IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD MICHAEL ADAMS, Appellant, v. THE STATE OF NEVADA, Respondent.	Case No. 83917

RESPONDENT'S ANSWERING BRIEF

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

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ROUTING STATEMENT

Pursuant to NRAP 17(b)(3), this case is assigned to the Nevada Supreme Court because this case is a denial of a Petition of Writ of Habeas Corpus (Post-Conviction) requesting relief from a criminal conviction involving Category A felonies.

STATEMENT OF THE ISSUES

1. Whether the district court did not abuse its discretion in finding that counsel was not ineffective for not interviewing an unidentified witness prior to trial.

2. Whether the district court did not abuse its discretion in finding counsel was not ineffective for allowing an unbiased juror to remain on the panel who socially knew the judge and one witness.
3. Whether the district court did not abuse its discretion in denying Appellant's procedurally barred claims for failure to raise them on direct appeal.
4. Whether the district court did not abuse its discretion in finding that Appellant is not entitled to an evidentiary hearing.

STATEMENT OF THE CASE

On February 12, 2008, the State filed an Information charging Edward Adams (hereinafter "Appellant") as follows: Count 1 – First Degree Kidnapping with Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165), Count 2 – Battery with Intent to Commit a Crime with Use of a Deadly Weapon (Felony – NRS 200.400, 193.165), Counts 3 through 11 – Sexual Assault with a Minor Under Fourteen Years of Age with Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165), and Count 12 – Open or Gross Lewdness (Gross Misdemeanor – NRS 201.210). On October 28, 2009, the State filed an Amended Information with the same charges. Appellant's Appendix Volume 1 (1 "AA") 0010.

On October 21, 2009, Appellant filed Defendant's Motion to Dismiss Based Upon the State's Failure to Preserve Exculpatory Evidence, and Motion to Dismiss

Due to the State's Failure to Provide Brady Material. 1AA 0056. Appellant withdrew that motion on October 27, 2009. 1AA 0071.

On October 28, 2009, the State filed an Amended Information updating the handling Deputy District Attorney's name, the charges remained the same. AA 0016.

On November 2, 2009, Appellant's jury trial commenced. 1AA 0079. On November 4, 2009, the jury found Appellant guilty of Count 1 – First Degree Kidnapping, Count 2 – Battery with Intent to Commit Sexual Assault, Counts 3, 4, 5, 6, 7, 8 and 11 – Sexual Assault, and Count 12 – Open or Gross Lewdness. The jury found Appellant not guilty of Counts 9 and 10. 3AA 0649.

On January 13, 2010, the district court sentenced Appellant as follows: Count 1 – to 60 months to life and $2932.00 in restitution; Count 2 – to 60 months to life, consecutive to Count 1; Count 3 – to 120 months to life, consecutive to Count 2; Count 4 – to 120 months to life, consecutive to Count 3; Count 5 – to 120 months to life, consecutive to Count 4; Count 6 – to 120 months to life, consecutive to Count 5; Count 7 – to 120 months to life, consecutive to Count 6; Count 8 – to 120 months to life, consecutive to Count 7; Count 11 – to 120 months to life, consecutive to Count 8; and Count 12 – to 12 months, concurrent with all other counts. 4AA 0846. The court also imposed a special sentence of Lifetime Supervision to commence upon release from any term of imprisonment, probation, or parole. 4AA 0846. The court also ordered Appellant to register as a sex offender after any release from

custody. 4AA 0846. The court entered the Judgment of Conviction on February 2, 2010. 4AA 0846.

Appellant filed his Notice of Appeal on February 22, 2010. 4AA 0852. The Nevada Supreme Court affirmed Appellant's Judgment of Conviction on July 26, 2012. 4AA 0905. Remittitur issued on August 21, 2012. 4AA 0910.

On September 11, 2012, Appellant filed a Post-Conviction Petition for Writ of Habeas Corpus. 4AA 0911. On October 15, 2012, the court appointed counsel for Appellant. Respondent's Appendix ("RA") 001. On September 4, 2015, the Court entered an Ex Parte Order of Appointment to appoint Dr. Hariton to "review medical records and investigate issues." RA 002. On May 5, 2016, Appellant filed a Motion to Place on Calendar for the Purpose of Obtaining SANE Exam Photographs from the District Attorney's Office ("Motion"). RA 003. The State filed an Opposition to the motion on May 10, 2016. RA 007. The Court denied Appellant's motion on May 16, 2016. 5AA 0932. The order denying the motion was filed on June 1, 2016. RA 012.

On August 31, 2016, Appellant filed Second Motion to Place on Calendar for the Purpose of Obtaining SANE Exam Photographs from the District Attorney's Office ("Second Motion"). RA 014. The State filed an Opposition to the Second Motion on September 6, 2016. RA 019. On September 12, 2016, the Court granted

the motion in part and ordered the State to provide the photographs in their possession. 5AA 0939.

On June 28, 2019, Appellant filed a Supplemental Post-Conviction Petition for Writ of Habeas Corpus. 5AA 0941. On September 26, 2019, the State filed State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). RA 031. On October 24, 2019, Appellant filed Reply to State's Response to Defendant's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). RA 051. On May 12, 2021, the district court denied Appellant's Petition. 5AA 1015. On December 7, 2021, the Findings of Fact, Conclusions of Law and Order was filed. 5AA 1017. On December 8, 2021, Appellant filed a Notice of Appeal. 5AA 1035. On April 20, 2022, Appellant filed Appellant's Opening Brief.

STATEMENT OF THE FACTS

On December 14, 2007, thirteen-year-old A.V. was released from school at 2:15 p.m. 2AA 0338. After plans to spend the night at a friend's house had fallen through, she decided to walk home. 2AA 0339. Her house was only a few blocks from the school. 2AA 0342. At some point between the school and her house, A.V. came into contact with Appellant. 2AA 0345. He was sitting on a wall across the street from A.V. smoking a cigarette when she first noticed him. 2AA 0346. A.V. did not consider him to be attractive. 2AA 0346. She described Appellant as mostly

bald with a goatee, crooked teeth, and a band-aid over his eyebrow. 2AA 0348-49. He was wearing a black hooded sweatshirt and blue pants. 2AA 0348.

A.V. crossed the street but did not walk towards Appellant. 2AA 0347. However, he began to walk to her side of the street and started following behind her. 2AA 0347. A.V. felt scared and continued to walk. 2AA 0347. Appellant came up behind her, put his arm on her shoulder and turned her towards him. 2AA 0349. He told her not to scream or yell because he had a gun. 2AA 0349. A.V. complied because she was afraid he would kill her. 2AA 0351. Appellant's left hand was in his pocket, and it appeared as if he had a gun. 2AA 0351. He then grabbed A.V. by the hand and started leading her back towards the school. 2AA 0351-52.

As Appellant was taking A.V. down the street, they passed two of A.V.'s schoolmates. 2AA 0352. Jonathan C. saw Appellant dragging A.V. up the street by her wrist. 2AA 0435. A.V. had a scared look on her face. 2AA 0436. Appellant's hand was in his pocket holding something. 2AA 0437. Jonathan thought it may have been a gun. 2AA 0439. As they passed by A.V. mouthed the words "help me" to Jonathan. 2AA 0353. Angela A. also saw Appellant holding A.V.'s hand and thought it looked as if they were trying to avoid her as they walked by. 3AA 0463.

Appellant took A.V. to an abandoned apartment unit on the second floor of the building. 2AA 0357. The apartment had been damaged by a fire and all utilities had been disconnected. 3AA 0485. Appellant had never leased the apartment. 3AA

0485. A.V. noticed a black couch, several lit candles, a black bag, and a pair of Nike shoes. 2AA 0358-59. After locking the apartment door, Appellant told A.V. to sit on the black couch. 2AA 0360. He also took the battery out of A.V.'s cell phone so she could not call for help. 2AA 0360. A.V. also saw Appellant take something out of his pocket and wedge it underneath the couch cushions. 2AA 0362.

Appellant made A.V. remove her clothes and get on the floor. 2AA 0362-63. He then removed his own clothes, got on top of her, and digitally penetrated her vagina. 2AA 0363. A.V. had never had any kind of sexual contact before. 2AA 0361. She told Appellant that what he was doing was causing her pain. 2AA 0364. However, he told her to shut up. 2AA 0364. Appellant then penetrated A.V.'s vagina with his penis, which caused her further pain. 2AA 0364.

Appellant stopped having intercourse with A.V. and made her sit on the couch again. 2AA 0364. As she was sitting up, he digitally penetrated her. 2AA 0365. She again told him that it was painful and asked him to stop. 2AA 0365. Appellant then penetrated A.V.'s vagina again. 2AA 0365. He then stopped and made A.V. move back to the floor. 2AA 0365.

Appellant placed himself on top of A.V. again and penetrated her vagina with his penis. 2AA 0366. He also digitally penetrated her vagina. 2AA 0366. Appellant then proceeded to force A.V. to bend over the couch. 2AA 0366. As she was bent over, he digitally penetrated her anus while standing behind her. 2AA 0366-67.

Appellant had also rubbed his penis in front of A.V. and put lotion on to his penis as he was touching himself. 2AA 0390. Appellant put lotion on his penis both while he was touching himself and prior to penetrating her. 2AA 0390. Appellant had also used blue painter's tape to bind A.V.'s hands and to tape her mouth shut. 2AA 0371. Appellant did not use a condom. 2AA 0369. A.V. continually told Appellant that he was hurting her and asked him to stop throughout the ordeal. 2AA 0373.

After Appellant was finished sexually assaulting A.V., he told her to get dressed. 2AA 0373. He then went into the kitchen and retrieved a damp towel which he told A.V. to use to wipe herself off. 2AA 0371. Appellant told her she could leave and threw her phone back at her. 2AA 0377. He also warned her not to call the police and to wait until she got to a nearby McDonald's restaurant before she called for someone to pick her up. 2AA 0377.

A.V.'s mother, Louise, had been trying to call A.V. when she noticed that she was late. 2AA 0378. A.V. finally answered and asked her to come pick her up. 2AA 0378. A.V. was crying, her hair was messy, and she did not have all of her clothing on. 2AA 0378. A.V. told her mother what had happened, and Louise called 911. 2AA 0378.

A.V. was taken to the hospital and was given a sexual assault exam. 4AA 0705-06. A.V. had abrasions in her vagina consistent with how she described the encounter and her hymen was lacerated. 4AA 0721. A.V. had experienced bleeding

from her vagina which stained the crotch of her pants. 4AA 0728. There was also a discharge from her anus and injuries to her anus. 4AA 0728.

A.V. could not remember exactly where the apartment was located, however eventually the correct apartment was found. 3AA 0562-64. When crime scene analysts arrived at the apartment, they found the opened package of hand lotion, candles, blue painter's tape, and the shoes A.V. had described. 3AA 0495-503. Appellant was eventually identified as the perpetrator because his fingerprints were found in the apartment. 3AA 0568. Appellant's prints were found on an open lotion packet, two glass candle jars, and the interior sliding glass door. 4AA 0699-701. A.V.'s prints were found on the interior front door. 4AA 0699-701. A gun was not found. 4AA 0830.

A DNA analysis was conducted on the sexual assault kit. 3AA 0660. Appellant's sperm was detected on the vaginal and cervical swabs. 3AA 0660-61. Appellant's sperm was also detected on the rectal and anal swabs. 3AA 0660-62. Both A.V.'s and Appellant's DNA were found on the towel located in the apartment. 3AA 0660-62. Appellant's DNA was also located on A.V.'s pants and shirt. 3AA 0670-71. Finally, both A.V.'s and Appellant's DNA was found on the couch cushions. 3AA 0671-73.

Appellant's defense at trial was that this was a consensual sexual encounter. 2AA 0320. He elicited testimony from Jonathan C. that A.V. had not said anything

to him as she passed by with Appellant and that he had not called the police. 2AA 0441-42. Appellant also elicited testimony from Angela A. that she had previously told police that A.V. appeared to be chasing after Appellant and that she had also not called the police. 3AA 0472. Witness Andre Randle testified that he saw A.V. and Appellant walk into the vacant apartment. 3AA 0680. He testified he thought it was strange, but A.V did not appear to be angry, crying, or screaming. 3AA 0680. Appellant also presented several character witnesses who testified that he was not a violent person. 4AA 0762-69.

SUMMARY OF THE ARGUMENT

The district court did not abuse its discretion in denying Appellant's Petition and Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) because Appellant's claims are without merit.

Appellant raises two main claims. First, trial counsel was ineffective for not investigating and interviewing key witness, Andre Randle, and not objecting to the State's disclosure of Randle on the second day of trial. Essentially, Appellant argues that counsel's actions prejudiced him because counsel could have developed a better defense but for counsel's mistakes. It should be noted that Randle's identity was unknown to both the State and defense counsel. Nonetheless, the State announced on the second day of trial that it found Randle and wanted to him present as a witness.

Trial counsel interviewed Randle before Randle testified, whose testimony strengthened Appellant's defense of consensual sexual encounter.

Counsel not objecting and requesting a trial continuance was not deficient performance because counsel interviewed Randle prior to Randle testifying. It is mere speculation that Randle's testimony, which was beneficial to Appellant, would have been any different had counsel requested a continuance. Further, counsel thoroughly cross-examined the State's witnesses, including the detective who interviewed Randle but did not obtain his name. The "exculpatory information" Randle possessed was heard by the jury.

Likewise, the district court did not abuse its discretion in finding counsel was not ineffective for allowing a juror to remain on the panel after disclosing she socially knew the judge and a State's witness. The juror was questioned concerning her ability to be fair and impartial, which she attested she could. Appellant cannot point to anything in the record that indicates otherwise. Accordingly, Appellant's claim is bare and naked.

Therefore, this Court should affirm the district court's denial of Appellant's Petition as the district court properly found Appellant failed to prove either Strickland prong in any of his claims.

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ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING COUNSEL WAS NOT INEFFECTIVE FOR NOT INTERVIEWING AN UNIDENTIFIED WITNESS PRIOR TO TRIAL

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

Appellant contends his trial counsel's performance was deficient was twofold regarding a key witness, Andre Randle ("Randle"). First, counsel was allegedly ineffective for failing to investigate and interview Randle prior to trial. Appellant's Opening Brief ("AOB") at 12. Randle's identity was unknown to both the State and defense counsel. AOB at 15-16. Specifically, Appellant contends counsel knew of Randle but did not seek Randle's identity until two years after the incident. AOB at 13. On the second day of trial, the State announced it had found Randle and wanted

to call him as a witness. AOB at 15. Second, Appellant contends counsel was ineffective for not objecting to the State's late disclosure and requesting a continuance "to have adequate time to interview Randle and develop the defense strategy." AOB at 16.

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 Strickland, 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). Further, 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). 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).

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.

In order to satisfy the Strickland standard and establish ineffectiveness for failure to investigate, a defendant must allege *in the pleadings* what information would have resulted from a better investigation or the substance of the missing witness' testimony. Molina v. State, 120 Nev. 185, 192, 87 P.3d 533, 538 (2004); State v. Haberstroh, 119 Nev. 173, 185, 69 P.3d 676, 684 (2003). It must be clear from the "record what it was about the defense case that a more adequate investigation would have uncovered." Id. A defendant must also show how a better investigation probably would have rendered a more favorable outcome. Id.

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). This portion of the test is slightly modified when the convictions occurs due to a guilty plea. Hill v. Lockhart, 474 U.S. 52, 59 (1985); Kirksey v. State, 112 Nev. 980, 988 (1996).

The district court did not abuse its discretion in denying Appellant's argument that counsel did not find Randle through a preliminary investigation as a bare and naked allegation. The District Attorney found him on the second day of trial and Randle still testified at trial. Further, counsel even had the opportunity to meet with Randle the morning before his trial testimony. In fact, trial counsel even conducted a thorough cross-examination of Detective Gabriel Lebario emphasizing that the detective did not do a report of his interview with Randle or provide his name in his report:

> Q (MR. MANINGO): Okay. And making reports is an important part of your job –
>
> A (DETECTIVE LEBARIO): Yes.
>
> Q: -- is that fair to say?
>
> A: Yes, sir.
>
> Q: Okay. You have to document when you do certain things or when you speak to people, correct?
>
> A: Yes.
>
> …
>
> Q: You spoke to another individual who – who lived in a nearby apartment building, correct?
>
> A: Yes.
>
> Q: Okay. And this is the person that – that you described as the adult black male, correct?

A: Yes.

Q: And the reason we refer to this gentleman that way, in your report you don't list his name, correct?

A: Right.

Q: And that's because you had taken notes and kept those notes separate, correct?

A: Well, written, yes.

Q: Okay. When you spoke to Mr. Randle, he gave a description of seeing two people together that matched the description of Mr. Adams and Amber?

A: Yes.

Q: Okay. He also noted that the two individuals he saw were not touching one another, correct?

A: Right.

Q: And he noted that they were not emotional, and that the girl was not emotional?
A: Correct.

Q: He also noted that the girl did not appear to be in any distress.

A: Correct.

. . .

Q: You just spoke to him about the two individuals that he saw that day?

A: Yes.

> Q: Okay. I think you said earlier that there was no need to get a report from him at that time.
>
> A: At the time, yes.
>
> Q: Okay. You did, however, none of the details of what he told you in your – in your report, correct?
>
> A: Yes.
>
> Q: Okay.
>
> A: My case notes.

3AA 0593-96.

Therefore, counsel took the time to prepare by fully cross-examining the detective about not providing Randle's name or details of his interview with him, and counsel was able to meet with Randle before his testimony before cross-examining him at trial. Therefore, Appellant's bare allegations did demonstrate prejudice and, therefore, this claim is absolutely without merit. See Hargrove, 100 Nev. at 502, 686 P.2d at 225. As such, the district court properly denied this claim.

Appellant also claims trial counsel should have objected to the late disclosure of State's witness, Andre Randle. AOB at 16. In fact, counsel filed a Motion to Dismiss on October 21, 2009, arguing that the State should turn over the "tall, physically fit, adult black male." 1AA 0058-59. Counsel argued in the Motion that the detectives did not follow up with the mystery witness, and that the state should produce the witness to testify at trial. 1AA 0059. By counsel filing this motion prior

to trial, he was objecting and challenging the fact that the State had not produced Mr. Randle.

Then, during trial, when the State did produce the witness, the State allowed counsel to not only cross-examine Mr. Randle, but also speak with him beforehand:

> MR. HENDRICKS: Okay. Now, I don't think either one of us, I'm not sure thought, has this – this black male adult listed on our witness list. But as you know, he was not interviewed at the time other than just what was reflected in his case notes. We've now contacted him. We tracked him down. We found him so he's available to defense counsel. He's going to be here tomorrow morning at 10:00 a.m. My concern is this, is he's not on our witness list, but we would still like to call him. And I want to make sure that defense counsel doesn't have an objection because they're actually the ones who wanted him and made a motion to – to dismiss the whole case because they didn't have him. Now we have him. I want to make sure it's okay we can call him.
>
> THE COURT: Defense position.
>
> MR. MANINGO: Yeah, that's fine. I don't have an objection. I'm not worried about – I know that the reason he wasn't on the witness list at the time is because neither one with of us knew who this person was.
>
> THE COURT: Well, hearing no objection from the defense, the State calling the witness, even though the witness wasn't identified on their witness list, so –
>
> MR. HENDRICKS: And I'll make him available in the morning so Jeff can speak with him also beforehand just -- just to know what we're getting.

3AA 0610-11 (emphasis added).

On one hand Appellant argues that counsel should have expended all resources to find this unidentified witness. And on the other hand, Appellant argues

when the witness is actually produced at trial, counsel should have challenged the late disclosure of the witness and not agreed to let him testify. Appellant's argument as to why counsel was ineffective at trial is based on the fact that he should have found this witness before trial, and the witness would have produced exculpatory evidence during his trial testimony. It is a roundabout argument to claim that counsel should have found him, then when the State actually did find him, counsel should have objected and not let him testify because he would testify to exculpatory evidence.

Moreover, it is utter speculation that Randle's testimony would have somehow been different at trial had counsel conducted a more in-depth pre-trial interview of the witness, when Appellant admits that Randle's testimony was favorable to the defense. Trial counsel had time before Randle's testimony to discuss his testimony with him and essentially have a pre-trial interview. Counsel also had the opportunity to cross-examine Randle and question him in-depth about how difficult it is to remember an event from two (2) years ago, that the witness did not write anything down or take any notes after the event, about his interactions with Appellant and the victim, and about the Appellant and the victim's demeanor entering the vacant apartment. 3AA 0683-85. Even on direct-examination, Randle testified that, "She didn't even look mad or nothing." 3AA 0681. On cross-examination, he says, "They was just walking normal." 3AA 0685. Therefore,

Appellant was not prejudiced because, as Appellant admits (AOB at 16), Randle's testimony was favorable to the defense and the jury heard Randle's testimony.

By the end of trial, counsel had the opportunity to present the exculpatory evidence through cross-examination because Randle ultimately testified during trial. Moreover, on direct-examination, Randle's testimony confirmed the victim's classmates, Jonathan and Angela's, testimony that they saw the two walking together. Even though counsel was unable to locate Randle prior to trial, counsel filed the Motion to Dismiss contesting the fact the State had not produced the witness, was still allowed the opportunity to cross-examine him during his trial testimony, and even discuss his testimony with him the morning before he testified.

It simply cannot be said that trial counsel did not make sufficient inquiries into information about Randle and his testimony after having the opportunity to speak with him before his testimony and cross-examine him at trial. The record belies Appellant's claim of failure to investigate and shows that counsel did everything Appellant claims should have been done. Therefore, the district court properly found no prejudice to Appellant by counsel not finding Randle prior to trial or objecting to having Randle called to testify and properly denied this claim as it is without merit.

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II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING COUNSEL WAS NOT INEFFECTIVE FOR ALLOWING AN UNBIASED JUROR TO REMAIN ON THE PANEL WHO SOCIALLY KNEW THE JUDGE AND ONE WITNESS

Appellant asserts trial counsel was ineffective for allowing Juror No. 7 to remain on the panel after Juror No. 7 disclosed socially knowing the Judge and LVMPD Crime Scene Analyst. AOB at 35-36.

The Nevada Supreme Court has held that it is improper for Appellant to make factual assertions without "adequately cit[ing] to the record in his briefs or provide this court with an adequate record." Thomas v. State, 120 Nev. 37, 43, 83 P.3d 818, 822 (2004). Here, Appellant failed to cite to any record in support of his claim of ineffective assistance of counsel. Instead of supporting his assertions with the record, Appellant merely made the assertion that because Juror 7 remained on the jury, it resulted in his conviction. This is not supported with any evidence from the record, and thus, was properly rejected.

Moreover, Appellant has failed to demonstrate that the juror was not fair and impartial. During voir dire, the juror acknowledges to the judge that she can be fair and impartial despite knowing him:

> PROSPECTIVE JUROR NO. 156: Your Honor, I'm juror number 156. You and I have met socially several times over the past 20 years. I worked with your wife at the Attorney General's office back in the 1990s.
>
> THE COURT: Okay. Anything about that association or relation that might cause you to –

PROSPECTIVE JUROR NO. 156: No, sir.

THE COURT: -- judge this case unfairly or be – you wouldn't

PROSPECTIVE JUROR NO. 156: No.

THE COURT: -- affect your ability to be fair and impartial?

PROSPECTIVE JUROR NO. 156: No.

THE COURT: All right. Thank you very much.

1AA 0095-96.

The juror then affirms again to the State that she can still remain fair and impartial despite knowing the judge:

> MR. HENDRICKS: One last question. You said that you were familiar with Judge Barker and his wife.
>
> PROSPECTIVE JUROR NO. 156: Yes, yes.
>
> MR. HENDRICKS: Is that going to affect you in any way in being able to make a just decision in regards to both defense and the State?
>
> PROSPECTIVE JUROR NO. 156: No.

1AA 0174-75.

Additionally, the juror acknowledges that she can be fair and impartial despite knowing the State's witness, Shayla Joseph:

> MR. HENDRICKS: Thank you, Judge. State calls Shayla Joseph.

JUROR NO. 7: Excuse me, your Honor. I realize I know Shayla Joseph. Just met her one time socially.

THE COURT: Okay.

JUROR NO. 7: I'm recognizing the name now.

THE COURT: Parties approach.

(Off-record bench conference).

. . .

THE COURT: Record should reflect we're outside the presence of the jury. Record should further reflect that parties approached after Juror No. 7, Ms. Clayton, indicated that she had knowledge, independent familiarity with the previous witness, Ms. Joseph, that was just called. And parties agreed to address this issue out – well, after the witness had completed her testimony.
It would be my inclination to call Ms. Clayton back in to – inquire as to her – the base of her knowledge. I'll give each side an opportunity to inquire and make decisions on whether or not you want to challenge her as consequence of this disclosure.

MR. HENDRICKS: No, I think that's a great idea just to – just to have that on the record. Just to make sure Mr. Maningo and the defendant's rights are preserved just in case.

MR. MANINGO: Agreed.

THE COURT: That's exactly what I want to do. Could you go ask Danny to bring in Juror No. 7, please.

(Juror No. 7 present)

THE COURT: Thank you. Record will reflect Ms. Clayton's returned to the courtroom, Juror No. 7.
Ms. Clayton, you indicated that you had some previous knowledge or you know Ms. Joseph, the previous witness called, so we've taken you outside the presence of the rest the jury to

inquire about how you know Ms. Joseph. Could you tell us a little bit about that relationship?

JUROR NO. 7: When I – since we're having crime scene examiners here, and I heard her name and I thought oh, my God, I've met – we have a – Shayla and I have a mutual friend named Tim Speese (phonetic), who's a police officer. And I met Shalya once, perhaps twice, over the summer socially at – I mean, at a bar, you know, just because we have mutual friends. And she and I spoke a few minutes.
I don't even think she probably would have even recognized me, honestly. But she has a distinctive name. And again, when (indiscernible) and again, she's not somebody that I consider to be – you know, she is somebody that I met once, possibly twice and we have a very good mutual friend.

THE COURT: All right. State, any inquiry of Ms. Clayton as a consequence of that disclosure?

MR. HENDRICKS: No. Thanks, Judge.

THE COURT: Ms. Clayton, anything about that contact, as you described with Ms. Joseph, that might affect your ability to be fair and impartial in this case?

JUROR NO. 7: No, not at all.

THE COURT: Mr. Maningo, any questions?

MR. MANINGO: Ms. Clayton, just because you have – you've met that witness in your social life, would you give her testimony more weight than you would any other witnesses?

JUROR NO. 7: No, sir.

MR. MANINGO: Okay, then – I have no problem.

JUROR NO. 7: I apologize, Judge.

> THE COURT: It's all right. That's what it's all about. Thank you. We'll be with you in just a few minutes.

3AA 0533-34, 0546-48 (emphasis added).

There is nothing in the record that Appellant cites to that demonstrates the juror could not remain fair and impartial despite knowing Judge Barker and the State's witness. Instead, the issue of knowing Judge Barker is brought to the Court's attention many times, and each time, the juror explains that she can remain fair and impartial to Appellant. Moreover, when the juror realized that she had briefly met the State's witness only one time, she brought it to the Court's attention and again, affirmed that she could remain fair and impartial. Appellant does not give any reason to indicate why she was not fair and impartial or why she would have been unable to remain fair and impartial. Therefore, the district court did not abuse its discretion in denying this claim.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S PROCEDURALLY BARRED CLAIMS FOR FAILURE TO RAISE THEM ON APPEAL

Appellate counsel adopts Appellant's issues raised in the Pro Per Petition and requests this Court address them. However, this Court should not address them because the district court correctly deemed them as being procedurally barred. AOB at 21; 5AA 1030. The district court held Claims 2 and 4-12 are waived because they should have been raised on direct appeal.

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 entered 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.
>
> unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

The Nevada Supreme Court has held that "challenges to the validity of a guilty plea and claims of ineffective assistance of trial and appellate counsel must first be pursued in post- conviction proceedings…. [A]ll other claims that are appropriate for a direct appeal must be pursued on direct appeal, or they will be considered waived in subsequent proceedings." Franklin v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994) (emphasis added) (disapproved on other grounds by Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999)). "A court must dismiss a habeas petition if it presents claims that either were or could have been presented in an earlier proceeding, unless the court finds both cause for failing to present the claims earlier or for raising them again and actual prejudice to the petitioner." Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001).

Here, Appellant's Claims two (AOB at 24), four (AOB at 30), seven (AOB at 35), and 8 (AOB at 37) should have been raised on a direct appeal because they do not challenge the validity of a guilty plea or allege ineffective assistance of counsel. NRS 34.810(1); Franklin, 110 Nev. at 752, 877 P.2d at 1059. Appellant does not allege good cause or prejudice for not bringing these claims on direct appeal and raising them for the first time in these habeas proceedings. Therefore, as these claims are all waived, the district court did not abuse its discretion in dismissing them. 5AA 1030-31.

Further, Appellant's claim number five regarding double jeopardy and redundancy principles (AOB at 32) and claim number six regarding prosecutorial misconduct (AOB at 34) are barred by the case of the law doctrine as they were addressed and denied on direct appeal.

"The law of a first appeal is law of the case on all subsequent appeals in which the facts are substantially the same." Hall v. State, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (quoting Walker v. State, 85 Nev. 337, 343, 455 P.2d 34, 38 (1969)). "The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." Id. at 316, 535 P.2d at 799. Under the law of the case doctrine, issues previously decided on direct appeal may not be reargued in a habeas petition. Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001) (citing McNelton v.

State, 115 Nev. 396, 414-15, 990 P.2d 1263, 1275 (1999)). Furthermore, this Court cannot overrule the Nevada Supreme Court. Nev. Const. Art. VI § 6.

Appellant raised these exact issues on direct appeal. See 5AA 0902-04. This Court held both claims were meritless.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT APPELLANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

In his Petition, Appellant requested an evidentiary hearing and does so again in his Conclusion. AOB at 39.

A defendant is entitled to an evidentiary hearing only if his petition is supported by specific factual allegations, which, if true, would entitle her to relief. Marshall v. State, 110 Nev. 1328, 1331, 885 P.2d 603, 605 (1994). "The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required." NRS 34.770(1). Further, "[i]f the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, the judge or justice shall dismiss the petition without a hearing." NRS 34.770(2).

The district court did not abuse its discretion in denying Appellant's request for an evidentiary hearing because there is no reason to expand the record as Appellant's claims are not cognizable in a post-conviction petition and Petitioner

fails to present specific factual allegations that would entitle him to relief. Marshall, 110 Nev. at 1331, 885 P.2d at 605.

CONCLUSION

Based on the foregoing, the State respectfully requests Appellant's denial of Petition and Supplemental Petition for Writ of Habeas Corpus be affirmed.

Dated this 15th 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 6,831 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 15th day of June, 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 15th 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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