IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 83516

RESPONDENT'S ANSWERING BRIEF

Appeal From Denial of Habeas Relief
Eighth Judicial District Court, Clark County

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number:

Cases

Statutes

Other Authorities

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY HARRIS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83516

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ROUTING STATEMENT

This matter is not presumptively assigned to the Nevada Court of Appeals as it pertains to postconviction appeals from a Category A felony. NRAP 17(b)(3).

STATEMENT OF THE ISSUES

I. Whether Appellant's right to be present at a post-conviction evidentiary hearing was not denied when his attorney waived his presence

II. Whether effective representation requires the attorney, not the defendant, to make strategic decisions to achieve the defendant's objective

III. Whether trial counsel was not ineffective for failing to appeal the denial of a pretrial writ when it would have delayed Appellant's trial against his wishes

IV. Whether post-conviction appellate counsel was not ineffective for failing to raise Appellant's desired claims when other issues appeared more favorable

STATEMENT OF THE CASE

On August 23, 2017, Barry Harris ("Appellant") was arraigned in justice court with nine (9) offenses. 2 AA 432-35. He was sent to competency on September 15, 2017. 2 AA 299. His preliminary hearing was set for October 13, 2017, but Appellant was combative. 2 AA 299.

The preliminary hearing was reset for October 26, 2017. 2 AA 299. Because the victim did not appear, the justice court continued the hearing and set a show cause hearing for November 3, 2017. 2 AA 299. After the victim was held as a material witness, the preliminary hearing was scheduled for November 9, 2017.[1] 2 AA 299. At the show-cause hearing, the court found Ms. Dotson's presence had been waived because she had been personally served and said she would attend on November 9, 2017. 2 AA 424. After the investigator listened to phone calls from Appellant to the victim, directing her not to appear, the court issued a material witness warrant. 2 AA 424.

On November 3, 2017, Appellant filed an emergency stay and filed a writ of mandamus. 2 AA 299. The November 9, 2017, preliminary hearing date was

[1] Appellant states Ms. Dotson failed to appear on October 26, 2017, and on November 3, 2017. AOB at 3. The preliminary hearing was scheduled for November 9th, not November 3rd, and the November 9th day was vacated for the writ.

vacated. 2 AA 299. The State responded to the writ on November 21, 2017. 2 AA 2017. The district court denied the writ on November 27, 2017. 1 AA 302.

Ms. Dotson appeared pursuant to the material witness warrant at the preliminary hearing held on December 14, 2017. 2 AA 303. Based on the fact that the victim minimized Appellant's conduct, the State needed to call the police detective to testify at the preliminary hearing as well. 2 AA 338. Because the detective was out of state, the district court bifurcated the preliminary hearing. 2 AA 341. The magistrate said that even if the court had been aware of the detective's absence, the first part of the preliminary hearing would have been held that day because the victim was held on a material witness warrant. 2 AA 339. The prosecutor was sworn in to testify to the detective's unavailability. 2 AA 340.

The second half of the preliminary hearing was set for December 27, 2017. 2 AA 345. It actually occurred on January 16, 2018, though Appellant's record is silent as to the cause of that delay. 2 AA 354.

On January 17, 2018, Appellant was charged by way of Information as follows:

> **Count 1:** Burglary While in Possession of a Firearm (Category B Felony – NRS 205.060)
> **Count 2:** First Degree Kidnapping With Use of a Deadly Weapon Resulting in Substantial Bodily Harm (Category A Felony – NRS 200.310, 200.320, 193.165)
> **Count 3:** Assault With a Deadly Weapon (Category B Felony – NRS 200.471)

Count 4: Battery With Use of a Deadly Weapon Constituting Domestic Violence (Category B Felony – NRS 200.481, 200.485, 33.018)
Count 5: Battery Constituting Domestic Violence – Strangulation (Category C Felony – NRS 200.481, 200.485, 33.018)
Count 6: Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence (Category C Felony – NRS 200.481, 200.485, 33.018)
Count 7: Preventing or Dissuading Witness or Victim from Reporting Crime or Commencing Prosecution: (Category D Felony – NRS 199.305)
Count 8: Carrying Concealed Firearm or Other Deadly Weapon (Category C Felony – NRS 202.350(1)(d)(3))
Count 9: Ownership or Possession of Firearm By Prohibited Person (Category B Felony – NRS 202.360)

Respondent's Appendix ("RA") at 1-4. An Amended Information removed Count 9.

On April 16, 2018, after five days of trial, a jury returned its verdict, as follows:

Count 1: Not Guilty
Count 2: Guilty of First Degree Kidnapping Resulting in Substantial Bodily Harm
Count 3: Guilty of Assault
Count 4: Guilty of Battery Constituting Domestic Violence
Count 5: Not Guilty
Count 6: Guilty of Battery Resulting in Substantial Bodily Harm Constituting Domestic Violence
Count 7: Not Guilty
Count 8: Not Guilty

RA at 5-8.

Appellant was sentenced on August 15, 2018, as follows:

Count 2: LIFE in the Nevada Department of Corrections ("NDC"), with the possibility of parole after fifteen (15) years
Count 3: six (6) months in the Clark County Detention Center ("CCDC"), concurrent with Count 2

Count 4: six (6) months in CCDC, concurrent with Count 3
Count 6: twenty-four (24) to sixty (60) months in NDC, concurrent with Count 2

RA at 9-11. Appellant received 351 days credit for time served. RA at 11. The Judgment of Conviction was filed August 16, 2018. RA at 9.

Appellant, through counsel, appealed on April 26, 2019. 2 AA 213-64. The Nevada Supreme Court returned unfiled an informal supplemental brief from Appellant. 2 AA 266. On December 19, 2020, the Nevada Supreme Court affirmed his conviction. 1 AA 209-11. Remittitur issued January 16, 2020. RA at 12.

On April 21, 2020, Petitioner filed a pro per Petition for Writ of Habeas Corpus ("Petition") and Ex Parte Motion for Appointment of Counsel and Request for Evidentiary Hearing. 1 AA 191-204. The State responded on October 2, 2020. 1 AA 163-82. Counsel was appointed November 24, 2020. 1 AA 126. The Supplemental Petition for Writ of Habeas Corpus ("Supplement") was filed April 8, 2021. 1 AA 104-23. The State again responded. 1 AA 89-103. The district court held an evidentiary hearing on August 26, 2021. 1 AA 13-71. After the hearing, the court denied the petition. 1 AA 69-71. The Findings of Fact, Conclusions of Law, and Order was filed on September 30, 2021. 1 AA 4-12.

Appellant filed his Notice of Appeal on September 14, 2021. Counsel was appointed on October 21, 2021. Appellant's Opening Brief was filed April 18, 2022.

STATEMENT OF FACTS

At his preliminary hearing on December 14, 2017, Appellant warned his victim that she did not have to testify against him if she did not want to. 2 AA 306. Nicole Dotson, the victim, then stated she did not wish to testify against Appellant. 2 AA 308.

Ms. Dotson dated Appellant for six years. 2 AA 309-10. On August 22, 2017, Appellant was in her house when she arrived home. 2 AA 310-11. They had been arguing on the phone and she told him she would call the police if he did not leave. 2 AA 313, 365. He began choking her. 2 AA 365. When confronted with her statement to the police, she conceded she had said he strangled her but she no longer recalled this. 2 AA 315-16.

The victim ran to the living room and screamed for help. 2 AA 366. Appellant punched her and would not let her leave the apartment. 2 AA 316-17. When she tried to leave, he pulled her back. 2 AA 333.

Appellant had a gun. 2 AA 318, 367. Ms. Dotson testified she did not know if Appellant hit her with the gun because his "fist is pretty strong." 2 AA 321. She admitted telling police he hit her on the head with the gun. 2 AA 321, 367. He kicked her several times. 2 AA 322. He threatened her if she called the police. 2 AA 323. Ms. Dotson denied Appellant placed the gun in her mouth, though she had reported this to the police. 2 AA 327, 367. Appellant said he would "blow her brains out" if

she did not stop screaming. 2 AA 368. He also said he would come back and kill her if she called the police. 2 AA 372. Ms. Dotson's eye "was swollen shut and extended a couple inches out from her face." 2 AA 361. Her eye hurt for four months. 2 AA 330. She had surgery on the eye. 2 AA 330.

The State offered a judgment of conviction to support the possession of firearm by prohibited person charge. 2 AA 339.

SUMMARY OF THE ARGUMENT

Appellant's attorney waived Appellant's appearance at the evidentiary hearing. Appellant makes no showing of prejudice by not attending as his attorney had not planned to call Appellant to testify.

Having the "assistance of counsel" does not mean the appointed attorney works as Appellant's legal assistant while Appellant represents himself in court. A defendant sets the objective of the representation, but the attorney makes the strategic decisions to achieve that objective.

When Appellant told his attorney the objective of the representation was to find him not guilty at trial as speedily as possible, trial counsel was not ineffective for failing to file an appeal of the denial of the writ of mandamus. Doing so would have required Appellant to waive his speedy trial rights. Since he expected to be found not guilty at trial, this delay would have thwarted the objective of the representation.

The assorted complaints Appellant labels "cumulative errors" are meritless. When appellate counsel had a number of potentially meritorious claims to make on direct appeal, she was not ineffective for failing to dilute her argument with every colorable claim Appellant demanded. Appellate counsel bore the responsibility of weeding out weaker claims to best showcase stronger arguments.

ARGUMENT

This Court gives deference to a district court's factual findings, 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).

I. BECAUSE COUNSEL WAIVED APPELLANT'S PRESENCE AT THE HEARING, HE WAS NOT DENIED DUE PROCESS

Appellant claims a right to be present at all levels of legal proceedings. AOB at 11, citing Gallego v. State, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), abrogated by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011), and Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658 (1987).

A. Right to Be Present Refers to Stages of *Trial*

The right to be present does not apply to "all levels of legal proceedings;" rather, it applies to stages of the criminal trial. Under Nevada law, "the defendant must be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of

sentence." NRS 178.388(1) ("setting forth the constitutionally protected critical stages of trial." Evans v. State, 130 Nev. 1175 (2014)). This statute refers to trial stages on its face, not to post-conviction evidentiary hearings.

Federal law is similar. Under Rule 43(a) of the Federal Rules of Criminal Procedure, a defendant must be present at initial appearance, arraignment, plea, every stage of trial, and sentencing. He is not required at hearings involving a question of law. Id.

A defendant does not have an unlimited right to be present at every proceeding. Gallego, 117 Nev. at 367, 23 P.3d at 240.

> The right to be present is rooted in the Confrontation Clause and the Due Process Clause of the Federal Constitution. The confrontation aspect arises when the proceeding involves the presentation of evidence. The due process aspect has been recognized only to the extent that a fair and just hearing would be thwarted by the defendant's absence. The right to be present is subject to harmless error analysis. The defendant must show that he was prejudiced by the absence.

Id. At 367-68, 23 P.3d at 240 (quoting Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996).

In Gallego, the defendant challenged his absence from in camera proceedings at which certain jurors were excused. Id. However, as no evidence at the proceedings implicated his confrontation rights, he could not show prejudice. Id.

Similarly, in Stincer, the defendant protested his absence from hearings to determine the competency of his child victims. 482 U.S. at 745, 107 S. Ct. at 2660.

The Supreme Court of Kentucky held his rights were compromised because the federal and state constitutions provided a right to face the witnesses against him. Id. at 735, 107 S. Ct. at 2662-63. The United States Supreme Court reversed, holding his confrontation rights were not violated because his attorney was able to ask questions at the competency hearing and the children then testified in front of him at trial. Id. at 744, 107 S. Ct. at 2667. "Respondent has given no indication that his presence at the competency hearing in this case would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify." Id. at 747, 107 S. Ct. at 2668. The Supreme Court held that nothing occurred during the competency hearings that affected the defendant's ability to defend against the *actual criminal charges* at trial.

Where the court did not make a ruling at a pre-trial hearing, the defendant was not prejudiced by his absence. Thomas v. State, 114 Nev. 1127, 1140, 967 P.2d 1111, 1120 (1998). Where a sentencing panel reconvened to discuss the impact of a recent case, the defendant was not prejudiced. Kirksey v. State, 112 Nev. 980, 1001, 923 P.2d 1102, 1115 (1996). A conference call held before trial in the defendant's absence did not thwart due process as "the conference call was not during trial, jury selection, or arraignment, and there is no demonstration by Evans that he was prejudiced by his absence from the conference call." Evans v. State, 130 Nev. 1175 (2014).

When a defendant chose not to appear at a preliminary hearing, the State could not force him to do so under NRS 178.388. State v. Sargent, 122 Nev. 210, 214–15, 128 P.3d 1052, 1055 (2006) ("In NRS 178.388, the Legislature explicitly specified when a defendant must be present; therefore, we will not infer that the defendant must be present during other proceedings unless the defendant's absence will impair the justice court's ability to conduct a proceeding.").

"Because Crawford was concerned only with testimonial evidence introduced at trial, Crawford does not change our long-settled rule that the confrontation clause does not apply in sentencing proceedings." United States v. Stone, 432 F.3d 651, 654 (6th Cir. 2005), discussing Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

A post-conviction evidentiary hearing is not an arraignment, trial stage, or sentencing. Appellant was entitled to attend the hearing, but his absence does not raise the constitutional concerns of a trial *in absentia*. NRS 34.390(2) states a writ of habeas corpus "requires only the production of the petitioner to determine the legality of the petitioner's custody or restraint."

Presence at an evidentiary hearing was addressed in Gebers v. State, 118 Nev. 500, 50 P.3d 1092 (2002). In Gebers, the petitioners were not present at evidentiary hearings where evidence was adduced "regarding the merits of the claims raised," nor were they represented by habeas counsel. Id. at 501, 50 P.3d at 1092-93. The

district court made no effort to procure their presence. Id. at 502, 50 P.3d at 1093. This Court remanded the matters for evidentiary hearings on the merits of the petitioners' claims. Id. at 506, 50 P.3d at 1095–96.

Here, the facts differ greatly from those in Gebers. Appellant was represented at the hearing by appointed counsel. 1 AA 15. He was not present because his attorney waived his presence. 1 AA 16-18. His attorney did not intend to use the hearing to introduce evidence regarding the ineffectiveness of counsel but rather to show the underlying writ of mandamus had merit. 1 AA 20. The district court attempted to secure Appellant's presence and offered to continue the hearing or bifurcate it. 1 AA 17-19. None of the salient features of Geber are present in the instant case. Because his absence does not raise constitutional concerns, he must demonstrate prejudice from his absence.

B. Counsel Validly Waived Appellant's Presence

Appellant is bound by his attorney's waiver of his presence. An attorney represents his client and takes action on his behalf which bind his client. Gonzalez v. United States, 553 U.S. 242, 248, 128 S. Ct. 1765, 1769 (2008).

> For certain fundamental rights, the defendant must personally make an informed waiver. For other rights, however, waiver may be effected by action of counsel. 'Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial.'

Id.

An attorney may waive his client's presence. In Schultz v. State, 91 Nev. 290, 535 P.2d 166 (1975), the defendant argued his attorney was not authorized to waive his presence at a continuance hearing. Id. at 292, 535 P.2d at 167. "We find no error in the district court's acceptance of the waivers proffered by appellant's counsel or in its denial of appellant's motion to dismiss." Id. Similarly, in Bates v. State, 84 Nev. 43, 436 P.2d 27 (1968), counsel waived his client's speedy trial rights in his absence, and also waived his absence. Id. at 45, 436 P.2d at 28. This Court found the waiver to be valid. Id. at 46, 436 P.2d at 29.

To the extent Appellant argues post-conviction counsel was ineffective for waiving his presence, he cannot show prejudice. Because he is not entitled to post-conviction counsel, he is not entitled to effective counsel. Halbert v. Michigan, 545 U.S. 605, 610, 125 S.Ct. 2582, 2587 (2005) (The right of assistance of counsel extends only to "first appeals as of right … however, … a state need not appoint counsel … in discretionary appeals"); McKague v. Whitley, 112 Nev. 159, 164, 912 P.2d 255, 258 (1996) ("no right to effective assistance of counsel, let alone any constitutional or statutory right to counsel at all, [exists in] post-conviction proceedings").

Here, the record shows habeas counsel waived Appellant's presence.

/ / /

/ / /

C. Appellant Must Show His Absence Prejudiced Him

"Violations of the right to be present are reviewed for harmless error." Rose v. State, 123 Nev. 194, 208, 163 P.3d 408, 417 (2007). The due process aspect of the Confrontation Clause is in play where the proceeding involves the presentation of evidence and impacts the defendant's ability to defend against the criminal charges against him. United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484 (1985).

Because Appellant's right to appear at his arraignment, trial, or sentencing was not compromised, he must show specific prejudice arising from his non-appearance at the evidentiary hearing. Rose, 123 Nev. at 208, 163 P.3d at 417. He claims he was prejudiced because he was unable to challenge the testimony of trial and appellate counsel. AOB at 12. Appellant's "desire and intention to be present" are not sufficient: he can be disappointed without being prejudiced.

Appellant asserts his "proposed testimony" would have contradicted the testimony of his attorneys. AOB at 12. He admits, however, that it is mere speculation as to whether his testimony would have been plausible. AOB at 13. Instead, he relies on his "fundamental right to testify." AOB at 13. Because the record belies Appellant's claim that he intended to testify, he cannot demonstrate prejudice from his absence at the evidentiary hearing.

D. The Record Belies Appellant's Claim That He Planned to Testify

Appellant's claim of prejudice relies on an assertion that he intended to testify. AOB at 12-14. He asserts the district court erred in relying on the "uncontested" testimony of his attorneys. AOB at 12-14. He claims he would have testified as follows:

> 1. That Harris did wish to file a writ of mandamus to the Nevada Supreme Court and that his counsel told him he would do so, stated to the district court that he would do so, and that no appeal was filed;
>
> 2. That Harris was told he could not invoke his speedy trial rights and independently pursue a Writ of Mandamus;
>
> 3. That his trial counsel did not provide certain body cam footage so he could be prepared for trial and/or make an informed decision whether to testify; and,
>
> 4. That he specifically directed his appellate counsel to raise the issue of the State's *Bustos* violations granting of continuances.
>
> 5. That he specifically directed his appellate counsel to raise the issue of his denial of a speedy trial and perjury claim (Grounds 8 and 9 of his Pro Per Petition).

AOB at 13.

He argues his absence meant he was unable "to provide testimony that would have been direct conflict with the testimony given by his trial and appellate Counsel. Harris would have testified that his trial counsel and appellate counsel were ineffective. Specifically, Harris would have testified to meritorious legal issues not raised at the trial court level and on appeal." AOB at 2.

The record belies his contention that he planned to testify under oath at the evidentiary hearing.

Appellant was absent from the hearing despite an order to transport him. 1 AA 15. The court clerk stated defendants have to manually add themselves as registered recipients on the efiling system in criminal cases. 1 AA 15-16. "Nobody else can add them." 1 AA 16. The record shows Appellant's absence cannot be attributed to the State. 1 AA 18.

Referring to her notes, the prosecutor said at the hearing on June 24, habeas counsel Mr. Lichtenstein had said there was no need for Appellant to be present. 1 AA 18. The Transcript of the Hearing Re: Argument: Petition for Writ of Habeas Corpus, filed March 14, 2022, contains the following passage:

> THE COURT: Mr. Lichtenstein, how long do you need to prepare, and do you want the client to be present?
> MR. LICHTENSTEIN: I don't think the client needs to be present.

RA at 17.

Mr. Lichtenstein informed the court he wished to proceed, as his witness, Ms. Dodson, was in attendance from Texas. 1 AA 17. The State offered to bifurcate the hearing so that the out-of-state witness could be accommodated and Appellant could attend the rest of the hearing. 1 AA 17. The prosecutor said this would allow counsel the choice: "if you want to call him you can call him." 1 AA 17. The court affirmed, "If he decides he wants to call him, we'll definitely bifurcate it for that part of the

hearing. It's up to him to decide that. He doesn't have to decide it now." 1 AA 17. Before counsel called its witness, the court again offered to bifurcate the hearing and have Appellant present. 1 AA 18-19.

Mr. Lichtenstein said he did not intend to call Appellant. 1 AA 17. The court, at defense counsel's request, proceeded with the hearing. 1 AA 17.

> The Court: Mr. Lichtenstein, are you prepared to go forward?
> Mr. Lichtenstein: Yes, Your Honor.

1 AA 19.

Appellant implies his habeas counsel called three witnesses [his attorneys] at the evidentiary hearing. AOB at 8. This is misleading, as habeas counsel in fact only called the victim to testify to show she was improperly served with a subpoena. 1 AA 19. The three attorneys testified only after the State reopened the matter to address the court's concern about the denial of the writ not being raised on direct appeal. 1 AA 41-42.

At the evidentiary hearing, habeas counsel used Ms. Dotson to argue the justice court erred in granting a continuance for her presence. 1 AA 20-28. Mr. Lichtenstein's first argument was that trial counsel was ineffective for not taking the writ of mandamus to the Nevada Supreme Court. 1 AA 29. His second was that appellate counsel did not include the issue on direct appeal. 1 AA 29. Mr. Lichtenstein did not intend to call the attorneys to ask why they did not pursue the

writ of mandamus; he only wanted to establish the factual predicate to support his contention that the writ had a strong chance in the Nevada Supreme Court. 1 AA 20.

The fact that Mr. Lichtenstein only called the victim to testify belies Appellant's claim that he intended to testify against his trial and appellate attorneys. 1 AA 19. Mr. Lichtenstein said, "I didn't plan on calling [the attorneys] and I had not subpoenaed them previously." 1 AA 19. He went on to say the habeas petition is "mostly about legal issues." 1 AA 20; see Rule 43(a) of the Federal Rules of Criminal Procedure (stating the defendant is not required at hearings involving a question of law).

After Ms. Dodson testified, Appellant presented no other witnesses.

> The Court: Mr. Lichtenstein, do you have another witness to call?
> Mr. Lichtenstein: No, Your Honor.
> The Court: All right. Are you resting?
> Mr. Lichtenstein: Yes.
> The Court: All right. Ms. Marland? [prosecutor]
> Ms. Marland: No witnesses, Your Honor.

1 AA 29.

If Ms. Dodson was his only witness, Appellant cannot claim he intended to testify 1) that he wanted to appeal the denial of the writ of mandamus and was promised his attorney would do so; 2) that he was correctly informed he could not have both a trial in 60 days and an appeal of his pretrial writ; 3) that he wanted to testify but did not do so because he did not have body cam footage in jail; 4) that he directed appellate counsel to include the Bustos issue and that he had a right to

demand what issues were argued on appeal; and 5) that he directed appellate counsel to include speedy trial and perjury claims and that he had a right to demand what issues were argued on appeal. AOB at 13.

Appellant contends the unexpected testimony of his trial and appellate attorneys went "unchallenged" and was "uncontested." AOB at 12, 14. When the district court denied the petition, Mr. Lichtenstein did not ask for a bifurcated evidentiary hearing so that Appellant could counter the testimony presented through his three former attorneys. 1 AA 71.

Appellant's habeas attorney waived his presence as it was unnecessary and Appellant is bound by that waiver. Even if his attorney erred in waiving his presence, such error was harmless. NRS 178.598 ("any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded"). Habeas counsel thoroughly cross-examined each attorney at the evidentiary hearing. Appellant has failed to demonstrate prejudice emanating from his absence, as there is no evidence he intended to testify at all, or that he expected his attorneys to have an opportunity to defend their effectiveness.

E. If This Court Wishes to Consider Whether Appellant Shows Prejudice By His Waived Absence, Appellant Can Raise This Claim in a Second Post-Conviction Petition for Writ of Habeas Corpus

Appellant has not shown he was prejudiced by his absence at the evidentiary hearing when his attorney waived his presence, because he did not intend to testify and his former attorneys were not subpoenaed to testify. Appellant does not allege any prejudice by his absence from the testimony of the only anticipated witness, his victim.

If Appellant wishes to pursue this issue and allege prejudice, he may file a second post-conviction petition for writ of habeas corpus. A second petition would allow the district court to develop the record for this Court's review.

Where the factual record is insufficient for an appellate court to resolve an issue, the Court may remand the matter for an evidentiary hearing. Valentine v. State, 135 Nev. 463, 467, 454 P.3d 709, 715 (2019) (remanding for an evidentiary hearing on a fair cross section challenge); Ryan's Express Transportation Services, Inc. v. Amador Stage Lines Inc., 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012) (reasoning that "[a]n appellate court is not particularly well-suited to make factual determinations in the first instance.").

Here, habeas counsel Mr. Lichtenstein would need to be questioned regarding his waiver of Appellant's presence and Appellant's intention to testify.

II. EFFECTIVE REPRESENTATION DOES NOT REQUIRE APPELLANT MAKE STRATEGIC DECISIONS

Appellant claims he was denied the "autonomy to make fundamental choices about his own defense." AOB at 14. He asserts he wanted certain issues to be pursued:

> Harris has consistently raised the following issues in Pro Per filings which evidences that he believed they were the objectives he wished to pursue in the case: (1) denial of his speedy trial rights, (2) perjury of Ms. Dotson, (3) sufficiency of the evidence relating to the kidnapping charge, (4) failure to request rehearing, and (5) denial of the Writ of Mandamus. (1 AA, 198-203). The issues were raised in Harris Pro Per Petition. (Id). They were also raised in the Pro Per appeal Harris attempted to file. (2 AA 266-74).

AOB at 17.

The operative word in this litany of complaints is "pro per." A defendant who wants to make all decisions regarding his defense "autonomously" has a right to represent himself. Faretta v. California, 422 U.S. 806, 834, 95 S. Ct. 2525 (1975). An indigent defendant has the right to effective appointed counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). A defendant represented by counsel does *not* have the right to control the strategic decisions concerning his defense. Dawson v. State, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992). That Appellant desired these issues be argued regardless of their merit does not transform them into "objectives" of the representation. Rather, they are strategic decisions left to counsel's discretion. Rhyne v. State, 118 Nev. 1, 8, 38 P.3d 163,

167 (2002) (conferring the responsibility of deciding defenses on trial counsel). Appellant could have represented himself if he wanted to make the strategic decisions.

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, 466 U.S. at 686, 104 S. Ct. at 2063; 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. Strickland, 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).

"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, 108 Nev. at 117, 825 P.2d at 596; see also Ford v. State, 105 Nev. 850, 853, 784 P.2d 951, 953 (1989). Likewise, 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. Rhyne, 118 Nev. at 8, 38 P.3d at 167.

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. 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.

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).

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).

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). "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. 'Bare' and 'naked' allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled by the record." Id. "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 v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). A habeas corpus petitioner must prove disputed factual allegations by a preponderance of the evidence. Means, 120 Nev. at 1011, 103 P.3d at 32. The burden rests on Petitioner to "allege specific facts supporting the claims in the petition." NRS 34.735(6).

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).

Counsel cannot be ineffective for failing to make futile objections or arguments. 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, 118 Nev. at 8, 38 P.3d at 167.

There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects tactics rather than "sheer neglect." 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.

In considering whether counsel has met this standard, the court should first determine whether counsel made a "sufficient inquiry into the information that is

pertinent to his client's case." Doleman v State, 112 Nev. 843, 846, 921 P.2d 278, 280 (1996); citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Once such a reasonable inquiry has been made by counsel, the court should consider whether counsel made "a reasonable strategy decision on how to proceed with his client's case." Doleman, 112 Nev. at 846, 921 P.2d at 280, citing Strickland, 466 U.S. at 690-691, 104 S.Ct. at 2066. Finally, counsel's strategy is a "tactical" decision and will be "virtually unchallengeable absent extraordinary circumstances." Doleman, 112 Nev. at 846, 921 P.2d at 280; Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

Appellant cites McCoy v Louisiana, 138 S. Ct. 1500 (2018), to hold that a defendant has the right to make fundamental choices about his own defense. AOB at 15. In McCoy, defense counsel conceded guilt without his client's permission. Id. at 1505. "[I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense." Id.

> Trial management is the lawyer's province: Counsel provides his or her assistance by making decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence." Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.

Id. at 1508 (internal citations omitted).

The McCoy Court held that the decision to assert innocence or represent oneself "are not strategic choices about how best to achieve a client's objectives;

they are choices about what the client's objectives in fact are." Id. McCoy holds the defendant decides the objective of his defense.

By contrast, the defendant is bound by his attorney's decisions about conducting the trial. Gonzalez, 553 U.S. at 248, 128 S. Ct. at 1769. "Thus, decisions by counsel are generally given effect as to what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence. Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." Id.

Appellant asserts that his desire to raise certain legal issues was a decision regarding the defense's objective rather than a strategic way of achieving his objective. AOB at 16. He claims his attorneys were ineffective for failing to "pursue the object of representation." AOB at 18. Without citation, he claims our jurisprudence presumes the defendant knows his own best interests and "does not need them dictated by the State." AOB at 16-17.[2]

American jurisprudence presumes no such thing. The Gonzalez Court held that tactical decisions did not require client approval, as the attorney has the expertise and experience to consider the larger strategic plan for the trial. Id. at 249–50, 128 S. Ct. at 1770. The defendant chooses the objective of the representation, i.e.,

[2] Presumably, Appellant means he does not need them dictated by his attorney, as Appellant is likely not accusing the *State* of ineffective assistance of counsel.

whether to maintain his innocence or plead guilty and hope for mercy. The attorney, however, decides how to achieve that objective. The fact that Appellant continuously harped on the preliminary hearing does not mean his attorneys had to raise that issue if they did not feel it would be successful. The strategic decisions are entrusted to the attorney. Dawson, 108 Nev. at 117, 825 P.2d at 596

III. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PURSUE AN APPEAL OF THE DENIAL OF THE WRIT WHEN APPELLANT INSISTED ON A SPEEDY TRIAL

Appellant argues the justice court erred in granting a continuance where the State did not swear under oath as to the circumstances surrounding the witness's absence. AOB at 18-26. As this issue was not raised on appeal, it is waived and it is thus not necessary to litigate the correctness of the justice court's decision. 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).

Here, Appellant argues trial counsel was ineffective for not appealing the denial of his writ of mandamus concerning this issue to the Nevada Supreme Court before trial. AOB at 18, 25. He wanted to appeal its denial but his trial counsel told him he could not invoke his speedy trial rights if he delayed proceedings by appealing. AOB at 13. He claims trial counsel's failure to appeal the denial "deprived Harris of important control over the objectives of his defense." AOB at 25.

The district court denied the writ of mandamus because the justice court had the discretion to continue the hearing for good cause under NRS 171.196. 2 AA 300. The court found the avenues for seeking a continuance in Bustos v. Sheriff, Clark

County, 87 Nev. 622 (1971) and Hill v. Sheriff of Clark County, 85 Nev. 234 (1969), were two of several avenues to seek a continuance. 2 AA 301. The justice court must review the totality of the circumstances. 2 AA 301 (citing Sheriff, Clark Cty v. Terpstra, 111 Nev. 860, 863, 899 P.2d 548, 551 (1995).

The district court found Appellant had directed his attorney not to seek an appeal that would delay his trial. 1 AA 10. The objective of Appellant's defense was to acquit him as quickly as possible. Mr. Ramsey, the attorney who filed the writ of mandamus, explained why he did not appeal the issue before the preliminary hearing:

> I had a discussion with Mr. Harris once the writ was denied. He wasn't present for the hearing on the writ because it was placed on a civil calendar. I had a discussion with Mr. Harris about what he wanted to do. I had a discussion with the appeals team as far as what the process would be for appealing the denial of the writ. The appeals team essentially told me we can take it up on another writ of mandamus to the Supreme Court to get them to instruct the District Court to grant my initial writ of mandamus.
>
> As far as the timeframe, which was a concern for Mr. Harris because he was very adamant that he wanted to go to trial quickly, in discussion with Mr. Harris about what we wanted to do with this he decided, and I let him have this decision, that he didn't want to delay his Preliminary Hearing any further, that we just needed to get the Preliminary Hearing to go forward, and were he convicted at trial we would take it up on direct appeal.

1 AA 66.

Of course, Mr. Ramsey did not represent Appellant on direct appeal because Appellant wanted to dismiss him when Mr. Ramsey did not allow Appellant to

control the defense. RA at 20-22. Earlier though, when Mr. Ramsey could have appealed the writ's denial, Appellant did not want to. "The only reason he didn't want to do the appeals process or the other writ to the Supreme Court was because he wanted to go forward to trial because he thought he was going to win." 1 AA 67.

Trial counsel Mr. Sheets testified Appellant remained focused on his goal of proceeding to trial as soon as possible:

> I seem to remember that Barry wanted to move faster than I felt comfortable with. I seem to remember over his objection seeking a continuance of just a couple of weeks or so to fill in some blanks. I seem to remember I was dealing with medical records, but, yeah, I seem to remember this was a quick moving trial and it was at the insistence of the client.

1 AA 47.

Appellate counsel Ms. Bernstein testified that her understanding was that "Mr. Harris did not want to waive his right to a speedy trial, so we lost a lot of challenges that we could have raised based on that." 1 AA 60.

Habeas counsel argued an "antsy" client should not cause an attorney to not appeal, because "clients oftentimes want to do things procedurally that are not in their best interest. That's why they have lawyers." 1 AA 68. "Mr. Harris may have wanted to get to trial but it was not in his best interest to do so, and it really is up to the attorney to proceed with the trial in a manner—or with the proceedings in a manner that is in the client's best interest." 1 AA 69. Interestingly, this is the opposite

of what Appellant now argues—that his autonomy is threatened when his lawyer makes legal strategic decisions.

The district court accepted that trial counsel was correct in not appealing the denial of the writ of mandamus before the preliminary hearing, given Appellant's eagerness to proceed. 1 AA 69-70. During the hearing, however, the district court asked for more information as to why the issue was not raised on direct appeal. 1 AA 41-42.

> I mean frankly extraordinary writs are things that the Supreme Court can choose not to hear. They don't think it's appropriate and they tell you to come back after the trial is over. Well, now we're back here, Mr. Harris is at that point where the trial is over, and if it's not raised then I'm not sure he can ever raise it again. … I mean the prejudice is if it doesn't get raised on direct appeal it never gets heard.

1 AA 42.

To address the court's concerns, the State offered to call the three attorneys to permit them to testify. 1 AA 43. Mr. Lichtenstein cross-examined each attorney. 1 AA 50, 56, 66. Mr. Ramsey testified that when the writ of mandamus was denied, he decided not to pursue it further. 1 AA 65. At the Supreme Court level, he thought the writ would either win or "set some pretty bad case law for my client." 1 AA 67.

Given Appellant's eagerness to vindicate his actions at trial, the district court correctly found Mr. Ramsey and Mr. Sheets were not ineffective for failing to delay the matter by appealing to the Nevada Supreme Court.

> Petitioner claims Trial Counsel was ineffective for failing to appeal the justice court's denial of his pretrial Petition for Writ of Mandamus. However, Petitioner told his attorneys that he did not want to appeal the decision. Instead, he desired to have a jury trial as soon as possible. Petitioner may not direct Counsel to not seek an appeal and then later claim ineffective assistance of counsel. Thus, this Court denies Petitioner's claim.

1 AA 10.

IV. THE ALLEGED "CUMULATIVE" ERRORS ARE MERITLESS

Under a heading referring to "cumulative errors," Appellant does not argue the various claims in this appeal somehow interact to become greater than the sum of their parts. Rather, he takes the opportunity to include a few additional issues from his wish list of complaints challenging his conviction.

This Court considers the following factors in addressing a claim of cumulative error: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. Mulder v. State, 116 Nev. 1, 17 (2000). Appellant must present all three elements to be successful on appeal. Id. Moreover, a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533 (1975) (citing Michigan, 417 U.S. 433).

Appellant has not asserted any meritorious claims of error, and, thus, there is no error to cumulate. United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("…cumulative-error analysis should evaluate only the effect of matters determined to be error, *not the cumulative effect of non-errors*") (emphasis added). The issue of

guilt is not close, as his crimes were committed against a person who knew him well and who testified to his actions. The main complaint raised on habeas is that the charges against Appellant should have been dismissed when his victim failed to appear. This type of error, even if true, would not impact the actual evidence of guilt against Appellant adduced at trial. Finally, Appellant was acquitted of many of the crimes against him.

The miscellaneous complaints raised in this section lack merit.

A. Trial Counsel Cross-Examined the Victim at Trial

Appellant asserts trial counsel ineffectively cross-examined his victim. AOB at 26. He fails to provide, however, the trial transcript in which his attorney performed the cross-examination. He cites to Ms. Dotson's testimony at the preliminary hearing, when Mr. Ramsey was the attorney, to argue that trial attorney Mr. Sheets' strategy was to impeach Ms. Dotson. The defense strategy of Mr. Sheets at trial cannot be ascertained by a citation to Mr. Ramsey's performance at the preliminary hearing.

This complaint lacks any specificity regarding which parts of Ms. Dotson's testimony could have been impeached and by which prior inconsistent statements. Appellant merely "points out that Ms. Dotson gave conflicting versions of events during her arrest, at the preliminary hearing, and during trial." AOB at 26. He does not demonstrate which statements made at trial were impeachable based on which

statements made at the preliminary hearing. Regarding her "arrest," Appellant cites no statement Ms. Dotson made when she was picked up on a material witness warrant.

Trial counsel made a strategic decision not to include Ms. Dotson's more detailed versions of the attack given to police at the scene or made at the preliminary hearing, as this would only serve to make Appellant's case worse:

> I … felt strategically it would be better not to call out the fact that when it was closer to the date of the offense and closer to the date of the crime, she made certain allegations regarding firearms and pouring of lemonade and being dragged through the apartment, I felt that if I were to emphasize that to a jury that might actually hurt Mr. Harris more than it would help him.

I AA 49.

Counsel felt Ms. Dotson's testimony at trial was "much less hurtful to us than the statements she had given to police on the days of the event." 1 AA 49. If trial counsel had insisted the jury hear how she had described the attack and her injuries at the time Appellant attacked her, when she was hurt and angry, the jury would have been exposed to a much more harmful version. Trial counsel cannot be ineffective for preferring the version of events that paint Appellant in the best light. It defies logic to assert trial counsel had a duty to point out inconsistencies in her testimony at trial when those inconsistencies were not in Appellant's favor.

Because Appellant offers no substantive examples of opportunities to impeach Ms. Dotson's testimony, his claim is suitable only for summary denial under

Hargrove, 100 Nev. at 502, 686 P.2d at 225. Even on its merits, his claim does not warrant relief under Strickland. Appellant does not allege, much less substantiate, that he was prejudiced by Mr. Sheets's failure to introduce worse versions of the events to the jury. Moreover, the jury returned verdicts of "Not Guilty" on multiple counts, and found him guilty of multiple lesser-included crimes, rather than what was charged in the Amended Information. Therefore, Appellant certainly does not establish prejudice sufficient to warrant relief under Strickland. 466 U.S. at 697, 104 S. Ct. at 2069 (when a petitioner fails to meet one prong of the Strickland analysis, examination of the other prong is unnecessary).

B. Appellant Fails to Support His Body Cam Evidence Claim

The next "cumulative error" complaint is that trial counsel failed "to adequately cross-examine the officers regarding body cam footage of their interview with Ms. Dotson." AOB at 26. He claims the officers coerced Ms. Dotson into making a statement against him and his counsel was ineffective for failing to impeach the officers or show their coercion. AOB at 26-27.

In his pro per petition, Appellant alleged the trial court erred on this issue: "Furthermore, if Judge Eric Johnson would have let petitioner's lawyer do his job, he should have asked for a dismissal on the bodycam grounds because it show officers telling the victim in this alleged case what to say and how to say what happen." 1 AA 197. He claims the judge "told petitioner's lawyer to tread lightly on

body cam evidence." 1 AA 197. In its response, the State pointed out substantive issues not raised on direct appeal were waived. 1 AA 172. The State also noted Appellant did not support his contention with any specific factual allegations. 1 AA 173.

On appeal of the denial of his habeas petition, Appellant no longer faults the trial judge regarding the bodycam evidence. 1 AA 197. Instead, he has modified his claim into one of ineffective assistance of counsel for inadequately cross-examining the officers about the bodycam. AOB at 26-27. The district court did not consider this version of the claim below, and it may not be raised for the first time on appeal.

Appellant failed to explore the issue during his evidentiary hearing. Mr. Sheets testified that he reviewed the video body cameras before developing his defense strategy. 1 AA 46. He planned his strategy around "some of the officers' statements on the body camera footage." 1 AA 46. Counsel raised the issue of the body cam footage in both his opening and closing arguments. 1 AA 50.

Appellant again fails, just as he did in his original petition, to support his claim with any specific factual allegations. He fails to include the trial transcripts regarding the officers' testimony, nor does he provide the body cam footage, or even a transcript, for this Court's review. He claims without citation or other support that the officers somehow and for unknown reasons coerced Ms. Dotson to make a

statement against Appellant, either before, during, or after the officers transported her to the hospital to have her serious injuries examined. AOB at 26-27.

Trial counsel raised the possibility that law enforcement may have coached Ms. Dotson's statement at trial. 1 AA 50. Counsel argued the issue at both opening and closing. 1 AA 50. The jury watched the body cam footage themselves. 1 AA 179 (referring to the State's Opposition to the original petition, as no other evidence is in the record on appeal).

Without reference to the actual trial transcripts, this Court is unable to evaluate the effectiveness of trial counsel's cross-examination of the officers. This unsubstantiated claim is suitable for summary dismissal under Hargrove, 100 Nev. at 502, 686 P.2d at 225.

C. Appellant Does Not Demonstrate Prejudice From an Inability to Personally Watch Body Cam Footage While in Jail

Here, Appellant contends that he was unprepared for trial because he personally did not have an opportunity to view the body cam footage while in jail. AOB at 27. In his original petition, Appellant merely asserted counsel "failed to send [him] all of his discovery which render some of Mr. Harris post-conviction challenges." 1 AA 202. On appeal, he now refers to personally viewing his body cam footage while in jail. AOB at 27.

At the evidentiary hearing, Mr. Sheets testified as follows:

> We provided to Mr. Harris paper discovery with redactions made to personal—or personal identifying information, and we will almost always leave personal identifying information out in order to comply with what we believe we're required to in that respect. As far as the events, the names of the parties involved, that was all produced, correct. The body cam footage was not obviously (audio distortion) to him within the Clark County Detention Center but was summarized to him.

1 AA 49.

Discovery must be provided to the defense attorney, not to the defendant. Appellant cites no authority for the proposition that he personally was entitled to review all discovery, including discovery that would require audio-visual equipment not normally found in a jail cell.

The body cam footage was summarized for Appellant. 1 AA 49. The footage was played at trial, before the defense closed its case. 1 AA 179. Appellant could have decided whether or not to testify after viewing the footage in open court. He did not need to see his victim's exact demeanor weeks in advance before deciding whether to expose himself and his previous felony convictions to cross-examination.

Appellant asserts the lack of the body cam footage prevented *him* from putting forth a coherent and adequate defense. AOB at 27. He states the footage would have put *him* in a better position to insist on presenting the evidence at trial. AOB at 27. The attorney, not the defendant, is responsible for putting on a coherent defense and for deciding what evidence to present. Rhyne, 118 Nev. at 8, 38 P.3d at 167. Appellant again confuses his role in this proceeding. This claim is without merit.

D. Appellate Counsel Determines What Issues to Raise

In his next two complaints, Appellant contends his direct appeal attorney should have included the "arguments he wished to raise on direct appeal" in her brief. AOB at 27-29. Citing to his own pro per habeas petition, he asserts without other evidence that he had valid claims of insufficient evidence, violation of his speedy trial rights, and failure to challenge the justice court proceedings. AOB at 28. He claims prejudice because he might be barred from raising these issues in federal court. AOB at 28.

Appellate counsel raised the issues she felt had merit. 1 AA 54. Meritless issues, waived or otherwise, cannot be expected to prevail in federal court.

There is a strong presumption that appellate counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." See United States v. Aguirre, 912 F.2d 555, 560 (2nd Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. The United States Supreme Court has held that there is a constitutional right to effective assistance of counsel in a direct appeal from a judgment of conviction. Evitts v. Lucey, 469 U.S. 387, 396-97, 105 S. Ct. 830, 835-37 (1985); see also Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). This Court has held that all appeals must be "pursued in a manner meeting high standards of diligence, professionalism and competence." Burke, 110 Nev. at 1368, 887 P.2d at 268.

A claim of ineffective assistance of appellate counsel must satisfy the two-prong test set forth by Strickland. Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996). To satisfy Strickland's second prong, the defendant must show the omitted issue would have had a reasonable probability of success on appeal. Duhamel v. Collins, 955 F.2d 962, 967 (5th Cir. 1992); Heath, 941 F.2d at 1132; Lara v. State, 120 Nev. 177, 184, 87 P.3d 528, 532 (2004); Kirksey, 112 Nev. at 498, 923 P.2d at 1114.

Appellate counsel is not required to raise every issue Appellant felt was pertinent to the case. The professional diligence and competence required on appeal involves "winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313 (1983). In particular, a "brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions." Id. at 753, 103 S. Ct. at 3313. For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy." Id. at 754, 103 S. Ct. at 3314. The Nevada Supreme Court has similarly concluded that appellate counsel may well be more effective by not raising every conceivable issue on appeal. Ford, 105 Nev. at 853, 784 P.2d at 953.

The defendant has the ultimate authority to make fundamental decisions regarding his case. Jones, 463 U.S. at 751, 103 S. Ct. at 3312. However, the defendant does not have a constitutional right to "compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." Id.

Ms. Bernstein testified she made determinations of merit on the issues she raised in the direct appeal, and that in this case she included more issues than she normally did. 1 AA 54-55. She made a strategic decision to only bring issues she thought the Nevada Supreme Court would entertain. 1 AA 55-56.

1. Writ of Mandamus

Appellant contends the denial of his pretrial writ of mandamus should have been appealed to the Nevada Supreme Court, both before and after trial. AOB at 1, 13, 17, 18-26.

Mr. Lichtenstein cross-examined Ms. Bernstein about why she did not find the issue regarding the denial of the writ of mandamus worth bringing up on direct appeal. 1 AA 56-63. Ms. Bernstein said that issues at the preliminary hearing that do not concern the facts as presented at trial were generally not considered by the Nevada Supreme Court. 1 AA 58. She sorts through potential issues to winnow out weaker arguments because "I don't want to dilute issues that I believe really do have merit." 1 AA 58.

> Ms. Bernstein: The denial of a motion to continue not necessarily of a significant nature enough to raise on appeal, it would qualify as what I would consider a fairly lesser issue given that it happened at the Preliminary Hearing, the issue was already addressed, so I think that the record was fairly clear on that.

I AA 59. She explained the issue had been addressed by the justice court's decision to continue the preliminary hearing anyway.

Mr. Lichtenstein asked if the issue, if it had been raised, could have affected the appeal, but Ms. Bernstein replied that she did not believe it would have changed the outcome. 1 AA 63.

> Mr. Lichtenstein: Here was something that was an issue that had not been addressed previously by the Nevada Supreme Court. What would have been the prejudice to Mr. Harris by raising that issue in direct appeal?
>
> Ms. Bernstein: My opinion, as I stated, it would have diluted what I considered to be more potentially meritorious issues that would offer him a greater deal of relief.
>
> Mr. Lichtenstein: So it's your opinion that it would have affected the appeal on the other issues?
>
> Ms. Bernstein: Again, I'm not going to necessarily raise every single issue that I may see in the transcripts because what I do is I select what I consider to be the strongest issues. I'm not going to have a brief—absent a murder case or a capital case, I'm not going to have a brief represent 25 different causes of action because I don't think that the Supreme Court would either appreciate that or take any one of them seriously. What I do is I narrow it down to what I believe at that time will be the causes of action or the grounds for relief that are going to most likely give him a chance of success.

1 AA 60.

Regarding a potential appeal of the denial of the writ of mandamus before the preliminary hearing, the district court felt that was a tactical decision best left to the attorney. 1 AA 38. The State called Mr. Ramsey, the attorney who filed the writ of mandamus, to testify at the evidentiary hearing. 1 AA 65. When asked why he failed to appeal the denial, Mr. Ramsey said he was concerned about delaying the trial. 1 AA 66. "The only reason he didn't want to do the appeal's process or the other writ to the Supreme Court was because he wanted to go forward to trial because he thought he was going to win." 1 AA 67.

Since Appellant chose not to appeal the denial of his writ of mandamus at the expense of delaying his trial, his trial attorney cannot be ineffective for failing to do so. Since appellate counsel felt the adequacy of the preliminary hearing would have been overshadowed by the fact that a jury found him guilty beyond a reasonable doubt, she was not ineffective for focusing her direct appeal on potentially more meritorious issues.

2. Sufficiency of the Evidence

Appellant asserts without citation that his appellate counsel failed to raise the issue of insufficient evidence, contrary to his wishes. AOB at 28. The Nevada Supreme Court addressed the sufficiency of the evidence on direct appeal. 1 AA 209-10. "Next, Harris contends there was insufficient evidence to support the

substantial bodily harm enhancement to his kidnapping conviction because he inflicted bodily harm prior to the kidnapping. We disagree." Id.

Appellant's claim that his attorney failed to raise this "meritorious" issue is belied by the record. Hargrove, 100 Nev. at 502, 686 P.2d at 225.

3. Speedy Trial Rights

Appellant contends his speedy trial rights were violated, but he does not address how. AOB at 28. He claims not including speedy trial and insufficient evidence issues "denied [him] the objective of his defense on appeal." AOB at 28. He says "had the issues been presented this Court would have granted relief due to his speedy trial rights being violated the inconsistent testimony of Ms. Dotson underlying his conviction." AOB at 28-29. He does not explain the connection between speedy trials and inconsistent testimony.

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." In Barker v. Wingo, the United States Supreme Court set out a four-part test to determine if a defendant's speedy trial right has been violated: "[l]ength of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. 514, 530, 92 S. Ct. 2182, 2192 (1972); see Prince v. State, 118 Nev. 634, 640, 55 P.3d 947, 951 (2002).

As to the first factor, in order to trigger a speedy trial analysis, "an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett v. United States, 505 U.S. 650, 651-52, 112 S. Ct. 2686, 2690 (1992). Courts have generally found post-accusation delays to be "presumptively prejudicial" as they approach the one-year mark. Id. at 652 n.1, 112 S. Ct. at 2691 n.1.

The Information against Appellant was filed January 17, 2018. RA at 1-4. Appellant's trial ended April 16, 2018. RA at 5-8. Ninety (90) days passed between the formal charge and the *completion* of trial. This is far less than the one-year, "presumptively prejudicial" timeline as expressed in Doggett. 505 U.S. at 652 n.1, 112 S. Ct. at 2691 n.1.

The violent attack itself that lay at the root of the charges against Appellant occurred on August 22, 2017, and Appellant was convicted April 16, 2018. Even if there had not been an issue of Appellant's competency, there have not been any prejudicial delays here. The first Barker factor does not weigh in Appellant's favor.

As to the second factor, different reasons for trial delay should be attributed different weights. Barker, 407 U.S. at 531, 92 S. Ct. at 2192. A deliberate delay in order to hamper the defense is weighed heavily against the State, while negligence is weighed less heavily. Id. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Id. However, when a petitioner is responsible for

most of the delay, he is not entitled to relief. Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 310-11 (1998).

Appellant acknowledges his own counsel requested more time to prepare for trial. 1 AA 199. He is not entitled to demand such a speedy trial that his own attorney cannot adequately prepare. Appellant does not point to any continuances requested by the State. He cannot demonstrate the second factor weighs in his favor.

Regarding the third factor, the Barker Court emphasized, "failure to assert the [speedy trial] right will make it difficult for a [petitioner] to prove that he was denied a speedy trial. 407 U.S. at 531, 92 S. Ct. at 2192.

Trial counsel advised his intention to file certain pretrial motions and requested a 30-day continuance. 1 AA 177 (the referenced court minutes are not in the record on appeal). The Court informed Appellant there were no judges available and granted the continuance. 1 AA 177. This third prong should weigh against Appellant as his attorney requested the continuance and the district court had no available trial dates.

The fourth factor, prejudice, should be assessed by looking to "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired by dimming memories and loss of exculpatory evidence." Doggett, 505 U.S. at 654, 112 S. Ct. at 2692 (internal citations omitted).

This final factor is not in Appellant's favor either. Appellant does not allege the short delay in trial was detrimental to his defense. He does not meet his burden of demonstrating prejudice, and this prong cannot weigh in his favor. Because he cannot show he was prejudiced by the delay, he cannot show the speedy trial claim would have succeeded on appeal. His appellate counsel was not ineffective for focusing on potentially more meritorious claims.

Given appellate counsel's responsibility to focus an appeal on the more meritorious claims, the district court correctly found Ms. Bernstein was not ineffective for failing to raise the issue of the preliminary hearing:

> Petitioner also includes a claim that appellate counsel was ineffective for failing to raise the issue of the unsuccessful Writ of Mandamus upon direct appeal. Appellate Counsel does not provide ineffective assistance by strategically focusing on certain issues. Here, Appellate Counsel reviewed the entire record and strategically chose not to raise this issue, as she did not believe there was a reasonable probability of success on appeal. Thus, this Court denies Petitioner's claim as he fails to show that Appellate Counsel's representation fell below an objective standard of reasonableness.

1 AA 10.

These miscellaneous issues in this "cumulative" error section are meritless.

CONCLUSION

Based on the foregoing, the State respectfully requests that this Court AFFIRM the denial of the Supplemental Petition for Writ of Habeas Corpus.

/ / /

Dated this 9th day of June, 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 12,049 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 9th day of June, 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 9th day of June, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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