but for counsel's errors, the result of the trial would have been different. McNelton v. State, 115 Nev. 396, 403, 990 P.2d 1263, 1268 (1999) (citing Strickland, 466 U.S. at 687, 104 S. Ct. at 2064). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citing Strickland, 466 U.S. at 687-89, 694, 104 S. Ct. at 2064–65, 2068).

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

/ / /

A. The district court did not abuse its discretion when it did not find deficient conduct for failure to obtain a timely PTSD evaluation, nor did it abuse its discretion in denying Appellant's request for the evaluation prior to the evidentiary hearing.

Appellant claims that "it was deficient conduct to fail to timely obtain the PTSD evaluation, rather than to seek a continuance a week prior to trial for the same." Opening Brief at 32. Appellant argues that (1) counsel should have known about Appellant's PTSD based on three (3) competency reports which mention PTSD, and (2) the court minutes from November 28, 2016, show that counsel knew about his PTSD claim. Id. at 10, 32. However, as explained below, these claims are not supported by the record.

i. Counsel Was Not Ineffective for Failing to Investigate Whether Appellant Has PTSD Based On His Competency Reports.

A defendant who contends he received ineffective assistance because his counsel did not adequately investigate must show how a better investigation would have changed the outcome of trial. Strickland, 466 U.S. at 687, 104 S. Ct. at 2064. Such a defendant must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. See State v. Love, 109 Nev. 1136, 1138, 865 P.2d 322, 323 (1993).

"[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." Id. Moreover, "[a] decision not to call a witness will not generally constitute ineffective assistance of counsel" Id. at 1145, 865 P.2d at 328. Indeed, it is well established that "counsel is not required to unnecessarily exhaust all available public or private resources." Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004).

Appellant argues that there are at least three (3) competency reports that indicate the prior shooting and/or PTSD. Opening Brief at 10. The three (3) reports Appellant is referring to are the reports dated September 16, 2013, October 21, 2013, and January 28, 2015. Id. at 12–13. However, both the September and January reports only mention that Appellant's *mother* was diagnosed with PTSD. 3 AA 708, 887. Neither report makes any mention of Appellant being diagnosed with PTSD. Id. Counsel cannot be ineffective for failing to investigate PTSD based on Appellant's reporting that his mother had been diagnosed with PTSD. It would be unreasonable for attorneys to be forced to investigate every claim of mental illness effecting a defendant's family members. See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066. The October 21, 2013, report does passingly mention that Appellant told Dr. Greg Harder that he was diagnosed with PTSD at the age of thirteen (13). 3 AA 714. When

Dr. Harder asked what caused him to be diagnosed with PTSD, Appellant could not tell him. 3 AA 714.

At the evidentiary hearing held on December 18, 2020, trial counsel was asked about the competency evaluations:

> Q. Based on the fact that you did file that motion to continue obviously you didn't see anything in these competency reports that you wouldn't have a good faith basis to thus evaluate Darion for PTSD?
>
> A. **My recollection in the six reports there was one that mentioned PTSD but it didn't go into any great detail. I think it was just a statement by the defendant to the interviewer.**
>
> Q. Do your recall when you came across that knowledge about the mention of PTSD in one of those competency evaluations?
>
> A. I don't but I would have looked through them before I filed the motion.

4 AA 820. (emphasis added). Appellant's claim that his counsel was ineffective based on one vague remark Appellant made about PTSD in one out of six (6) competency evaluations strains credulity. See Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004) ("[C]ounsel is not required to unnecessarily exhaust all available public or private resources."). Multiple doctors had found that Appellant was malingering and the evaluation stated that Appellant could not give any further details when Dr. Harder asked him about the PTSD diagnosis. 3 AA 709, 714, 794, 895, 897. Thus, it was reasonable for trial counsel not to investigate this comment

any further and Appellant cannot show that his counsel's representation fell below an objective standard of reasonableness. See Strickland, 466 U.S. at 691, 104 S. Ct. at 2066.

As soon as Appellant brought his PTSD claim to his attorney's attention, he filed a Motion to Continue Trial on an Order Shortening Time within a matter of days. 4 AA 817–818. Although this motion was denied, Appellant's counsel was still able to argue that Appellant was shot at the age of sixteen (16) during his closing statements. 4 AA 819. Accordingly, Appellant cannot show that his attorney's actions fell below an objective standard of reasonableness regarding his competency evaluations, nor can he show that he suffered any prejudice therefrom. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64; Molina, 120 Nev. at 192, 87 P.3d at 538.

ii. The Record Does Not Support Appellant's Claim that Trial Counsel Knew About His PTSD Claim More Than a Month Prior to Trial.

Appellant argues that the minutes from November 28, 2016, show that trial counsel knew about Appellant's PTSD claim by November 28, 2016, at the latest. Opening Brief at 30. The minutes from November 28, 2016, state in their entirety:

> Mr. Schwarz advised he is requesting a continuance of the trial. Court directed Counsel to file a motion. Mr. Schwarzer announced ready and advised 7 days for trial.

4 AA 884. Appellant argues, "[i]t is inconceivable that the above referenced anything other than the forthcoming Motion to Continue that referenced PTSD,

contrary to the district court's position." Opening Brief at 30. However, as the district court pointed out at the evidentiary hearing on Appellant's PTSD claim, this is mere supposition. 4 AA 846. At the evidentiary hearing, trial counsel, Mr. Schwartz, clearly testified that he first learned of Appellant's alleged PTSD just days prior to filing the Motion to Continue Trial on Order Shortening Time. 4 AA 817–18. The court stated in relevant part:

> THE COURT: Okay. Thank you very much, Mr. Zaman. Well, I mean this is the thing, Mr. Zaman, I understand that you're talking about what these minutes state and that counsel wanted to file motions but I can't jump to the conclusion that Mr. Schwarz knew about something ahead of time and didn't file a motion when the evidence before is very clear that Mr. Schwarz says he was notified about this he filed a motion. Not only does he file a motion he knows it's too late to get it on calendar, he files an order shortening time, and there is no real evidence indicating that prior to that he even attempted to file this motion, he even attempted to do anything in regards to this PTSD. So the evidence before me is insufficient to establish that Mr. Schwarz's performance failed the low and objective standard based upon the fact that we can make assumptions about what was in these minutes. I can't make assumptions. I have to only make rulings dealing with evidence. So the State is correct that you don't meet the first prong of the analysis.
> 4 AA 846.

There was absolutely no evidence before the district court to support Appellant's claim that he told trial counsel about his PTSD in March of 2016, aside from his own self-serving testimony. 4 AA 823–24. The evidence before the district court showed that Mr. Schwarz was told about Appellant's PTSD claim shortly

before trial. 4 AA 817–18. When he did learn of the claim, he filed a motion to continue trial within a matter of days and even filed it on shortening time because he knew it was too late to have it heard in the regular course. 4 AA 817–18. Thus, the district court did not abuse its discretion when it found that Appellant had not shown that his counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 686-87, 104 S. Ct. at 2063–64; Molina, 120 Nev. at 192, 87 P.3d at 538.

Finally, Appellant argues that the district court abused its discretion when it denied his request for a PTSD evaluation prior to the December 18, 2020, evidentiary hearing. Opening Brief at 32. The issue before the district court was whether Appellant's counsel was ineffective, not whether he actually has PTSD. Thus, it was not an abuse of discretion for the district court to first determine whether Appellant's counsel had even been ineffective prior to expending additional resources and ordering a PTSD examination.

Accordingly, Appellant's claim that his trial counsel either knew or should have known about his alleged PTSD more than a month prior to trial is belied by the record and the district court did not err in denying this claim.

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B. The District Court Did Not Abuse Its Discretion When It Did Not Find Appellant's Counsel Ineffective For Failure to Impeach or Argue at Closing.

Appellant next claims that his counsel was ineffective for failure to impeach Detective Miller on her contradictory statements regarding who shot first and for failing to argue the same during closings. Opening Brief at 49. At trial, during the State's redirect examination, the Court elicited the following testimony from Detective Miller following a juror question:

> THE COURT: Okay. And from your investigation were you able to determine who shot first?
>
> THE WITNESS: Technically, we have a fairly good idea. I can tell you from my experience and training that when – where the cartridge cases were located, the who .40 caliber that Boreo had was in stall 3 and 4. The 9 millimeter were spread in three behind Mr. Boreo's vehicle and out in the middle of the parking lot. On a Ruger, typically, they eject to the right. So I Would expect to find the .40s, if Dale Borero fired first because he was up against the wall with the shipping container behind them, it would eject to the right the casings should have been there.
>
> THE COURT: Okay.
>
> THE WITNESS: That's – the way I look at it.
>
> THE COURT: So all of which your determination of who shot who first was what?
>
> THE WITNESS: Is that it's – there's no way to be exactly sure, but based on the physical evidence I would say Mr. Coleman shot first.

3 AA at 544. As a follow up question, Appellant's counsel elicited the following testimony:

Q: Detective Miller?

A: Yes.

Q: You did the declaration of warrant in this case, didn't you?

A: Yes.

Q: Do you recall saying in there that it appeared that Dale Borero fired the first shot?

A: No.

Q: Can you look over on page 2, do you have a copy of it with you? And I am looking at about the middle of the –

….

Q: I'm looking at –

A: Okay.

Q: --like right there.

A: May I read that?

Q: Yeah.

A: At that point Borero pulled a handgun from his right pocket and fired at the black male suspect, Muhammad-Coleman. I don't see where it says fired first.

Q: Well, if you look at the chronology of the events, the black made pulled a handgun from his right and pointed it, Borero appeared to try to push the gun away, black male struck the upper left side of Borero's body with the butt of the gun, at that point Borero pulled a handgun from his right pocket side, and fired. Nobody else has fired at the point that you make that observation.

> A: Well, I don't read it that way. And based on physical evidence of where those cartridge cases are and with the fact that most semi-automatic handguns, I'm no firearms expert, but most fire and eject, when they eject, they eject to the right. As you can see on the video where Mr. Borero was standing in which direction he was facing prior to him heading west and south to the fact of where Mr. Coleman was standing and where his cartridge casings were located.
>
> Q: Does the video show who shot first?
>
> A: No

3 AA 544-45.

The declaration of warrant counsel used to impeach detective Miller read in relevant part:

> At one point the black male suspect (Muhammad-Coleman) moved from the left rear of the Cadillac to stand on the opposite side of the white male (Bleak). The black male (Muhammad-Coleman) pulled a handgun from his right side and pointed it at Borero. Borero appeared to try and push the gun away and the black male (Muhamed-Coleman) struck the upper left side of Borero's body with the butt of the gun. At that point, Borero pulled a handgun from his right pocket and fired at the black male suspect (Muhammad-Coleman).

3 AA 631.

The record is clear. The Court elicited testimony from Detective Miller that she believed Appellant shot first based on the physical evidence. 3 AA 544. Appellant's counsel immediately attempted to impeach Detective Miller with the exact statement Appellant now alleges counsel should have used. 3 AA 546–47. In fact, the relevant portion of the document was read almost word for word, by

Detective Miller, into the record and in front of the jury. Id. As such, any claim that counsel did not impeach Detective Miller is belied by the record. Pursuant to Hargrove, such an allegation is insufficient to succeed on an ineffective assistance of counsel claim.

Appellant also seems to allege that it was ineffective for counsel not to identify that the above statement also appeared in Detective Miller's Application and Affidavit for search warrant. Opening Brief at 49. It is unclear how such a strategy would have made a more favorable outcome at trial probable. When Detective Miller was impeached on the stand, she testified that counsel was misreading the declaration of warrant. 3 AA 547. Detective Miller indicated that she did not intend the statement to be construed as Borero shot first. Id. Detective Miller further reiterated that based on the physical evidence, she believed Appellant shot first. Id. To the extent Appellant wanted to draw attention to the alleged inconsistency in Miller's statements, his counsel accomplished that. However, given that Detective Miller offered an explanation for this alleged inconsistency, it is dubious that showing another instance where that exact same statement (which likely would have been explained the exact same way) occurred would have had any additional effect. Given the dubious probative value of such a line of questioning, whether to engage in it or to mention the same during closings was clearly a strategic decision reserved for counsel. See Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163, 167 (2002) (stating:

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."). Therefore, such a decision was neither unreasonable, nor did it prejudice Appellant. See Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984).

To the extent that Appellant argues his attorney was ineffective for failure to investigate, this claim also lacks merit. 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 probable. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004). Given that counsel in fact impeached Detective Miller with the complained of statement, it cannot be seriously alleged that counsel's investigation was insufficient to the point that he did not discover the statement. As such, this claim is belied by the record and the district court did not err in denying this claim.

V. THE DISTRICT COUIRT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT FIND DETECTIVE MILLER' S TESTIMONY IMPROPER EXPERT WITNESS TESTIMONY FOR WHICH SHE WAS NOT NOTICED

Appellant alleges that the district court abused its discretion when it failed to find that Detective Miller's testimony regarding who shot first amounted to an expert opinion for which she was not properly noticed. Opening Brief at 36.

This Court reviews a district court's evidentiary rulings for an abuse of discretion. Rodriguez v. State, 128 Nev. 155, 160, 273 P.3d 845, 848 (2012). "The trial

court's determination to admit or exclude evidence is given great deference and will not be reversed absent manifest error." Baltazar-Monterrosa v. State, 122 Nev. 606, 613 – 14, 137 P.3d 1137, 1142 (2006). The admissibility of opinion is largely discretionary with the trial court. Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978). This Court reviews the trial court's admission of opinion testimony for abuse of discretion. Id.

NRS 50.265 states:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> 1. Rationally based on the perception of the witness; and
> 2. Helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

A lay witness is not precluded from forming conclusions based on their perceptions. Duran v. Mueller, 79 Nev. 453, 457, 386 P.2d 733, 735-36 (1963). Although a lay witness may not opine to the specific cause of an indeterminate injury, Lorde v. State, 107 Nev. 28, 34, 806 P.2d 548, 551 (1991), a witness may give an opinion based upon rational perceptions and sufficient information. Paul v. Imperial Palace, Inc., 111 Nev. 1544, 1550, 908 P.2d 226, 230 (1995). Where the trial judge treats a witness as a lay witness, upon appellate review the witness is viewed as a lay witness absent an abuse of discretion. DeChant v. State, 116 Nev. 918, 924, 10 P.3d 108, 112 (2000).

Here, Detecive Miller testified that Appellant was likely the one who fired first based on the location of the shell casings discharged by Borero's gun and Borero's location at the time of the shooting. 3 AA 544, 547. The relevant portion of her testimony is as follows:

> THE COURT: Okay. And from your investigation were you able to determine who shot first?
>
> THE WITNESS: Technically, we have a fairly good idea. I can tell you from my experience and training that when -- where the cartridge cases were located, the who [sic] .40 caliber that Borero had was in stall 3 and 4. The 9 millimeters were spread in three behind Mr. Borero's vehicle and out in the middle of the parking lot. On a Ruger, typically, they eject to the right. So I would expect to find the .40s, if Dale Borero fired first because he was up against the wall with the shipping container behind him, it would eject to the right the casings should have been up there.

3 AA 544. Detective Miller responded to the scene and personally observed the locations of the various casings left in the parking lot after the shooting. 2 AA 427–428. She also reviewed the video surveillance of the shooting. 2 AA 432. Based on the locations of the shell casings left by Borerro's gun and the location of the two (2) men in the surveillance video, she reasonably inferred that Borerro likely did not fire first. 3 AA 544. Such a conclusion is not expert testimony. See Duran, 79 Nev. at 457, 386 P.2d at 735-36 (finding that an investigator who had testified as to skid marks, point of impact, apparent car direction, and car damage could also testify to how two automobiles collided).

Firearms expert Anya Lester had already testified regarding how Borerro's gun discharged. 2 AA 389. Thus, the jury easily could have reached the conclusion that Borerro likely did not fire first based on the fact that his gun discharges to the right and the location he was standing in when shots were first fired. Miller did not form any conclusions requiring expert knowledge or testify to any information that the jury had not already been presented with. Accordingly, the district court did not abuse its discretion when it permitted Detective Miller to testify as a lay witness and the district court did not err in denying this claim.

VI. THE SENTENCING COURT DID NOT RELY ON IMPROPER EVIDENCE

The Nevada Supreme Court has granted district courts "wide discretion" in sentencing decisions, and these are not to be disturbed "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Allred, 120 Nev. at 410, 92 P.2d at 1253 (quoting Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)). A sentencing judge is permitted broad discretion in imposing a sentence and absent an abuse of discretion, the district court's determination will not be disturbed on appeal. Randell v. State, 109 Nev. 5, 846 P.2d 278 (1993) (citing Deveroux v. State, 96 Nev. 388, 610 P.2d 722 (1980)). As long as the sentence is within the limits set by the legislature, a sentence will normally not be considered cruel and unusual. Glegola v. State, 110 Nev. 344, 871 P.2d 950 (1994).

Here, Appellant appears to challenge the district court's reliance on the video surveillance of the shooting as well as the district court's conclusion that there was overwhelming evidence of Appellant's guilt. Opening Brief at 38. However, there is nothing to indicate that the video surveillance was suspect or that the district court relied on the video alone. At sentencing, the court stated in relevant part:

> But I will also tell you that I sat through the same trial that you all did obviously and -- and it was -- and I agree with you, Mike, that you can't just watch a video and tell what it is that -- that happened in a vacuum. **But I think watching the video, listening to the testimony, looking at what the forensic evidence was about where shell casings were found, I am convinced that your client not only pulled the weapon first but he shot first as well before Mr. Borero had produced a handgun.**
> **And that's based in part on the conduct of the people in the video, the reaction to certain things occurring.** I think Mr. Borero was shot and going down before he started firing his gun. And I think that's why the jury convicted your client of first degree murder regardless of whether they think a robbery actually occurred, I think there was evidence for them to say you produced a gun and shot the man and they -- they found him guilty on the premeditated and deliberate theory. So, in any event, I won't belabor it.

3 AA 744 (emphasis added). Thus, it is clear that the sentencing court based its opinion on the entirety of the evidence presented at trial including the video, the testimony presented at trial, and the forensic evidence. Id. The jury found Appellant guilty of First Degree Murder and the Supreme Court found that there was sufficient evidence presented at trial to sustain this conviction. 4 AA 851. Thus, it is unclear

why Appellant is taking issue with the district court's finding that there was sufficient evidence of First Degree Murder. Opening Brief at 38. As the Supreme Court stated in its Order of Affirmance affirming Appellant's Judgment of Conviction:

> The State's theory of the case was that appellant planned to shoot Borero and take the money and methamphetamine found on Borero's body. The jury was shown video surveillance of the shooting, which the State argued showed appellant sneaking up on Borero, pointing the gun at Borero's head, and waiting for potential witnesses to leave the scene before shooting Borero. The jury also heard testimony from the lead detective on the case that the physical evidence at the scene suggested that appellant fired the first shot. Further, the jury heard testimony from appellant that he (1) pulled his gun out as he walked toward Borero, (2) pointed the gun at Borero's head, and (3) struck Borero in the head with the gun before Borero ever pulled out his own gun. Viewing the evidence in the light most favorable to the State, we conclude that a rational juror could find that appellant acted willfully, deliberately and with premeditation when he shot Borero. *See Guitron,* 131 Nev. at 221, 350 P.3d at 97.

4 AA 849. Accordingly, the district court did not abuse its discretion when it found that the sentencing court did not rely on improper evidence and the district court did not err in denying this claim.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT THE STATE DID NOT IMPERMISSIBLY IMPUGN APPELLANT'S RIGHT TO SILENCE

The Fifth Amendment requires that the State refrain from directly commenting on the defendant's decision not to testify. Griffin v. California, 380 U.S. 609, 615,

85 S. Ct. 1229 (1965); Harkness v. State, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991). A direct comment on a defendant's failure to testify is a per se violation of the Fifth Amendment. Harkness, 107 Nev. at 803, 820 P.2d at 761. However, an indirect comment violates the defendant's Fifth Amendment right against self-incrimination only if the comment "was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." Id. (internal quotations omitted).

In Harkness, the defendant chose not to testify in his defense, and the prosecution commented on gaps in the evidence, intimating that the defendant was the only one who could resolve those gaps: "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case?" Id. at 802, 820 P.2d at 760 (internal quotations omitted). This Court held those comments to be indirect references to the defendant's failure to testify. Id. at 804, 820 P.2d at 761. This Court also held that these comments violated the defendant's Fifth Amendment rights because, when taken in full context, there was a likelihood that the jury took those statements to be a comment on the defendant's failure to testify. Id.

"The prosecution is forbidden at trial to comment upon a defendant's election to remain silent following his arrest and after being advised of his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)."

Murray v. State, 113 Nev. 11, 17, 930 P.2d 121, 124 (1997) (citing Neal v. State, 106 Nev. 23, 25, 787 P.2d 764, 765 (1990). In Murray, the defendant did not make a statement to authorities until he testified before the grand jury. Id. at 15, 930 P.2d at 123. The State sought to impeach the defendant by stating that trial was the first time the defendant had explained his side of the story. Id. at 17-18, 930 P.2d at 124-25.

A statement in reference to a recorded statement made by a defendant to authorities is not a comment on the defendant's right to remain silent under plain error review. Houtz v. State, No. 60858, 2013 WL1092730, Mar. 14, 2013, 129 Nev. 1123 (2013) (unpublished disposition). Further, any cross-examination into inconsistencies between a defendant's testimony and defendant's voluntary statement to authorities after being read his rights under Miranda is not an impermissible comment on post-arrest silence. Morales v. State, No. 54216, 2010 WL3384992, Jul. 15, 2010, 126 Nev. 740, 367 P.3d 802 (2010) (unpublished disposition). Comments on a defendant's post-arrest silence are held to be harmless beyond a reasonable doubt if "(1) at trial there was only passing reference, without more, to an accused's post-arrest silence, or (2) there was overwhelming evidence of guilt." Morris v. State, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996).

Here, Appellant argues that the State "effectively argued that the jury could negatively infer against Darion that he did not come forward during the four (4)

years preceding trial to claim self-defense." Opening Brief at 41. In its closing argument, the State argued in relevant part:

> The four-year plan, what's that? Well, the Defendant has four years to figure out what he was going to say on the stand. Think about that when you're evaluating his credibility. **And remember he had a conversation four years ago and it's not the same story. Think about that. Think about the motives and the reasons as to why.** And I think my co-counsel will probably be touching on that. **And again his story now and his story then. Ladies and Gentlemen, the truth is the truth. The truth doesn't change. It doesn't change year by year or month to month. The truth is the truth. So ask yourself why two completely different stories? Why?**

3 AA 587 (emphasis added). Appellant argues that this case is analogous to McCraney v. State, 110 Nev. 250, 255–56, 871 P.2d 922, 925–926 (1994), where the State improperly commented on the defendant's post-*Miranda* silence during cross-examination. However, this case is distinguishable. Unlike McCraney, where the defendant had invoked his right to silence, here, the State was pointing out inconsistencies between a voluntary statement that Appellant made to police and his testimony at trial. 3 AA 534. On July 2, 2013, Appellant gave a voluntary statement to police where he stated that he did not know anything about the shooting. 3 AA 535. He also stated that he did not know Costa, Bleak, or McCampbell and that he had never been to the Traveler's Inn where the incident occurred. 3 AA 534-35. Thus, unlike McCraney, it is not Appellant's right to silence that was implicated by

the State's comments, but rather the inconsistencies between his voluntary statement to police and his testimony at trial. Thus, this claim should be denied.

Even assuming that the State impermissibly commented on Appellant's post-arrest silence, any such commentary was harmless. The State brought out that Appellant's story was inconsistent only twice: first during the testimony of Detective Miller, and then again during closing arguments. 3 AA 534-35, 587. Moreover, there was ample evidence of guilt in the instant case. An eyewitness and surveillance video placed Appellant as the individual who shot and killed the victim. 2 AA 432. Further, forensic evidence demonstrated that Appellant fired first, thereby negating any self-defense claim. 3 AA 544. Thus, the district court did not abuse its discretion when it found that the State did not improperly comment on Appellant's right to silence.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT FAILED TO DEEM THE STATE'S CLOSING ARGUMENT AS IMPERMISSIBLE TAILORING

As an initial matter, the State does not contest that the written Findings of Fact, Conclusions of Law and Order did not dispose of this issue. However, the State notes that Appellant did not raise this issue in his Petition for Writ of Habeas Corpus. 1 AA 10-35. Rather, Appellant raised this issue for the first time at the evidentiary hearing on his Petition for Writ of Habeas Corpus on October 12, 2020. 4 AA 799–801.

Appellant's tailoring claim fails on the merits. In Portuondo v. Agard, the United States Supreme Court held that the State's comments during closing calling the jury's attention to the fact that defendant had the opportunity to hear other witnesses testify and tailor his testimony accordingly did not violate his right to be present at trial and to be confronted with witnesses against him or his right to testify on his own behalf. Portuondo v. Agard, 529 U.S. 61, 67, 120 S. Ct. 1119, 1123, 146 L. Ed. 2d 47 (2000). The Court stated in relevant part:

> In sum, we see no reason to depart from the practice of treating testifying defendants the same as other witnesses. A witness's ability to hear prior testimony and to tailor his account accordingly, and the threat that ability presents to the integrity of the trial, are no different when it is the defendant doing the listening. Allowing comment upon the fact that a defendant's presence in the courtroom provides him a unique opportunity to tailor his testimony is appropriate—and indeed, given the inability to sequester the defendant, sometimes essential—to the central function of the trial, which is to discover the truth.

Portuondo v. Agard, 529 U.S. 61, 73, 120 S. Ct. 1119, 1127, 146 L. Ed. 2d 47 (2000). In Woodstone v. State, 435 P.3d 657 (unpublished), this court declined to depart from the majority in Portuondo. Although the Court noted that it finds general tailoring "particularly troubling in instances where accusations are raised for the first time on rebuttal closing arguments," the Court ultimately declined to address whether it should depart from Portuondo because Woodstone did not object to the

accusations at trial, and thus, plain error review applied. Woodstone, 435 P.3d at 657.

Here, Appellant claims that the State "effectively argued that Darion heard all the evidence, and then and only then told his story of self-defense, implicating his due process rights and right to be present at trial." Opening Brief at 47. As explained above, pursuant to Portuondo and Nevada caselaw, there is nothing improper in the State making such an argument. 529 U.S. at 73, 120 S. Ct. at 1127. In addition, like the defendant in Woodstone, Appellant did not object to the State's alleged tailoring argument at trial, and therefore, even if this Court does consider Appellant's argument, plain error review applies. "This court recently reaffirmed that '[u]nder Nevada law, a plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a grossly unfair outcome).'" Woodstone, 435 P.3d at 657 (internal quotations omitted).

Appellant points to only two instances in the record that he believes constituted impermissible tailoring: (1) the State's comment that he had to testify that he did not intend to rob Borero, and (2) the State's comment that he had to testify at trial in order to negate the video. Opening Brief at 48. First, Appellant cannot show that he suffered any prejudice from the State's first comment because the jury did not ultimately convict him of robbery. 3 AA 625. Second, Appellant cannot show that the State's comments affected the jury's assessment of his credibility. When

determining whether Appellant acted in self-defense, the jury had surveillance video which clearly showed Appellant pulling out his gun, pointing it at Borrero, and striking Borero in the head with it prior to Borero ever pulling out his own gun. 4 AA 849. The jury also heard testimony from the lead detective on the case that the physical evidence at the scene suggested that appellant fired the first shot. Id. Accordingly, Appellant cannot demonstrate that actual prejudice or a miscarriage of justice occurred. Thus, this claim should be denied.

IX. APPELLANT HAS NOT ESTABLISHED CUMULATIVE ERROR

Appellant asserts that all of the alleged errors contained in his Petition warrant a finding of cumulative error. Opening Brief 52. The Nevada Supreme Court has held that under the doctrine of cumulative error, "although individual errors may be harmless, the cumulative effect of multiple errors may deprive an appellant of the constitutional right to a fair trial." Pertgen v. State, 110 Nev. 554, 566, 875 P.2d 361, 368 (1994) (citing Sipsas v. State, 102 Nev. 119, 716 P.2d 231 (1986); see also Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

However, the doctrine of cumulative error should not be applied to ineffective assistance of counsel claims, and the Nevada Supreme Court has stated its hesitance to do so. In McConnell v. State, when the defendant argued that his claims of ineffective assistance of counsel amounted to cumulative error, the Nevada Supreme Court plainly said about the application of the cumulative error standard to

ineffective assistance claims, even after acknowledging that some courts have applied that doctrine saying, "[w]e are not convinced that this is the correct standard." McConnell v. State, 125 Nev. 243, at 259, 212 P.3d 307, at 318.

Ineffective assistance of counsel claims are a rare breed of claims in that harm is an element of the alleged error. That is to say, there can be no harmless ineffective assistance of counsel error because prejudice (or harm) is a required element of proving the ineffective assistance in the first place. Deficient performance, in and of itself, is not an error without accompanying prejudice. And if prejudice exists, a reversal of the verdict is automatic.

Since there can be no harmless ineffective assistance of counsel, it stands to reason that there cannot be cumulative error as to defendant's claims of the ineffective assistance variety. Nor should cumulative error apply on post-conviction review. Middleton v. Roper, 455 F.3d 838, 851 (8th Cir. 2006), cert. denial, 549 U.S. 1134, 1275 S. Ct. 980 (2007) ("a habeas Petitioner cannot build a showing of prejudice on series of errors, none of which would by itself meet the prejudice test.").

For the reasons set forth above, the district court did not err when it denied Appellant's claims. As the individual claims were properly denied, there is no error to cumulate. Further, the doctrine of cumulative error should not be applied to Appellant's ineffective assistance of counsel claims. See McConnell v. State, 125

Nev. 243, at 259, 212 P.3d 307, at 318. Accordingly, the district court did not err in denying this claim.

CONCLUSION

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

Dated this 7th day of February, 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 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 of more, contains 13,310 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 7th day of February, 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 7th day of February, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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